2014 LSBC 52
Decision issued: November 3, 2014
Citation issued: February 22, 2013

**THE LAW SOCIETY OF BRITISH COLUMBIA**

**In the matter of the *Legal Profession Act,* SBC 1998, c. 9**

**and a hearing concerning**

**THOMAS PAUL HARDING**

**RESPONDENT**

---

**DECISION OF THE HEARING PANEL**
**ON FACTS AND DETERMINATION**

---

| | |
|---|---|
| Hearing date: | July 16 and 17, 2014 |
| Panel: | Sharon Matthews, QC, Chair<br>Ralston S. Alexander, QC, Lawyer<br>John Lane, Public Representative |
| Counsel for the Law Society: | Robin McFee, QC |
| Counsel for the Respondent: | Gerald Cuttler |

## INTRODUCTION

[1] Thomas Harding has been cited by the Law Society of British Columbia for professional misconduct as follows:

> 1. Between approximately January 2007 and May 2011, in the course of representing your client DA, the plaintiff in British Columbia Supreme Court Vancouver Registry Action No. [number] (the "Action"), you failed to serve your client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook.* In particular, after being retained by

your client, you failed to take any substantive steps to advance the Action for over four years.

This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

2. Commencing in May 2011, you acted contrary to Chapter 4, Rule 5 of the *Professional Conduct Handbook* by failing to give written notice to the Lawyers Insurance Fund immediately or at all, as required by section 4.1 of the BC Lawyers' Compulsory Professional Liability Insurance Policy (the "Policy"), of an error or circumstance which could form the basis of a claim against you, after you had been notified of and later served with an application to dismiss the Action for want of prosecution.

   This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

3. Commencing in May 2011, you failed to recommend to your client DA, the plaintiff in the Action, that she obtain independent legal advice when you knew, or had a reasonable apprehension, that you had made an error or omission which might be damaging to your client by failing to advance the Action, contrary to Chapter 4, Rule 5.1 of the *Professional Conduct Handbook.*

   This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

4. Between approximately May 2007 and November 2011, you acted contrary to Chapter 4, Rule 5 of the *Professional Conduct Handbook* by:

   (a) failing to give written notice to the Lawyers Insurance Fund of the claim for special costs made against you and your client, PJ, in British Columbia Supreme Court, New Westminster Registry Action No. [number], in connection with a contempt of court application brought by you, as required by section 4.1 of the Policy;

   (b) failing to give written notice to the Lawyers Insurance Fund of the claim for special costs made against you and your client, ZS, in British Columbia Supreme Court, New Westminster Registry Action No. [number], in connection with a contempt of court application brought by you, as required by section 4.1 of the Policy.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

5. In or around February 2010, in the course of representing your client ZS, the plaintiff in British Columbia Supreme Court, New Westminster Registry Action No. [number], you acted in a conflict of interest when you negotiated a settlement on her behalf which included a release of a claim for special costs against you personally and a release of a claim for special costs against your client when you had a direct or indirect financial interest in that settlement, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook*.

   This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] Mr. Harding admits that, on February 22, 2013, he was served through his counsel with the citation and waived the requirements of Rule 4-15 of the Law Society Rules.

[3] Mr. Harding's position is that the evidence does not support a finding of professional misconduct on any of the grounds cited.

**THE ISSUES**

[4] This case requires us to address the jurisprudence on professional misconduct, define its constituent principles, and apply them to the allegations made in the citation, namely that Mr. Harding:

(a) failed to represent his client DA in a conscientious, diligent and efficient manner;

(b) failed to report an application for want of prosecution brought against his client DA to the Lawyers Insurance Fund;

(c) failed to advise his client DA, whose case was the subject of an application to dismiss for want of prosecution, to seek independent legal advice;

(d) failed to report claims for special costs against him and his clients PJ and ZS to the Lawyers Insurance Fund; and

(e) settled a lawsuit on behalf of his client ZS in circumstances where both he and ZS were provided with releases of claims for special costs as part of the settlement.

## FACTS

[5] The parties filed an Agreed Statement of Facts ("ASF") and a book of documents, the contents of which are referred to in the ASF. The contents of the documents are not agreed facts, except as provided for in the ASF.

[6] The entire ASF is relevant and is attached to these reasons as an appendix. We distill the following facts from the ASF to provide the background and context for our reasons.

### Member background

[7] Thomas Paul Harding was called and admitted as a member of the Law Society of British Columbia on August 31, 1990.

[8] Since his call, Mr. Harding has practised primarily in the areas of personal injury and family law. Since 1999 he has practised under the name Trial Lawyers Advocacy Group.

### Conduct related to client DA

[9] In April 2002 DA commenced a claim in BC Supreme Court against the Insurance Corporation of British Columbia ("ICBC") and two individual employees of ICBC, GB and JG, (collectively, the "DA Defendants") alleging, *inter alia*, malicious prosecution (the "DA Action"). Her lawyer at that time was DR. A trial date was set for January 22, 2007.

[10] The DA Action arose out of events that occurred on January 30, 2000, when DA's husband, GA, was struck by a motor vehicle while they were crossing Nelson Avenue in Burnaby, BC.

[11] DA, although not struck by the motor vehicle, claimed relief for the injuries suffered when she slipped on the road during the incident.

[12] DA, whose first language is Serbo-Croatian, sought no-fault medical and disability payments for her injuries from ICBC. In pursuing her claim, DA provided a statement about the incident and her injuries to an ICBC adjuster through a person who purported to translate Serbo-Croatian to English. ICBC alleged that she

provided a false statement and initiated steps that led to her being charged with fraud. DA said the translator misinterpreted her statement. On July 16, 2001, the Crown stayed the fraud charge because the statement had not come directly from DA.

[13] On October 11, 2006, DR withdrew as counsel for DA upon reviewing documents from ICBC that caused him to conclude that he might be required to testify in the trial of the DA Action.

[14] Mr. Harding was retained and received DR's file by January 2007. He also received two memos regarding the DA Action.

[15] On January 10, 2007, Mr. Harding filed a Notice of Change of Solicitor and became the solicitor of record for DA in the DA Action.

[16] On January 12, 2007, the trial of the DA Action, set for January 22, 2007, was adjourned generally by consent.

[17] On June 23, 2008, Mr. Harding met with GA and DA for the first time.

[18] Other than meeting with GA and DA on June 23, 2008, Mr. Harding took no recorded steps to advance the DA Action from January 12, 2007 when he became the solicitor of record until February 11, 2011, a period of 49 months. At the June 23, 2008 meeting, Mr. Harding took notes, which were an exhibit to the ASF. Those notes are approximately one-half of an 8-by-11-inch page. They do not contain a plan to move the action forward. They do note a need to get a medical update for DA.

[19] Mr. Harding's explanation for not taking steps to advance the DA Action prior to February 11, 2011 was that he generally lost track of the file. Mr. Harding's practice is to rely on a "bring forward" system regarding active files, but through inadvertence this file was not diarized. In the application for dismissal for want of prosecution that followed, he swore an affidavit in which he admitted that, "[d]ue to the pressures of my workload and the seemingly constant occurrence of pressing and urgent matters, this file slipped through the cracks. This is entirely my fault and was not the result of any conduct or instruction by the Plaintiff. The Plaintiff has never instructed me to delay this matter intentionally, nor have I intentionally delayed this matter. Rather, the Plaintiff has instructed me to press forward with this matter … ."

[20] On February 11, 2011, Mr. Harding filed a Notice of Intention to Proceed in the DA Action.

[21] On February 22, 2011, Mr. Harding was faxed a letter from RC, a lawyer consulted by DA. RC advised Mr. Harding that DA "expressed concern about the status of her file and the difficulties they are having in communicating with you."

[22] In a letter dated February 22, 2011, Mr. Harding served the Notice of Intention to Proceed on counsel for the DA Defendants.

[23] Rule 3(4) of the Rules of Court precluded Mr. Harding from proceeding with the DA Action until 28 days after service of the Notice of Intention to Proceed on all other parties of record.

[24] On May 11, 2011, counsel for the DA Defendants advised Mr. Harding that it was their intention to bring an application to dismiss the DA Action for want of prosecution (the "Want of Prosecution Application").

[25] On July 21, 2011, Mr. Harding wrote to counsel for the defendants to advise that he wanted to set examination for discovery of the defendants. Counsel for the defendants refused to provide dates advising that they intended to bring the Want of Prosecution Application.

[26] On August 19, 2011, the DA Defendants filed the Want of Prosecution Application.

[27] On August 26, 2011, Mr. Harding met with GA, who swore an affidavit in opposition to the Want of Prosecution Application.

[28] On August 29, 2011, Mr. Harding filed an affidavit that he swore (referred to above) and the affidavit of GA in opposition to the Want of Prosecution Application.

[29] GA's affidavit stated that DA always wanted to continue the DA Action and take the matter to trial, and that she instructed Mr. Harding to proceed with the DA Action and proceed to trial.

[30] Mr. Harding did not at any time notify the Lawyers Insurance Fund ("LIF") about the Want of Prosecution Application.

[31] Mr. Harding did not recommend to DA that she obtain independent legal advice with regard to the Want of Prosecution Application.

[32] Mr. Harding explained to the Law Society's Professional Conduct Department that he did not report the Want of Prosecution Application to the Lawyers Insurance Fund because he did not think there was a reasonable chance that the Want of

Prosecution Application would succeed since the delay did not result in serious prejudice to the DA Defendants.

[33] On November 18 and 24, 2011, the Want of Prosecution Application was heard by Mr. Justice Blair. On January 13, 2012, he delivered Reasons for Judgment dismissing the Want of Prosecution Application. He held that there had been inordinate delay and that there was inexcusable delay on behalf of DA's counsel, but while the defendants had suffered some prejudice, it was not serious prejudice and it was reduced by the records that had been made and kept.

[34] Mr. Harding and counsel for the DA Defendants subsequently agreed to bear their own costs of the applications since success was divided.

[35] On March 1, 2012, the Law Society advised Mr. Harding that it had opened a complaint file after obtaining a copy of the Reasons for Judgment.

[36] Prior to the Law Society opening that complaint file, GA and DA never complained to the Law Society about any aspect of Mr. Harding's conduct. Nor have they complained since.

**Conduct related to clients PJ and ZS**

[37] Mr. Harding was counsel of record for the plaintiff PJ in a Supreme Court of British Columbia Action in which PJ brought proceedings for damages and losses allegedly caused by a motor vehicle accident that occurred on June 26, 1999 (the "PJ Action").

[38] Mr. Harding was counsel of record for the plaintiff ZS in a Supreme Court of British Columbia Action in which ZS brought proceedings for damages and losses allegedly caused by a motor vehicle accident that occurred on January 15, 2003 (the "ZS Action"). ZS alleged, among other things, that she had suffered a brain injury as a result of the motor vehicle accident, which caused her to experience numerous symptoms, including memory loss. Psychiatric and psychological reports supporting her claim were served in the course of the litigation.

[39] On October 5, 2006, the defendants in the PJ action and the ZS Action (collectively, the "Joint Defendants") brought applications for orders that various non-parties produce various documents and information about PJ and ZS (the "Omnibus Document Applications"). The Omnibus Document Applications were supported by affidavits that either synopsized or exhibited information obtained by the Joint Defendants through the discovery process.

[40] On October 23, 2006, Mr. Harding prepared a Notice of Motion on behalf of PJ and the PJ Action and on behalf of ZS in the ZS Action seeking the dismissal of the Joint Defendants' Application for the Production and a finding that the Joint Defendants and Third Parties in the two actions (except the Third Party, C Insurance Company) as well as their lawyers, the affiants of the affidavits in support of the motions for non-party discovery in each case, the commissioners who took the affiants' oaths, the ICBC adjusters in each case, and the CEO of ICBC were in contempt of court for breaching the "implied undertaking" of confidentiality by releasing documents obtained through discovery in the PJ Action and the ZS Action to third parties without consent and without a court order (the "Contempt Applications"). The Notices of Motion were filed on March 9, 2007.

[41] Prior to bringing the Contempt Applications, Mr. Harding discussed the matter with his clients and received their instructions to proceed. Mr. Harding's recollection is that the discussion with his clients included a discussion about costs, specifically: if the application was dismissed, costs might be awarded; that costs generally follow the event; and that the costs of interlocutory applications are generally not payable until an action is concluded. Mr. Harding did not discuss the issue of whether special costs might be awarded against his clients. Mr. Harding explained to the Law Society's Professional Conduct Department that he did not foresee that special costs might be awarded. When interviewed on February 13, 2014, ZS did not recall Mr. Harding advising her at the time that in the event the contempt application failed, she may be exposed to liability.

[42] In letters dated October 27, 2006, DB, counsel for the Joint Defendants, advised Mr. Harding that, in the event the Joint Defendants were successful in having the Contempt Application dismissed, they would be seeking special costs "payable by your client or his counsel, personally in any event of the cause … ."

[43] Mr. Harding met with ZS on November 15, 2006. When interviewed on February 13, 2014, ZS's recollection was that Mr. Harding did not provide her with a copy of DB's October 27, 2006 letter.

[44] On December 19, 2006, Mr. Harding sought advice from the Law Society on the issue of whether separate representation was necessary at the Contempt Applications on the costs issue in view of DB's position that the Joint Defendants would be seeking special costs "payable by your client or his counsel, personally in any event of the cause … ." The reply from the Law Society practice advisor was that it was not necessary to retain private counsel on the issue where personal costs were sought against Mr. Harding, unless he would be giving evidence, but it might

be prudent to have other counsel appear on the matter. Mr. Harding replied that he would retain separate counsel at his expense.

[45] On March 23, 2007, Mr. Justice Edwards dismissed the Contempt Application and ordered written submissions to address the issue of costs.

[46] In their written submissions dated April 19, 2007, the Joint Defendants sought an order that Mr. Harding pay special costs of the Contempt Application personally, or, in the alternative, that PJ and ZS pay special costs of the Contempt Application.

[47] In May 2007, Mr. Harding arranged for EC to provide independent legal advice and representation to ZS and PJ.

[48] Mr. Harding gave EC an undertaking to pay his accounts as presented and also agreed to indemnify his clients, ZS and PJ, in the event they were found liable for costs.

[49] On August 14, 2007, written submissions were filed on behalf of PJ and ZS by EC. It was the position of both PJ and ZS that the application for special costs as against them be dismissed.

[50] Mr. Harding continued to act for PJ in the PJ Action and ZS in the ZS Action.

[51] On or before May 12, 2009, ZS instructed Mr. Harding to try to settle her case for $800,000 or more as a gross payment.

[52] On July 15, 2009, the hearing of the Joint Defendants' Special Cost Application was commenced before Mr. Justice Greyell. The hearing did not conclude that day.

[53] On August 3, 2009, ZS sent an email to Mr. Harding. ZS confirmed her previous instruction to Mr. Harding that she did not want to go to trial and to settle for $800,000. She confirmed those instructions again in a written note dated August 19, 2009.

[54] On October 1, 2009, the hearing of the Joint Defendants' Special Cost Application was concluded before Mr. Justice Greyell. Judgment was reserved.

[55] On February 26, 2010, Mr. Harding negotiated a settlement of the ZS Action during the course of a Case Management Conference before Mr. Justice Sewell. The terms of settlement were spoken to in open court and recorded in the court clerk's notes.

[56] One of the terms of the settlement agreement was that the Joint Defendants in the Contempt Application as it related to ZS "will not seek costs against ZS and Mr. Harding, in his capacity as solicitor for ZS on the ZS contempt application, which costs are in respect of steps and proceedings related exclusively to the ZS contempt proceedings." Prior to the settlement being concluded, Mr. Harding did not advise ZS that it was a term of the settlement that the ZS contempt Respondents would not seek costs against her or Mr. Harding personally in his capacity as her solicitor, which costs were in respect of steps or proceedings related exclusively to the ZS contempt proceeding.

[57] Mr. Harding did not advise ZS to seek independent legal advice with respect to the settlement he negotiated on her behalf. Mr. Harding explained to the Law Society's Professional Conduct Department that he did not do so because: he did not consider that there was a conflict of interest between him and ZS; that independent legal advice was necessary in these circumstances because of his view that the settlement was for $50,000 more than ZS instructed him to accept; the settlement was not reduced because of the special costs claim;, and the release agreed to be provided to Mr. Harding was only for costs related exclusively to the ZS Contempt Application, which Mr. Harding did not consider to be material. Mr. Harding advised the Law Society's Professional Conduct Department that had he perceived a potential conflict of interest between himself and ZS, due to the issue of special costs or for any other reason, he would have ensured that she receive independent legal advice about the settlement before it was concluded.

[58] On March 26, 2010, Mr. Justice Greyell pronounced reasons for judgment awarding special costs against PJ in any event of the cause of the Contempt Application. Mr. Justice Greyell declined to order special costs against Mr. Harding personally.

[59] On January 7, 2011, Mr. Justice Greyell pronounced reasons for judgment awarding the Defendants special costs for the special costs application, as well as special costs for the Registrar's hearing to determine the amount of such costs.

[60] On October 6, 2011, Mr. Justice Greyell pronounced reasons for judgment dismissing Mr. Harding's application for special costs or, alternatively, costs of defending the application brought by the Defendants for special costs against Mr. Harding and PJ.

[61] Mr. Harding did not give written notice in April 2007 to LIF that a claim for special costs was being made against him personally and against his clients PJ and ZS in consequence of Mr. Justice Edwards' dismissal of the Contempt Application.

[62] Mr. Harding never reported the matter of ZS's potential special costs liability to LIF.

[63] Mr. Harding first reported the matter of PJ's special costs liability to LIF sometime after November 29, 2011. LIF agreed to fund a settlement between PJ and the Joint Defendants in satisfaction of the Joint Defendants' claims for special costs arising from the Contempt Action and did so in the amount of $22,500.

[64] The BC Lawyers' Compulsory Professional Liability Insurance Policy states that the insurer does not provide coverage for special costs sought or awarded personally against a member/insured. Although not specifically stated in the Policy, LIF provides coverage for claims brought by a client against his or her solicitor arising out of an alleged error that exposes the client to a claim for special costs.

[65] In 1994 the BC Lawyers' Compulsory Professional Liability Insurance Policy wording with respect to the notice of claim or suit condition was amended to add the words "however unmeritorious" such that the material part of the wording stipulated that:

> If you become aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious, you will give written notice, along with the fullest information obtainable, as soon as practicable during the policy period to: PLI Claims, The Law Society of British Columbia Insurance Department ...

The words "however unmeritorious" are contained in Condition 4 of the policy which governed at the time of the events in this case.

## THE LEGAL PRINCIPLES

### Onus and standard of proof

[66] It is common ground that the Law Society bears the onus of establishing professional misconduct with evidence that is clear, convincing and cogent such that it satisfies the balance of probabilities.

### Professional misconduct

[67] A leading judicial authority on professional misconduct is *Stevens v. Law Society (Upper Canada)* (1979), 55 OR (2d) 405 (Div. Ct.), where Cory J. said as follows:

> What constitutes professional misconduct by a lawyer can and should be determined by the discipline committee. *Its function in determining what may in each particular circumstance constitute professional misconduct ought not to be unduly restricted.* No one but a fellow member of the profession can be more keenly aware of the problems and frustration that confront a practitioner. The discipline committee is certainly in the best position to determine *when a solicitor's conduct has crossed the permissible bounds and deteriorated to professional misconduct.* Probably no one could approach a complaint against a lawyer with more understanding than a group composed primarily of members of his profession.
>
> [emphasis added]

[68] During submissions, there was much debate as to meaning of professional conduct. We emphasize the words above because in our view, they are an important starting point. Attempts to define professional misconduct too specifically run the risk of restricting the panel in determining the case based on all the facts and circumstances before it. Whether conduct "has crossed the permissible bounds" must be assessed in a holistic way, taking into account all of the circumstances and the nature of the impugned conduct.

[69] The test has been synthesized as follows: "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct": *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171. At paragraph 154, the panel in *Martin* worked its way to the marked departure synthesis saying as follows:

> … The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[70] The cases that follow *Martin* appear to be divided on the question of culpability. It is clear that the conduct need not be disgraceful nor dishonourable to be a marked departure: *Law Society of BC v. Hops*, [1999] LSBC 29, [2000] LSDD No. 11 and *Martin*, paras. 143-154. Intentional malfeasance is not required: *Law Society of BC v. Gellert*, 2013 LSBC 22, at para. 67. *Martin* calls for culpability that is grounded in a degree of fault.

[71] Some of the cases have, with respect, blurred the distinction between the degree of fault and the nature of the fault. In *Re: Lawyer 10*, 2010 LSBC 02, the Benchers on Review said as follows at paras. 31-33:

> [31] The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the conduct in question was a marked departure from the norm and that the member was culpable. To put it more precisely, it *may not* be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.
>
> [32] A respondent must be culpable in order to have committed professional misconduct. The conduct must not only be a marked departure from the norm, but must also be blameworthy.
>
> [33] In order to determine whether the Applicant's conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.
>
> [emphasis added]

[72] We emphasize that the panel in *Re: Lawyer 10* said inadvertence or mistake *may not* be professional misconduct, leaving open the possibility that it may be professional misconduct. We agree with that. However, the panel in *Re: Lawyer 10* went on at paragraphs 32 and 33 to add a requirement of culpability or blameworthiness that has been interpreted to mean the behaviour must be intentional or advertent. We do not agree with this interpretation.

[73] *Re: Lawyer 10* was considered by the Benchers on Review of a single-Bencher panel decision in *Re: Lawyer 12*, 2011 LSBC 35 (panel decision cite is 2011 LSBC 11). Paragraphs 31-33 of *Re: Lawyer 10* were disapproved by the majority of the Benchers on Review for being circular and for failing to allow for an analysis that takes into account all of the circumstances (majority at para. 8) and by the minority for failing to recognize a spectrum of culpability or blameworthiness (minority at para. 49). However, the majority still allowed that, if the conduct as a whole amounts to an innocent mistake or events beyond one's control, it is not conduct that falls below the norm in a marked way. The minority (with whom the majority agreed on this point) held that the culpability must be of an aggravated character not the mere failure to exercise ordinary care (at para. 50-51) but, if it is "aggravated", then there must be a finding of professional misconduct.

[74] Counsel for Mr. Harding relies on *Re: Lawyer 10* and submits that the element of culpability cannot be satisfied without evidence of something more than an error on the lawyer's part. He says that the cases read in context (and this is most pronounced in the cases involving delay) all involve some element of culpable behaviour that goes beyond inadvertence or a mistake.

[75] Counsel for the Law Society says that culpability means that the conduct is the fault of the lawyer and marked departure refers to the degree of culpability (*Martin*). The degree of culpability requirement is satisfied if the conduct rises to the level of being aggravated (*Re: Lawyer 12*).

[76] In our view, given all the cases and the guiding principles from *Stevens* and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.

[77] As *Stevens* and *Re: Lawyer 12* (both the single-bencher and the review decision) make clear the panel must look at all of the circumstances. In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:

(a) the gravity of the misconduct;

(b) the duration of the misconduct;

(c) the number of breaches;

(d) the presence or absence of *mala fides*; and

(e) the harm caused.

[78] The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.

[79] Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a

defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

[80] Having set out the governing legal principles, we will turn to a review of the cases considering professional misconduct in circumstances with the same sorts of particulars as the citations in this case.

**Conscientious, diligent and efficient representation**

[81] A number of Law Society discipline cases have included citations where the professional misconduct alleged is the failure to represent the client in a conscientious, diligent and efficient manner including: *Law Society of BC v. Campbell,* [1997] LSDD No. 58; *Law Society of BC v. Simons,* 2012 LSBC 23; *Law Society of BC v. Wilson,* 2012 LSBC 06; *Law Society of BC v. McLellan,* 2011 LSBC 23; *Law Society of BC v. Williamson,* 2005 LSBC 4; *Law Society of BC v. Epstein,* 2011 LSBC 12; *Law Society of BC v. Rai,* 2005 LSBC 37; *Law Society of Alberta v. Chick,* [2008] LSDD No. 155. We are aware of two cases decided after the hearing of this case, *Law Society of BC v. Chiasson*, 2014 LSBC 32 and *Law Society of BC v. Perrick,* 2014 LSBC 39. These recent cases include applications of the legal principles but do not change them.

[82] Chapter 3, Rule 3 of the *Professional Conduct Handbook,* headed "Quality of Service", sets out a list of indicia that may be a measure of whether the quality of service meets the expected standard. Some of those indicia include doing the work in a prompt manner so that its value to the client is not diminished or lost, maintaining office staff and faculties adequate to the lawyer's practice and, having informed the client that something will happen or that some step will be taken by a certain date, not allowing that date to pass without follow-up information or explanation.

[83] Rule 5, "Promptness", reads as follows:

> A lawyer shall make all reasonable efforts to provide prompt service to each client and, if the lawyer foresees undue delay, shall promptly inform the client.

[84] Many of the cases were decided in the context of an admission that the lawyer had not served a client in a conscientious, diligent and efficient representation and that his or her conduct amounted to professional misconduct. Because in such

situations the panel must still decide whether the conduct amounts to professional misconduct despite the admission, the cases are helpful to delineate the factors to be considered, but they are of limited assistance in deciding a case where it is debated as to whether the conduct crossed the permissible bounds.

[85] Counsel for Mr. Harding submitted that a common ingredient of these cases was a feature of culpability lacking in this case such as inaction, procrastination despite reminders, the lawyer not responding to communications from the client and/or lying about activity on the case. Counsel for the Law Society points out that many of the cases (but not all) did involve such other conduct but that conduct was the subject of a separate allegation of professional misconduct. He submits that such communication issues are not a necessary precondition to professional misconduct based on delay or lack of activity.

[86] Some of the cases are dominated by allegations about failing to communicate with the client. For example, in *McLellan*, the lawyer had commenced the claim and taken some steps, but did not respond to his client's communications and in particular, did not tell his client that the case was not practical to pursue. In that sense, the behaviour that was the marked departure was not so much that he did not move the case along, but that he did not communicate with his client why the case should not be pursued.

[87] This issue is similar to the broad issue discussed above relating to the nature of the culpability and what role intention plays in the analysis. Again, we hold that such conduct is relevant as part of the entire set of circumstances that must be considered, but it is not in and of itself determinative.

[88] From these cases, and expressing the *Lyons* factors in terms of specifics that apply when the allegation is that professional misconduct arose out of a failure to represent a client in a conscientious, diligent and efficient manner, particularly where the allegations involve delay or lack of activity, we distill the following factors to be considered:

(a) gravity of the misconduct requires a consideration of:

i. the length of the delay or lack of activity;

ii. whether the delay or lack of activity was coupled with representations to the client about the case that were not true or failing to communicate with the client; and

iii. the nature of the steps that could or should have been taken to advance the case;

(b) duration of the misconduct also requires a consideration of the length of the delay or lack of activity;

(c) the number of breaches takes into account whether the citation is based on a single incident or a series of incidents that should be considered together;

(d) the presence or absence of *mala* fides requires an assessment of the reasons for the delay or lack of activity; and

(e) the harm caused by the respondent's conduct requires an assessment of the consequences to the client in not advancing the case.

**Obligation to give notice to the Lawyers Insurance Fund**

[89] The relevant clause of the British Columbia Compulsory Professional Liability Insurance Policy is Condition 4, Notice of Claim or Suit, which reads as follows:

> 4.1 If you become aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious, you will give written notice immediately, along with the fullest information obtainable, during the policy period to:
>
> Lawyers Insurance Fund
> 5th Floor, 845 Cambie Street
> Vancouver, BC V6B 4Z9
> Attention: Susan I. Forbes, Q.C, Director of Insurance
> Fax: 604 682-5842

[90] At the time of the conduct that gives rise to these citations, the *Professional Conduct Handbook* governed. Chapter 4, Rule 5 of the *Professional Conduct Handbook* provided that "[a] lawyer must comply with the terms of each professional liability insurance policy." Footnote 2 to Chapter 4, Rule 5 provides:

> Rule 5 imposes an ethical duty to report to the insurer. Imposing such an ethical obligation is necessary, in the public interest, to reduce the risk of coverage being denied.

[91] The law is clear that, notwithstanding the nomenclature of the title of the *Professional Conduct Handbook*, a failure to comply with it is not necessarily

professional misconduct: *Law Society of BC v. Coglon*, [2002] LSBC 21, at para. 7. Whether the lawyer had a duty to report under the policy and in compliance with the *Professional Conduct Handbook* does not necessarily answer the question as to whether failure to report is a marked departure from the standard expected.

[92] In *Law Society of BC v. Dent*, [2001] LSBC 36, the respondent was cited for failing to report a matter to the Lawyers Insurance Fund, as well as other matters pertaining to the same client's series of transactions. The matter arose out of financial arrangements the respondent made with a client where he acted both as a lawyer to the client as well as the recipient of a loan for which the security was insufficient. The client, who ended up with no security, made a complaint to the Law Society and sued her former lawyer/mortgagor. The respondent did not report the matter to the Lawyers Insurance Fund during the foreclosure proceedings or at the time of a complaint to the Law Society by his client. He made the report after the client commenced an action against him but before judgment. Coverage was denied on the basis of his personal involvement in the transaction.

[93] Professional misconduct was admitted and, while the panel confirmed the admission, there is no analysis of the citation pertaining to failing to report the matter to the Lawyers Insurance Fund.

[94] The Law Society points to the policy reasons underpinning the requirement to report potential claims, including those that may be unmeritorious, on the objective "reasonable basis" standard. Those policy reasons include that, by failing to give notice to the insurer of the potential claim, the insurer's ability to prepare a strong defence is compromised, which can result in forfeiture of the claim to coverage under the policy: Dennis Boivin, *Insurance Law* (Toronto: Irwin Law, 2004). The policy reasons also include that early notice gives the insurer the opportunity to repair the issue that may give rise to the claim before the claim occurs. In our view, those policy reasons inform the analysis as to whether the failure to report is marked departure, but they do not rise to the level of establishing that every failure to report a claim that should be reported under the terms of the insurance contract is a marked departure. The policy reasons and their applicability to the facts of a given cases should be considered as part of the *Lyons* factors. In many cases they will be relevant to the gravity of the conduct and the harm caused.

[95] Counsel for Mr. Harding submits that Mr. Harding's correct opinion that the Want of Prosecution Application would not succeed means that the failure to report is not professional misconduct. Again, we are of the view that this fact should be considered as part of the analysis, but is not determinative.

[96] We are of the view that the *Lyons* factors cited above are an appropriate framework within which to assess this type of allegation.

**Obligation to recommend a client obtain independent legal advice**

[97] The *Professional Conduct Handbook*, Chapter 4, Rule 5.1 reads as follows:

> 5.1 If, in respect of a matter in which the lawyer is or was engaged, the lawyer has a reasonable apprehension that an error or omission:
>
> (a) has been made
>
> (b) is one for which the lawyer is or may be responsible, and
>
> (c) is or may be damaging to the client,
>
> then the lawyer must promptly:
>
> (d) inform the client of the facts of the error or omission, without admitting legal liability, and
>
> (e) recommend that the client obtain independent legal advice.

[98] In addition, Chapter 3, Rule 3, referred to above, lists whether the lawyer has disclosed all relevant information to the client including information that could reveal neglect or error of the lawyer as one of the indicia of conscientious, diligent and efficient manner of representation.

[99] This is an area of trepidation for lawyers. It is tempting but not appropriate for lawyers to decide that they can "fix" the error so there is no utility to recommending independent legal advice. The duty to recommend independent legal advice is based on an objective standard. It is part of a lawyer's fiduciary duty to his or her client, which includes scrupulous adherence to the obligation not to put the lawyer's own interests ahead of the client and to be candid, even where they have a plan to remedy the situation: *Law Society of Alberta v. Chick*, [2008] LSDD No. 155.

[100] In the context of an application to dismiss for want of prosecution, the lawyer's conduct in the circumstances that give rise to the application are important but not determinative. If the want of prosecution is due to the lawyer, not the client or extraneous circumstances, the lawyer must give consideration to recommending independent legal advice. This is not to say that the lawyer's conduct must be intentional and the circumstances completely within the lawyer's control. Again,

the *Lyons* factors will assist in determining whether the failure to recommend independent legal advice amounts to professional misconduct in a given set of circumstances.

**Conflict of interest**

[101] The question of whether a conflict of interest is professional misconduct starts with, but does not finish with, what a conflict of interest is and whether one has been established. If a conflict of interest exists, the question becomes whether the lawyer's conduct in relation to that conflict is a marked departure from what is expected of a lawyer. That must be considered, as noted above, with reference to all the circumstances and within the framework of the *Lyons* factors.

[102] In *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 SCC 70, the Supreme Court of Canada adopted the following statement of a conflict of interest:

> … a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

[103] Retainers between lawyers and clients are overlaid with fiduciary responsibilities, which include the duty of loyalty and the duty of transparency. The duty to avoid conflicts of interest is part of the duty of loyalty and the duty of candour. The law, however, also recognizes that not every conflict of interest is a breach of the duty of loyalty; sometimes a lawyer is caught in a crossfire between clients, in other cases, conflicts are engineered strategically: *Strother v. 3464920 Canada Inc.*, [2007] 2 SCR 177, at paras. 34-36.

[104] One category of cases that comprises a significant portion of the jurisprudence dealing with conflicts of interest pertains to cases involving a lawyer or a law firm and two or more clients. Some cases, particularly in the discipline context, arise out of circumstances where a lawyer has intertwined business dealings with a solicitor-client relationship, causing conflicts where the lawyer is alleged to have preferred his or her interests over those of the client. In this case, the Law Society relies on the provisions of the *Professional Conduct Handbook* found in Chapter 7, which deal with those business relationship circumstances. They are:

> CONFLICTS OF INTEREST BETWEEN LAWYER AND CLIENT
>
> The purpose of this Chapter is to state the general principles that should guide a lawyer's conduct when the lawyer is invited to act both as legal advisor and business associate.
>
> …
>
> **Direct or indirect financial interest**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>
>  (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>
>  (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgment.

[105] There do not appear to be any provisions of the *Professional Conduct Handbook* addressing conflicts that arise out of circumstances where the lawyer is alleged to have financial interest arising out of litigation on which he was retained, as in this case. Counsel for the Law Society takes the view the Chapter 7 prohibition is a strict prohibition against acting in any case where there is a direct or indirect financial interest.

[106] The Law Society's position would mean that Chapter 7 of the *Professional Conduct Handbook* prohibits many fee arrangements typical in litigation, including contingency fees, hourly rate fees, and fees where there is a bonus or additional fee based on the result achieved. It would prohibit arrangements where the lawyer pays for disbursements as they are incurred and is not repaid those disbursements by the client until the conclusion of the litigation. In all of those cases, the lawyer has a financial interest in the litigation analogous to the special costs issue in this case. For example, in hourly rate arrangements, the lawyer's fee increases with the amount of time required to bring about a resolution.

[107] The logic that underlies the reasoning that a conflict occurs any time the lawyer has a direct or indirect financial interest in the matter is that lawyers prefer their own financial interests to the interests of their clients or, to put it another way, are not bound by a duty of loyalty not to prefer their own interests to those of the client. The law of fiduciary duty forbids lawyers from putting their own interests before

those of their clients. If the duty is not met by the lawyer, then a conflict may occur that may be the subject of an allegation of professional misconduct, depending on the circumstances.

[108] Counsel for Mr. Harding submitted that the Law Society's position would have widespread application with potentially absurd results, particularly with regard to contingency fee agreements or even whenever a lawyer had funded disbursements when settlement negotiations occurred. We agree.

[109] We note the July 30, 2014 decision of a discipline panel in *Chiasson*, which was released after the hearing in this case. In that case, there was no citation alleging a conflict of interest, nonetheless the panel held that contingency fee agreements create an "inherent conflict of interest". This point was argued before us and we reach the opposite conclusion.

[110] In summary on this point, Chapter 7 of the *Professional Conduct Handbook* on its face applies to circumstances where the lawyer goes into business with the client and has a financial interest in the outcome. Whether it creates a strict prohibition in those circumstances is not for us to say, but it clearly does not create a strict prohibition for the circumstances before us. We also observe that even if it did, that does not necessarily translate to professional misconduct. That is the topic to which we now turn.

[111] In cases where a conflict of interest has arisen, the question (from a discipline perspective) is whether the lawyer's conduct in regard to that conflict of interest is a marked departure. The analysis of this issue must take into account that the law of conflicts has been evolving over the last several decades and is fairly characterized as a "minefield". The challenging issues presented by this area have been the subject of much controversy among the profession and in the jurisprudence. We noted above the comments by the Supreme Court of Canada in *Neil* that allegations of conflicts have been used tactically to disrupt the ability of a client to retain the lawyer of his or her choice. We also note that, in *Strother*, the Supreme Court of Canada split 5:4 on whether the facts of that case created a conflict. In the most recent case, *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, Chief Justice McLachlin observed as follows:

> In recent years the Canadian Bar Association and the Federation of Law Societies of Canada have worked toward common conflict rules applicable across Canada. However, they have been unable to agree on their precise form: see, for example, A. Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011), 14 *Legal Ethics* 193. That debate was transported into the proceedings before us, each of these interveners

> asking this Court to endorse their approach. While the court is properly informed by views put forward, the role of this Court is not to mediate the debate. Ours is the more modest task of determining which principles should apply in a case such as this, from the perspective of what is required for the proper administration of justice.

[112] The complexity and controversy around the law of conflicts and the practical difficulties of navigating the area in modern day practice must be considered as part of all the circumstances in any case. Under the *Lyons* factors, these considerations will relate to the gravity of the conduct and the presence or absence of *mala fides*.

## ANALYSIS

### Client DA: Failure to provide conscientious, diligent and effective representation

[113] On the agreed facts, Mr. Harding took no steps on this matter for over four years, with the exception of one update meeting with the client. When he was retained in late 2006 or early 2007, the matter was scheduled to proceed to trial with a month or two months.

[114] The single meeting with the client yielded notes of one half of a page, but no plan and certainly no action to move forward a case that had been poised to go to trial when Mr. Harding took over the retainer.

[115] Counsel for Mr. Harding emphasizes the agreed fact that his explanation of the failure to move the case forward was because he generally lost track of the file. Mr. Harding's practice is to rely on a "bring forward" system regarding active files, but this file was not diarized through inadvertence. Mr. Harding's counsel says that conduct that is characterized by inadvertence cannot be the basis of a finding of professional misconduct. As we have noted above, we do not agree there is a burden to prove intention or that inadvertence is an absolute defence to an allegation of professional misconduct, although intention and inadvertence are factors to be considered.

[116] In addition, the ASF also includes Mr. Harding's evidence on the motion to dismiss for want of prosecution that the failure to move the case forward was:

> … due to the pressures of my workload and the seemingly constant occurrence of pressing and urgent matters, this file slipped through the cracks. This is entirely my fault and was not the result of any conduct or instruction by the Plaintiff.

[117] This agreed fact is not exactly the same as inadvertence due to a failed bring forward system. Nor does the failure to diarize the file fit comfortably as the complete reason for lack of action given the June 2008 meeting with DA and GA. At least part of the explanation is that he was too busy to get to DA's case, in circumstances where he inherited a case that was about to go to trial and he did nothing in four years to conclude it.

[118] We now turn to the application of the *Lyons* factors.

**The gravity of the misconduct**

[119] On the application to dismiss for want of prosecution, Mr. Justice Blair held that the delay was inordinate and inexcusable. We agree. Simply put, to take no steps on a file for four years is a marked departure from what is to be expected in any case, but in a case where the retainer came when the trial was set but adjourned to accommodate the retention of new counsel, the inexcusability is heightened. The additional circumstances here that, in four years, one meeting was held, the notes of that meeting show no commitment to move the case, and no action was taken subsequent to that meeting are aggravating.

[120] A mitigating factor is that there is no evidence of any dishonesty about activity on the file. There is no agreed fact that Mr. Harding failed to respond to communications, but there is an agreed fact that Mr. Harding received a letter from another lawyer in which that lawyer stated that GA and DA were having trouble getting in touch with Mr. Harding. As noted, the contents of that letter are not agreed facts. There has been no complaint from GA or DA in this regard. The letter arrived shortly after Mr. Harding started to take steps to advance the matter by filing a notice of intention to proceed.

[121] Overall, this factor militates in favour of a finding of professional misconduct.

**The duration of the conduct**

[122] The failure to advance the matter extended to four years and one month. This factor goes in favour of a finding of professional misconduct.

**The number of breaches**

[123] In this context, the number of breaches can be viewed as one long breach over four years or the sum of the steps that should have been taken during that period. Either way, this factor goes in favour of a finding of professional misconduct.

**The presence or absence of *mala fides***

[124] As noted above, this is the factor on which counsel for Mr. Harding placed the most reliance. He urged on us the agreed fact that the failure to advance the matter was due to inadvertence in Mr. Harding's bring forward system and that there were no other facts we could look to in this regard. We have noted that his affidavit evidence provides a more complete picture and that the June 2008 meeting is not consistent with an assertion that he simply lost track of the file for four years and one month. During part of that time he was aware of the file, but was too busy to get to it.

[125] Having said all of that, there certainly is no evidence that rises to the level of *mala fides* in the sense of Mr. Harding having improper motives for not advancing the file.

[126] This factor is neutral.

**The harm caused**

[127] Mr. Harding successfully defended the dismissal for want of prosecution, so the ultimate harm, the dismissal of DA's case, was avoided.

[128] However, her case was not advanced for four years. We have no evidence from her on that. Delay in resolution of litigation is a serious issue generally, and the administration of justice suffers when cases are inordinately and inexcusably delayed.

[129] This factor is in favour of a finding of professional misconduct.

**Conclusion**

[130] Mr. Harding failed to serve DA in a conscientious, diligent and efficient manner in circumstances that amount to professional misconduct.

**Client DA: Failure to Give Notice To the Lawyers Insurance Fund**

[131] The nexus of the contest on this ground is whether Mr. Harding's views that the Want of Prosecution Application would not succeed inform the obligation to make the report or nullify a finding that it was professional misconduct to not do so.

[132] We are of the view that Mr. Harding was required to report the Want of Prosecution Application because of the objective test of the wording of the Policy, and because

of the agreed fact that the failure to advance the case was solely the fault of Mr. Harding.

[133] The question then becomes whether his failure to report was professional misconduct.

[134] As discussed above, not all applications that could result in the dismissal of a client's case need be reported. However, where the cause of the delay that underscores the application is solely the fault of the lawyer, the obligation to report is enhanced and the failure to report is more serious. Even though Mr. Harding correctly assessed that the outcome would be in DA's favour because the prejudice to the defendants was not serious enough, that was not a foregone conclusion. It was clear that the defendants had evidence of prejudice and Mr. Justice Blair found some prejudice.

[135] The following is our analysis of the *Lyons* factors.

**The gravity of the misconduct**

[136] The conduct was moderately severe. Mr. Harding's conduct in not advancing the claim put his client in a perilous situation. As soon as the application was brought, he knew that his client's interests were vulnerable to be compromised due to his conduct. That should have triggered him to think about reporting immediately. His view that he did not need to report because he did not think the Want of Prosecution Application would be successful was not a correct view given his responsibility under his Policy and his responsibility to his client.

[137] This factor militates in favour of a finding of professional misconduct.

**The duration of the conduct**

[138] The misconduct commenced when the defendants' lawyer brought the Want of Prosecution Application and continued until it was resolved, a period over eight months. This factor militates in favour of a finding of professional misconduct.

**The number of breaches**

[139] There was one breach. This factor militates against a finding of professional misconduct.

**The presence or absence of *mala fides***

[140] There were no improper intentions or motives. Mr. Harding did not believe the application would succeed. He was not trying to cause harm to either DA or the Lawyers Insurance Fund by not reporting. He simply formed the erroneous view that he need not report.

[141] This factor militates against a finding of professional misconduct.

**The harm caused**

[142] There was no harm caused. This factor militates against a finding of professional misconduct.

**Conclusion**

[143] While we are of the view that Mr. Harding should have reported the Want of Prosecution Application to the Lawyers insurance Fund, we conclude the Law Society has not met its burden of establishing on a balance of probabilities that Mr. Harding's conduct was a marked departure from that expected.

**Client DA: Failure to Recommend Independent Legal Advice**

[144] During the timeframe starting when the Want of Prosecution Application was launched up to the time it was dismissed, DA's interests were in peril due to the conduct of Mr. Harding. He should have referred her for independent legal advice.

[145] Whether the failure to do so amounts to professional misconduct is informed by the duty of candour and the duty not to prefer his interests over those of his client. While the client was told of the application, and she was told that the delay was due to Mr. Harding, she was never told she might have a claim against him if the application succeeded. She would have been told that if she had been referred for independent legal advice.

[146] We review the *Lyons* factors as follows.

**The gravity of the misconduct**

[147] The conduct was grave. As soon as the application was brought, Mr. Harding knew that his client's interests were vulnerable to be compromised due to his conduct. His client needed independent legal advice. His view that he did not need to refer her because he did not think the Want of Prosecution Application would be

successful aggravates this situation. DA should have had independent legal advice to get an objective view on that and in case he was wrong. His obligation of complete candour and transparency required that.

[148] This factor militates in favour of a finding of professional misconduct.

**The duration of the misconduct**

[149] The misconduct commenced when the defendants' lawyer served the Want of Prosecution Application and continued until it was resolved, a period over eight months. This factor militates in favour of a finding of professional misconduct.

**The number of breaches**

[150] There was one breach. This factor militates against a finding of professional misconduct.

**The presence or absence of *mala fides***

[151] There is no evidence of any improper intentions or motives; however, Mr. Harding's behaviour is not consistent with his obligation to put his client's interests first.

[152] This factor militates in favour of a finding of professional misconduct.

**Conclusion**

[153] Mr. Harding's failure to recommend independent legal advice to DA amounts to professional misconduct.

**Clients PJ and ZS: Failure to Report to the Lawyers Insurance Fund**

[154] The Policy excludes special costs from the definition of damages. Notwithstanding the Policy, apparently LIF will cover special costs in some circumstances. The agreed fact is that "[a]lthough not specifically stated in the Policy, LIF provides coverage for claims brought by a client against his or her solicitor arising out of an alleged error that exposes the client to a claim for special costs."

[155] In light of the fact that the Policy, on its face, excludes coverage for the matter the Law Society alleges should have been reported, we fail to see that Mr. Harding could have an obligation to report, let alone committed professional misconduct by failing to report.

[156] Counsel for the Law Society submitted that insurance contract interpretation jurisprudence provides that coverage is interpreted broadly and exclusions are interpreted narrowly. We do not think that doctrine creates a duty to report a claim that is excluded from coverage on a plain reading of the Policy, even though the practice of LIF is to provide coverage for it.

[157] We need not address the *Lyons* factors because there is no misconduct to assess.

**Conclusion**

[158] The Law Society has not met its burden of establishing that there is a duty to report in these circumstances. These circumstances do not amount to professional misconduct.

## CLIENT ZS: CONFLICT OF INTEREST

[159] In this case, the alleged conflict arose when the application brought by ZS to have the defendants, ICBC and several other persons in contempt of court triggered a claim for special costs against both ZS and the Respondent.

[160] When that claim was made, Mr. Harding recommended ZS obtain independent legal advice, arranged for her to have that advice and paid for that advice. However, he did not encourage her to seek legal advice on the issue of his representation of her in the settlement negotiations in light of the claim for special costs.

[161] Mr. Harding subsequently, on instructions from ZS, settled her case for more than the amount she had instructed him to accept. The settlement terms included a release for the claim for special costs.

[162] Was Mr. Harding in a conflict of interest in negotiating such a settlement, and if so, is that professional misconduct?

[163] For the reasons given above, we find that Chapter 7 of the *Professional Conduct Handbook* does not apply to these circumstances. Mr. Harding was not in business with ZS. The claim for special costs by the opposing parties did not create a business relationship.

[164] The claim for special costs did create circumstances where Mr. Harding had a financial interest in the outcome, but we find there is no evidence it created a conflict. As we have discussed above, having a financial interest in the outcome

does not automatically mean there is a conflict. If that were the case, then all manner of retainer agreements would create conflicts.

[165] The evidence does not establish on the balance of probabilities that there was a conflict of interest. It is regrettable that the tactic that Mr. Harding recommended to ZS resulted in claims for special costs against ZS and Mr. Harding. Such claims are rare, but they do happen. It would be wrong to set a rule that, wherever a claim for special costs against a lawyer arises, a conflict also automatically arises. That would permit opposing parties to interfere, potentially mischievously, with the relationship between a lawyer and a client. We hasten to say that there is no evidence that was the case here; the allegations made in the Contempt Application were serious and of the type where it was not surprising a claim for special costs was made.

[166] Accordingly, there may be circumstances where a claim for special costs against the lawyer or the lawyer and the client does create a conflict on the evidence. The evidence in this case does not establish such a conflict. There is no evidence that Mr. Harding breached his duty of loyalty or acted to put his interests ahead of those of ZS. Their interests were aligned to the extent that they both shared an interest in resolving the case in a way which eliminated the claims for special costs. There is no evidence that the negotiations were such that the amount ZS recovered was diminished by the release of the claim for special costs.

[167] Given that the citation is based on an allegation of acting in a conflict of interest, and having found no conflict, it is not necessary to address the issue of professional misconduct. However, we will do so briefly in the event there is any issue of what our views would have been.

[168] We apply the *Lyons* factors as follows.

**The gravity of the misconduct**

[169] The conduct does not rise to the level of being grave or a marked departure. Mr. Harding did seek out the views of a practice advisor who did not identify a conflict or suggest to Mr. Harding that he could not continue to act while a claim for special costs against him was outstanding. While there was some debate at the hearing about the scope of his inquiry and the soundness of the advice he received, the fact that he sought guidance goes to the issue of whether Mr. Harding's conduct was a marked departure. DA had independent legal advice and representation at the hearing for special costs. Mr. Harding negotiated a settlement that was more than what she instructed him she was prepared to settle for. There is no evidence he preferred his interests over hers or that her claim was compromised in favour of a

release of the claim of costs against him. It is typical to negotiate costs awards as part of a settlement.

[170] This was a challenging situation for any lawyer. Mr. Harding worked his way through it seeking appropriate guidance and keeping his clients' interests at the forefront of his actions.

[171] Even if we are not correct that there was no conflict, it cannot be said that his handling of the matter falls outside the permissible boundaries and is a marked departure from the conduct expected.

**The duration of the misconduct**

[172] The negotiation of the settlement took place over a short period of time.

**The number of breaches**

[173] There was one breach alleged.

**The presence or absence of *mala fides***

[174] There is no evidence of any *mala fides*.

**The harm caused**

[175] There was no harm caused.

**Conclusion**

[176] We conclude that Mr. Harding was not in a conflict of interest and that his conduct did not amount to professional misconduct on this allegation.

## DISPOSITION

[177] Professional misconduct has been established with regard to allegation 1, failing to represent DA in a conscientious, diligent and effective manner. Professional misconduct has been established with regard to allegation 3, failing to recommend independent legal advice to DA. Allegation 2, professional misconduct pertaining to the failure to report the application to dismiss for want of prosecution on DA's claim to the Lawyers Insurance Fund, is dismissed. Allegations 4(a) and (b), professional misconduct for failing to report to the Lawyers Insurance Fund

pertaining to PJ and ZS, are dismissed. Allegation 5 pertaining to professional misconduct in acting in a conflict of interest in relation to ZS is dismissed.

---

## AGREED STATEMENT OF FACTS

### Member Background

1. Thomas Paul Harding (the "Respondent") was called and admitted as a member of the Law Society of British Columbia ("LSBC") on August 31, 1990.

2. After his admission, the Respondent practised with Peterson Stark in Surrey, British Columbia. Since May 1, 1999, the Respondent has practised under the firm name of Trial Lawyers Advocacy Group in Surrey. The Respondent has practised in the Lower Mainland since 1990, primarily in the areas of personal injury and family law.

### Citation and Service

3. The citation in this matter was authorized by the Discipline Committee on January 24, 2013 and was issued on February 22, 2013 (the "Citation").

4. The Respondent admits that on February 22, 2013 he was served through his counsel with the Citation and waived the requirements of Rule 4-15 of the Law Society Rules.

### Attachments

5. Except where otherwise stated, it is agreed in respect of each document attached to this Agreed Statement of Facts that it:

    a. is a true copy of the original document,
    b. was written or created on the date on the face of the document,
    c. where by the content or nature of the document it was intended to be sent or delivered, that it was sent or delivered on the date it bears on its face and was subsequently received by the intended recipient,

d. where on its face the document purports to have been written or created under the instructions of the person who signed it or where on its face the document's creation was authorized by the person who signed it, that it was so written, created or authorized; and

e. where the document purports on its face to have been received on a particular date or time, that it was so received.

**Conduct related to the Respondent's client DA**

6. On or about April 9, 2002 DA ("DA") filed a Writ of Summons with attached Statement of Claim against the Insurance Corporation of British Columbia ("ICBC") and two individual employees of ICBC, GB and JG, (collectively, the DA Defendants") alleging, *inter alia,* malicious prosecution (the "DA Action"). Her lawyer at that time was DR and the Court File Number assigned was [number]. A trial date was set for January 22, 2007.

7. The DA Action arose out of events that occurred on January 30, 2000, when DA's husband, GA, was struck by a motor vehicle while they were crossing Nelson Ave. in Burnaby, B.C.

8. GA subsequently reached a settlement with ICBC for the damages resulting from his injuries. DA, although not struck by the motor vehicle, claimed relief for the injuries suffered when she slipped on the road during the incident.

9. Witnesses provided written statements contemporaneously or soon after the events which led eventually to GA and DA's claim.

10. DA, whose first language is Serbo-Croatian, sought no-fault medical and disability payments for her injuries from ICBC. In pursuing her claim, DA provided a statement through a person who purported to translate Serbo-Croatian to English about the incident and her injuries to an ICBC adjuster. ICBC alleged that she provided a false statement and initiated steps which led to her being charged with fraud. DA said the translator misinterpreted her statement. On July 16, 2001, the Crown stayed the fraud charge on hearing because the statement had come not directly from DA, but from such person.

11. Written records of the defendant JG's involvement in the investigation of DA's claim were produced in the DA Action.

12. On April 26, 2004, DR conducted an examination for discovery of JG.

13. On October 31, 2006, DR withdrew as counsel for DA upon reviewing documents from ICBC which caused him to conclude that he might be required to testify in the trial of the DA Action.

14. By January, 2007, the Respondent received DR's file. He also received two memos regarding the DA Action.

15. On January 10, 2007 the Respondent filed a Notice of Change of Solicitor and became the solicitor of record for DA in the DA Action. On January 12, 2007 the trial of the DA Action was adjourned generally by consent.

16. On June 23, 2008 the Respondent met with GA and DA for the first time.

17. On October 14, 2008 the Respondent filed a Notice of Change of Address for Delivery in the DA Action.

18. Other than meeting with GA and DA on June 23, 2008, the Respondent took no recorded steps to advance the DA Action from January 12, 2007 when he became the solicitor of record until February 11, 2011, a period of 49 months.

19. The Respondent's explanation for not taking steps to advance the DA Action prior to February 11, 2011 was that he generally lost track of the file. The Respondent's practice is to rely on a "bring forward" system regarding active files, but this file was not diarized through inadvertence.

20. On February 11, 2011 the Respondent filed a Notice of lntention to Proceed in the DA Action.

21. On February 22, 2011 the Respondent was faxed a letter from RC, a lawyer consulted by DA. RC advised the Respondent that DA "expressed concern about the status of her file and the difficulties they are having in communicating with you".

22. In a letter dated February 22, 2011, the Respondent served the Notice of lntention to Proceed on counsel for the DA Defendants.

23. Pursuant to Rule 3(4) of the Rules of Court, the Respondent was precluded from proceeding with the DA Action until 28 days after service of the Notice of Intention to Proceed on all other parties of record.

24. On May 11, 2011, counsel for the DA Defendants advised the Respondent that it was their intention to bring an application to dismiss the DA Action for want of prosecution (the "Want of Prosecution Application").

25. On July 21, 2011, the Respondent wrote to counsel for the defendants to advise that he wanted to set examinations for discovery of the defendants. Counsel for the defendants refused to provide dates, advising that they intended to bring the Want of Prosecution Application.

26. On August 19, 2011 the DA Defendants filed the Want of Prosecution Application.

27. On August 25, 2011, the DA Defendants offered to settle the DA Action for $10,000.

28. The Respondent discussed this offer with GA and DA and was instructed not to accept it.

29. On August 26, 2011 at 2:01a.m., the Respondent sent an email to DA, who was then in Belgrade. DA replied to Mr. Harding 3:12a.m.

30. Later on August 26, 2011 Mr. Harding met with GA, who swore an affidavit in opposition to the Want of Prosecution Application.

31. On August 28, 2011, the Respondent delivered a Notice to Admit dated August 26, 2011 (the "Notice to Admit") to counsel for the DA Defendants.

32. On August 29, 2011, the Respondent filed an Application Response to the Want of Prosecution Application.

33. On August 29, 2011, the Respondent also filed an affidavit which he swore and the affidavit of GA in opposition to the Want of Prosecution Application.

34. GA's affidavit stated that DA always wanted to continue the DA Action and take the matter to trial, and that she instructed the Respondent to proceed with the DA Action and proceed to trial. In his affidavit filed August 29, 2011 the Respondent admitted that "due to the pressures of my workload and the seemingly constant occurrence of pressing and urgent matters, this file slipped through the cracks. This is entirely my fault and was not the result of any conduct or instruction by the Plaintiff ... The Plaintiff has never instructed me to delay this matter intentionally, nor have I intentionally delayed this matter. Rather, the Plaintiff has instructed me to press forward with the matter ..." No evidence contrary to Mr. Harding's affidavit was filed.

35. Counsel for the DA Defendants did not serve a reply to the Notice to Admit by September 12,2011, which was the 14 day deadline for responding to the Notice to Admit delivered August 28, 2011, in accordance with Rule 7-7(2) of the Rules of Court. Accordingly, pursuant to this Rule, the truth of the facts in the Notice to Admit was deemed to be admitted by the DA Defendants.

36. On September 23, 2011, counsel for the DA Defendants delivered to the Respondent a Reply to Notice to Admit, a Notice of Application to extend the time for filing a reply to the Notice to Admit (the "Notice to Admit Extension Application"), an affidavit of JS sworn September 22, 2011 and the affidavit of MT sworn September 23, 2011.

37. The Notice to Admit Extension Application stated that the failure to reply to the Notice to Admit within the time specified by Rule 7-7(2) of the Rules of Court was "due to an administrative error" which "lies solely with defendants' counsel."

38. On September 21, 2011, the Respondent delivered an offer to settle to the DA Defendants.

39. On October 5, 2011, the Respondent filed a Notice of Application seeking cross- examination of MT on his affidavit sworn September 23, 2011 (the "Cross Examination Application").

40. The Respondent did not at any time notify the Lawyers Insurance Fund about the Want of Prosecution Application.

41. The Respondent did not recommend to DA that she obtain independent legal advice with respect to the Want of Prosecution Application.

42. The Respondent's explanation to the Law Society of British Columbia Professional Conduct Department on September 12, 2012 for not reporting the Want of Prosecution Application to the Lawyers' Insurance Fund ("LIF") was that he did not think there was a reasonable chance that the Want of Prosecution Application would succeed since the delay did not result in serious prejudice to the DA Defendants.

43. On November 18 and 24, 2011, the Want of Prosecution Application, the Notice to Admit Extension Application and the Cross-Examination Application were heard by the Honourable Mr. Justice Blair. CC, who was then an articled student employed by Mr. Harding, was present with Mr. Harding and spoke to Mr. Harding's affidavit. No objections or concerns were expressed by the Court or opposing counsel about CC doing so. At the conclusion of the hearing, Mr. Justice Blair reserved judgment

44. On January 13, 2012, Reasons for Judgment were delivered by Mr. Justice Blair. Mr. Justice Blair dismissed the Want of Prosecution Application.

45. The Respondent and counsel for the DA Defendants subsequently agreed to bear their own costs of the applications since success before Blair J. was divided.

46. On March 1**,** 2012, the Law Society advised the Respondent that it had opened complaint file No. 20120061 after obtaining a copy of the Reasons for Judgment.

47. Prior to the Law Society opening complaint file no. 20120061, GA and DA never complained to the Law Society about any aspect of the Respondent's conduct. Nor have they complained since.

**Conduct related to the Respondent's clients PJ and ZS**

48. The Respondent was counsel of record for the plaintiff PI in Supreme Court of British Columbia Action No. [number] wherein **PJ** brought proceedings for damages and losses allegedly to have been caused by a motor vehicle accident that occurred on June 26, 1999 (the **"PJ** Action").

49. The Respondent was counsel of record for the plaintiff ZS in Supreme Court of British Columbia Action No. [number] wherein ZS brought proceedings for damages and losses allegedly to have been caused by a motor vehicle accident that occurred on January 15, 2003 (the "ZS Action"). ZS alleged, among other things, that she had suffered a brain injury as a result of the motor vehicle accident, which caused her to experience numerous symptoms, including memory loss. Psychiatric and pyschological reports supporting her claim were served in the course of the litigation.

50. On October 5, 2006 the defendants in the PJ Action and the ZS Action (collectively, the "Joint Defendants") brought applications for orders that various non-parties produce various documents and information about PI and ZS (the "Omnibus Document Applications"). The Omnibus Document Applications were supported by affidavits which either synopsized or exhibited information obtained by the Joint Defendants through the discovery process.

51. On October 23, 2006 the Respondent prepared a Notice of Motion on behalf of PJ in the PJ Action and on behalf of ZS in the ZS Action seeking to have the Joint Defendants' Application for Production dismissed and a finding that the Joint Defendants and Third Parties in the two actions (except the Third Party, C Insurance Company) as well as their lawyers, the affiants of the affidavits in support of the motions for non-party discovery in each case, the commissioners who took the affiants' oaths, the ICBC adjusters in each case, and the CEO of ICBC were in contempt of court for breaching the "implied undertaking" of confidentiality by releasing documents obtained through discovery in the PJ Action and the ZS Action to third parties without consent and without a Court order (the "Contempt Applications"). The Notices of Motion were filed on March 9, 2007.

52. Prior to bringing the Contempt Applications, the Respondent discussed the matter with his clients and received their instructions to proceed. The Respondent's recollection is that the discussion with his clients included that if the application was dismissed, costs might be awarded, that costs generally follow the event and that the costs of interlocutory applications are generally not payable until an action is concluded. Mr. Harding did not discuss the issue of whether special costs might be awarded against his clients. Mr. Harding's explanation to the Law Society of British Columbia Professional Conduct Department on September 5, 2012 was that he did not foresee that special costs might be awarded. When interviewed on February 13, 2014, ZS did not recall the Respondent advising her at the time that in the event the contempt application failed, she may be exposed to liability for costs.

53. ZS and PJ swore affidavits in support of the Contempt Application.

54. In letters dated October 27, 2006 DB, QC counsel for the Joint Defendants, advised the Respondent that in the event the Joint Defendants were successful in having the Contempt Application dismissed, they would be seeking special costs "payable by your client or his counsel, personally in any event of the cause ...".

55. At the relevant time, Mr. Harding's usual practice was to provide copies of in-coming and out-going materials, such as correspondence, to his clients with a little chit (not a cover letter) in the form below:

Thomas Harding Law Corporation
200-8459-160th Street, Surrey, B.C. V4NOV6
Telephone: (604) 635-1330 Fax: (604) 635-1340

*FROM THE DESK OF THOMAS HARDING* DATE _____

Attached are documents prepared or received by us on your behalf.
PIease:
[ ] No action required--for your information only
[ ] Fill out out as required and return by mail
[ ] Send me the documents requested
[ ] Review them and call me to discuss
[ ] Call my secretary to set up an appointment
[ ] This matter is urgent—***call me immediately***
[ ] Other

56. In accordance with Mr. Harding's usual practice, copies of the letters from DB should have been provided to his clients around the times they were received.

57. Shortly after receiving DB's letter dated October 27, 2006, Mr. Harding asked his assistant, IW to call ZS and schedule a meeting with him. IW called ZS and then scheduled the meeting for 2 pm on November 15, 2006. Mr. Harding met with ZS on November 15, 2006. On Mr. Harding's instructions, IW provided a copy of DB's letter dated October 27, 2006 to him in preparation for this meeting. The meeting took place as scheduled.

58. When interviewed on February 13, 2014, ZS's recollection was that the Respondent did not provide her with a copy of DB's October 27, 2006 letter.

59. Further correspondence between the Respondent and DB occurred on November 3, 10, 23and 30, 2006 and on December 5 and 15, 2006.

60. The Respondent's December 5, 2006 letter states, in part:

> By threatening me personally, you create a conflict of interest. This conflict, if real, requires that I obtain counsel. ..

61. On December 19, 2006, the Respondent sought advice from the Law Society on the issue of whether separate representation was necessary in view of DB's position that the Joint Defendants would be seeking special costs "payable by your client or his counsel, personally in any event of the cause ...".

62. On March 12 and 13, 2007, the Contempt Application was heard by Mr. Justice
Edwards.

63. On March 23, 2007 Mr. Justice Edwards dismissed the Contempt Application and ordered written submissions to address the issue of costs.

64. In their written submissions dated April 19, 2007, the Joint Defendants sought an Order that the Respondent pay special costs of the Contempt Application personally, or, in the alternative, that PJ and ZS pay special costs of the Contempt Application (the "Joint Defendants' Special Cost Application").

65. On April23, 2007 both PJ and ZS filed a Notice of Application for Leave to Appeal Mr. Justice Edwards' decision to the British Columbia Court of Appeal ("BCCA").

66. In May, 2007, the Respondent arranged for EC to provide independent legal advice and representation to ZS and PJ.

67. The Respondent gave EC an undertaking to pay his accounts as presented and also agreed to indemnify his clients, ZS and PJ, in the event they were found liable for costs.

68. On May 31, 2007, ZS and IW, the Respondent's assistant, exchanged emails.

69. On August 14, 2007 written submissions were filed on behalf of PJ and ZS by EC, the lawyer retained to represent both on the issue of costs. It was the position of both PJ and ZS that the application for special costs as against them be dismissed.

70. The Respondent continued to act for PJ in the PJ Action and ZS in the ZS Action.

71. On September 10, 2007 Mr. Justice Chiasson for the BCCA dismissed both applications for Leave to Appeal and awarded costs to the Joint Defendants.

72. On November 5, 2007, Mr. Justice Edwards died.

73. On or before May 12, 2009, ZS instructed the Respondent to try to settle her case for $800,000 or more as a gross payment. On May 12, 2009, the Respondent sent an email to ZS which stated:

> This is to confirm that you will send me a letter instructing me to try to settle your case for anything $800K or more as a gross payment. From

> that amount would come my fees, disbursements. I have told you forcefully that I disagree with this instruction, but that should you provide me a letter giving me the instruction, I will follow it.
>
> I don't promise that we WILL settle for $800K. The money has to come from the other side

74. On July 15, 2009, the hearing of the Joint Defendants' Special Cost Application was commenced before Mr. Justice Greyell. The hearing did not conclude that day.

75. On August 3, 2009, Ms. ZS sent an email to the Respondent. ZS confirmed her previous instruction to the Respondent that she did not want to go to trial and to settle for $800,000.

76. On or about August 19, 2009, a handwritten note from ZS was received by the Respondent. In her note, ZS confirmed her previous instruction to the Respondent that she did not want to go to trial and to settle for $800,000.

77. On October 1, 2009, the hearing of the Joint Defendants' Special Cost Application was concluded before Mr. Justice Greyell. Judgment was reserved.

78. On February 26, 2010 the Respondent negotiated a settlement of the ZS Action during the course of a Case Management Conference before Mr. Justice Sewell. The terms of settlement were spoken to in open court and recorded in the court clerk's notes. The terms of the settlement are recorded in a March 5, 2010 letter from CB, counsel for the Defendants, to the Respondent.

79. One of the terms of the settlement agreement was that the Joint Defendants in the Contempt Application as it related to ZS "will not seek costs against ZS and [the Respondent], in his capacity as solicitor for ZS on the ZS contempt application, which costs are in respect of steps and proceedings related exclusively to the ZS contempt proceedings." Prior to the settlement being concluded, the Respondent did not advise ZS that it was a term of the settlement that the ZS contempt Respondents would not seek costs against her or the Respondent personally in his capacity as her solicitor, which costs were in respect of steps or proceedings related exclusively to the ZS contempt proceeding.

80. March 2, 2010, the Respondent's assistant and ZS exchanged emails .

81. On March 7, 2010, the Respondent met with ZS, reviewed the terms of the settlement with her, reviewed his account with her, witnessed her signature on the release that was required for the settlement and provided the contents of ZS's file to her.

82. The Respondent provided the Joint Defendants with a fully executed Release and endorsed Consent Dismissal Order.

83. The Respondent did not advise ZS to seek independent legal advice with respect to the settlement he negotiated on her behalf. The Respondent's August 16, 2012 explanation to the Law Society of British Columbia Professional Conduct Department for not doing so is that he did not consider that there was a conflict of interest between him and ZS or that independent legal advice was necessary in these circumstances because of his view that the settlement was for $50,000 more than ZS instructed him to accept, the settlement was not reduced because of the special costs claim and the release agreed to be provided to the Respondent was only for costs related exclusively to the ZS Contempt Application, which the Respondent did not consider to be material. The Respondent advised the Law Society Professional Conduct Department on August 16, 2012 that had he perceived a potential conflict of interest between himself and ZS, due to the issue of special costs or for any other reason, he would have ensured that she receive independent legal advice about the settlement before it was concluded.

84. On March 1, 2010 counsel for the Joint Defendants in the Contempt Application notified EC that he had no objection to EC advising the court that the Joint Defendants had agreed not to claim costs arising out of the ZS contempt proceedings as against ZS and the Respondent, but that the costs application of the Joint Defendants in the PJ Action remained extant as against PJ and the Respondent.

85. On March 26, 2010 Mr. Justice Greyell pronounced reasons for judgment awarding special costs against PJ in any event of the cause of the Contempt Application. Mr. Justice Greyell declined to order special costs against the Respondent personally.

86. On January 7, 2011 Mr. Justice Greyell pronounced reasons for judgment awarding the Defendants special costs for the special costs application, as well

as special costs for the Registrar's hearing to determine the amount of such costs.

87. On October 6, 2011 Mr. Justice Greyell pronounced reasons for judgment dismissing the Respondent's application for special costs or, alternatively, costs of defending the application brought by the Defendants for special costs against the Respondent and PJ.

88. The Respondent did not give written notice in April2007 to the Lawyers Insurance Fund that a claim for special costs was being made against him personally and against his clients PJ and ZS in consequence of Mr. Justice Edwards' dismissal of the Contempt Application.

89. The Respondent never reported the matter of ZS's potential special costs liability to the Lawyers Insurance Fund.

90. The Respondent first reported the matter of PJ's special costs liability to the Lawyers Insurance Fund sometime after November 29, 2011. The Lawyers Insurance Fund agreed to and funded a settlement in the amount of $22,500 between PJ and the Joint Defendants in satisfaction of the Joint Defendants' claims for special costs arising from the Contempt Application.

**B.C. Lawyers' Compulsory Professional Liability Insurance Policy**

91. The Policy states that the insurer does not provide coverage for special costs sought or awarded personally against a member/insured. Although not specifically stated in the Policy, LIF provides coverage for claims brought by a client against his or her solicitor arising out of an alleged error that exposes the client to a claim for special costs.

92. In 1994 the B.C. Lawyers' Compulsory Professional Liability Insurance Policy wording with respect to the notice of claim or suit condition (now Condition 4) was amended to add the words, "however unmeritorious" such that the material part of the wording stipulated that:

> If you become aware of an error or any circumstance that could reasonably be expected to be expected to be the basis of a claim, **however unmeritorious** (emphasis added) you will give written

> notice, along with the fullest information obtainable, as soon as practicable during the policy period to ... PLI Claims, the Law Society of British Columbia Insurance Department.

93. In January 1994 the Law Society of British Columbia mailed to all members a publication entitled "Insurance Issues" – 1994: 1 January.

94. In early 2006 the Law Society of British Columbia mailed to all its members its 2005 Annual Report which included a portion entitled "Our Financial Protections, Lawyers Insurance Fund".

95. In early 2007 the Law Society of British Columbia sent to all of its members a publication entitled, "The 2007 Lawyers Insurance Fund Program".

96. In 2007 the Law Society of British Columbia sent out to all its members a publication entitled "Missed Limitations and Deadlines – Beat the Clock – Timely Lessons from 1600 Lawyers". At page 6 of that publication is a title "If you discover a missed deadline".

97. In July 2008 the Law Society of British Columbia sent to all of its members LSBC's 2007 Annual Report which included a section "Regulatory Programs and Service Departments – the Lawyers Insurance Fund".

98. In early 2008 the Law Society of British Columbia sent to all of its members a publication entitled "Insurance Issues: the 2008 Program and Policy".

99. In late March/early April 2010 the Law Society of British Columbia sent to all of its members a publication entitled "Insurance Issues - the 2010 Program and Policy".

100. In early 2011 the Law Society of British Columbia sent to all of its members a publication entitled "Insurance Issues - the 2011 Program and Policy".

101. The Law Society of British Columbia maintains a website, part of which is a page entitled "The Lawyers Insurance Fund".

102. The LSBC website includes a section under the Lawyers Insurance Fund for reporting a claim, including reporting guidelines for lawyers.