

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

LEONIDES TUNGOHAN

RESPONDENT

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

Hearing dates: April 15 and 16, 2014 and
September 15, 16 and 17, 2014

Submissions received: October 7, 2014
October 15, 2014
October 17, 2014

Panel: Miriam Kresivo, QC, Chair
Bruce LeRose, QC, Lawyer
Lois Serwa, Public representative

Discipline Counsel: Alison Kirby
Appearing on his own behalf: Leonides Tungohan

INTRODUCTION

[1] On May 29, 2013 a citation was issued against Leonides Tungohan pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules. The citation directed that the Panel inquire in the Respondent's conduct as follows:

1. Between October 2009 and March 2010, you received trust funds totaling \$19,250 (the "Funds") from your client RG in a real estate litigation matter,

and you did not handle the Funds in accordance with Division 7 of Part 3 of the Law Society Rules, and in particular:

- (a) you failed to deposit \$17,250 of the Funds into a pooled trust account and instead deposited that amount into your firm's general account or your own personal account purportedly in payment of fees for services, when you had not delivered a bill or issued a receipt containing sufficient particulars, contrary to Rules 3-51(1) and 3-63(3);
- (b) you withdrew some or all of \$2,000 of the Funds from trust when you had not prepared or delivered a bill to your client, contrary to Rule 3-57(2);
- (c) you failed to record the receipt of \$250 in cash in accordance with Rule 3-61.1;
- (d) you did not record each trust or general transaction related to the Funds, promptly or at all, contrary to Rules 3-59(1) and 3-63.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

2. You failed to notify the Executive Director of the Law Society in writing of the circumstances of a judgment in the amount of \$18,627.03 granted against you on April 18, 2011 in British Columbia Supreme Court, Vancouver Registry Action No. [number], and your proposal for satisfying such judgment, contrary to Rule 3-44 of the Law Society Rules.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

3. Between December 2009 and May 2011, you withdrew trust funds purportedly in payment of your fees from your pooled trust account without first preparing a bill and immediately delivering the bill to your clients, contrary to Rule 3-56 and Rule 3-57(2) of the Law Society Rules on some or all of the following 17 occasions:
 - (a) on or about December 23, 2009, you withdrew some or all of the \$1,000 retainer you received from your client NR in connection with an immigration matter;

- (b) on or about December 23, 2009, you withdrew some or all of the \$500 retainer you received from your client LR in connection with a sponsorship appeal;
- (c) on or about December 23, 2009, you withdrew some or all of \$1,500 retainer you received from your client JL in connection with a Federal Court judicial review;
- (d) on or about December 23, 2009 and January 7, 2010, you withdrew some or all of the \$2,120 retainer you received from ML on behalf of your client ZS in connection with an immigration matter;
- (e) on or about December 23, 2009 and January 7, 2010, you withdrew some or all of the \$2,120 retainer you received from ML on behalf of your client CM in connection with an immigration matter;
- (f) on or about December 23, 2009 and January 7, 2010, you withdrew some or all of the \$2,120 retainer you received from ML on behalf of your client XM in connection with an immigration matter;
- (g) on or about January 7, 2010, you withdrew some or all of the \$600 cash retainer you received from your client JH in connection with a family law matter;
- (h) on or about January 22, 2010, you withdrew some or all of the \$1,000 retainer you received from ML on behalf of your client LX in connection with an immigration law matter;
- (i) on or about January 22, 2010, you withdrew some or all of the \$1,000 retainer you received from ML on behalf of your client LF in connection with an immigration law matter;
- (j) on or about January 22, 2010, you withdrew some or all of the \$1,000 retainer you received from ML on behalf of your client ZN in connection with an immigration law matter;
- (k) on or about January 22, 2010, you withdrew some or all of the \$1,000 retainer you received from ML on behalf of your client LP in connection with an immigration law matter;
- (l) on or about January 22, 2010, you withdrew some or all of the \$1,000 retainer you received from ML on behalf of your client CH in connection with an immigration law matter;

- (m) on or about February 10, 2010 and March 9, 2010, you withdrew some or all of the \$2,885 retainer you received from SH on behalf of your client LQ in connection with an immigration law matter;
- (n) on or about February 10, 2010 and March 9, 2010, you withdrew some or all of the \$2,885 retainer you received from SH on behalf of your client CJ, also known as CM, in connection with an immigration law matter;
- (o) on or about April 23, 2010, you withdrew some or all of the \$1,000 retainer you received from WX on behalf of your client PY in connection with an immigration law matter;
- (p) on or about April 23, 2010, you withdrew some or all of the \$1,000 retainer you received from WX on behalf of your client CK in connection with an immigration law matter;
- (q) on or about September 30, 2010, you withdrew some or all of the \$1,950 retainer you received from your client FE in connection with an immigration law matter.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

- 4. Between December 1, 2009 and December 31, 2010, you failed to maintain your books, accounts and records in accordance with Division 7 of Part 3 of the Law Society Rules, by some or all of the following:
 - (a) you did not record all funds received and disbursed in connection with your law practice by maintaining the records required under Division 7 of Part 3, contrary to Rule 3-59;
 - (b) you did not retain all supporting documents for both trust and general accounts, contrary to Rule 3-59;
 - (c) you did not promptly record trust and general transactions in accordance with Rule 3-63;
 - (d) you did not maintain trust account records in accordance with Rule 3-60;
 - (e) you did not prepare a monthly trust reconciliation for your pooled trust account within 30 days of the effective date of the reconciliation, contrary to Rule 3-65;

(f) you did not keep billing records in accordance with Rule 3-62.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

5. Between December 1, 2009 and December 31, 2009, you made payments from trust funds when your trust accounting records were not current, contrary to Rule 3-56(1.2) of the Law Society Rules.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

FACTS

- [2] Many of the facts upon which the allegations rest are disputed. However, the Respondent did admit to certain facts in response to the Law Society's Notice to Admit dated August 28, 2013.
- [3] During the course of the hearing, after the Law Society had closed its case and towards the end of the Respondent's case, the Respondent applied to revoke all previously made admissions. This Panel ruled that the Respondent could not revoke all previously made admissions. Therefore, this Panel will rely on those admissions.
- [4] During the course of the hearing, the Respondent led some evidence related to admissions made. The Panel agreed that the Respondent could lead evidence related to the admissions, but only to clarify those admissions. Therefore any evidence led contradicting the admissions would not be relied upon in determining the facts.
- [5] Prior to commencement of the hearing, the Respondent applied to this Panel to allow him to present evidence regarding the matters before Registrar Sainty in her decision relating to the taxation of two "bills" for work done by the Respondent *Tungohan v. RG*, (April 15, 2011). This Panel ruled that the Respondent could not re-argue the matters reviewed and determined by Registrar Sainty in that hearing.
- [6] During the course of the hearing, the Respondent led evidence related to the matters determined by Registrar Sainty. The Panel agreed that the Respondent could lead evidence related to the determination, but only to clarify those determinations. Therefore, this Panel will rely on the facts determined by Registrar Sainty.

BACKGROUND

- [7] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 1, 2008.
- [8] From 1975 to 1995 the Respondent practised law in the Philippines.
- [9] From 1996 to 1999 the Respondent worked as in-house counsel in Hong Kong.
- [10] In 1999 the Respondent moved to Canada.
- [11] In 2006 the Respondent commenced articles with Edwards & Company in New Westminster, British Columbia. He remained at Edwards & Company as an associate until November 27, 2009, when he left that firm to set up his office as a sole practitioner in Vancouver.
- [12] On or about December 1, 2009 the Respondent opened a general account and a pooled trust account at a chartered bank through which he intended to operate his law practice.

Allegations 1 and 2 relating to RG

- [13] On or about Oct 14, 2009 the Respondent entered into a written retainer agreement with RG with respect to an appeal of real estate litigation.
- [14] On or about Oct 14, 2009 the Respondent gave RG a “bill” for services rendered.
- [15] The Respondent received five payments totaling \$19,250 in 2009 and 2010 from or on behalf of RG as follows:

Date Payment Received	Type of Payment	Date of Deposit	Where Deposited	Recorded in Law Firm Records
October 14, 2009	\$2,000 Cheque	October 22, 2009	Joint Chequing with Wife	No
December 9, 2009	\$2,000 Cheque	December 15, 2009	Trust Account (Transferred to General Account on December 23, 2009)	No

January 20, 2010	\$250 Cash	January 20, 2010	Used to Pay Filing Fees	No and No Receipt Provided
January 20, 2010	\$5,000 Cheque	Unknown	Unsure (Not in Trust or Firm General Account)	No
March 24, 2010	\$10,000 Cheque	March 25, 2010	Firm General Account	Recorded in Firm General Ledger after September 2010
November 12, 2010	\$600 Cheque	Not deposited	Not deposited	No
Total	\$19,250.00	(not including the \$600 cheque not deposited)		

- [16] The Respondent did not deposit \$17,250 of the \$19,250 into his pooled trust account. Instead, he deposited the funds into his personal account or the firm's general account.
- [17] On or about November 19, 2010 the Respondent rendered a "bill" to RG in the amount of \$16,149.21, which RG had reviewed.
- [18] On April 15, 2010 Registrar Sainty handed down her reasons in *Tungohan v. RG*, finding that the "bill" for legal services did not constitute a bill and that RG had paid Mr. Tungohan \$19,250, including \$250 in cash for filing fees. She held that Mr. Tungohan was required to pay RG the sum of \$18,627.03.
- [19] By letter dated April 18, 2011 counsel for RG demanded payment of the \$18,627.03.
- [20] By letter dated April 29, 2011 the Respondent advised counsel for RG that he was appealing the Registrar's decision and was therefore not paying the outstanding amount.
- [21] Counsel for RG sent the Respondent an email dated April 29, 2010 highlighting the Respondent's obligations pursuant to Rule 3-44.
- [22] The Certificate of Fees was entered on May 9, 2011 and provided to the Respondent in an attachment to a letter dated May 9, 2011.
- [23] RG and the Respondent entered into a settlement agreement dated August 15, 2011 (the "Agreement"), and the Respondent paid RG the amount owing pursuant to the Agreement.

- [24] The Respondent admitted that he never reported the unsatisfied monetary judgment to the Law Society. Nor did he provide an explanation to the Law Society, or to the Panel, as to why he failed to do so.
- [25] The Respondent's position during the hearing was that the payments were made after the services were rendered. Therefore, it was entirely appropriate for the money to be deposited directly into the general account since the work had been done, and there was no need to deposit it into the trust account.
- [26] The Respondent provided no evidence that a bill was rendered, other than the "bill" Registrar Sainty determined was not a "bill".

Allegation 3 – 17 withdrawals from trust

- [27] In the summer of 2010 the Respondent met with accountant GG regarding his accounting needs for his practice.
- [28] The Respondent retained GG. He provided GG with his spreadsheets and copies of his 2010 general and trust bank account statements. GG used these documents and the Simply Accounting program to set up the accounting system for the Respondent's practice.
- [29] GG did not deal with the December 2009 accounting. He merely took the amount in the accounts as a starting balance.
- [30] GG's evidence was that he was told that, in 2010, there were no trust funds and therefore no need for a trust ledger. No trust ledger was created for 2010 in that year.
- [31] The Respondent confirmed that he was of the view that he never received any trust funds from clients in that period. The Respondent did not ask GG to prepare client trust ledgers for 2010 as he was of the view, and continues to be of the view, that he never received any client trust funds and that the funds deposited into his pooled trust account were deposited by mistake and should have been deposited into his general account.
- [32] As of March 2012 the Respondent had not prepared any client trust ledgers for 2009 and 2010.
- [33] Sometime in 2011 GG created "bills" for individual clients based upon the Respondent's bank account statements for record-keeping purposes, and these "bills" were not provided to the clients (Exhibit 11).

- [34] Sometime between June and August 2012, the Respondent prepared general and trust ledgers for December 2009 by utilizing the December 2009 trust and general bank statements.
- [35] During the hearing, the Respondent reiterated his position that the retainer agreements were not bills. The Respondent's position was that the retainer agreements were receipts evidencing payments for services rendered in connection with those files.
- [36] In his written argument, and contrary to the position he took during the hearing, the Respondent argued that retainer agreements entered into with the majority of his clients constituted bills.
- [37] The Respondent takes the position that proper bills were rendered in connection with all his matters. Unfortunately, he was unable to provide copies of those bills.
- [38] As indicated above, GG did create bills for client services, but both he and the Respondent agree that those bills were for the purposes of the accounting records only and were not provided to clients.

Allegation 3(a) – NR

- [39] On or about December 2009 the Respondent was retained by NR.
- [40] The Respondent states that on December 13, 2009 he rendered a bill to NR in the amount of \$500, but he did not keep a copy of the bill.
- [41] On or about December 15, 2009 the Respondent received \$1,000 from NR, which he deposited into his pooled trust account. The Respondent takes the position the deposit was made by mistake.
- [42] On or about December 23, 2009, the Respondent withdrew the \$1,000 received from NR. The Respondent did not render a bill for legal services prior to withdrawing the funds from trust.
- [43] The Law Society does not dispute the Respondent's claim that legal services were rendered prior to withdrawal of the funds.
- [44] In the Respondent's submission to the Panel, he refers to the invoices marked as Exhibit 11. However, during the course of the hearing, GG gave evidence that he (GG) created the invoices that form Exhibit 11 "after the fact" and that they were not provided to the clients at the time the work was performed.

Allegation 3(b) – LR

- [45] On or about December 2009 the Respondent entered into a retainer agreement with LR.
- [46] On or about December 15, 2009 the Respondent received \$500 from LR, which he deposited into his trust account. It is the Respondent's evidence that he deposited the money into his trust account by mistake.
- [47] On or about December 23, 2009 the Respondent withdrew some or all of the \$500.
- [48] The Respondent could provide no evidence that he rendered a bill prior to withdrawing the funds.

Allegation 3(c) – JL

- [49] On or about December 4, 2009 the Respondent entered into a retainer agreement with JL.
- [50] On or about December 15, 2009 the Respondent deposited \$1,500 received on behalf of JL into his pooled trust account. The Respondent states the deposit was made by mistake.
- [51] On or about December 23, 2009 the Respondent withdrew some or all of the \$1,500.
- [52] The Respondent provided no evidence that he had rendered a bill before he withdrew the funds.
- [53] The Law Society does not dispute the Respondent's claim that he had rendered services to JL prior to the withdrawal of the funds.

Allegation 3(d) – ML/ZS

- [54] On or about December 23, 2009 the Respondent entered into a retainer agreement with ZS through his immigration consultant ML.
- [55] On or about December 23, 2009 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent states that he deposited this amount into the pooled trust account by mistake.

- [56] On or about January 7, 2010 the Respondent deposited a further \$1,120 received from ML into his pooled trust account. Again, the Respondent claims it was deposited by mistake.
- [57] On or about January 7, 2010 the Respondent withdrew some or all of the money he received from ML.
- [58] The Respondent could provide no evidence he rendered a bill to ML prior to withdrawing the funds.
- [59] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to ZS prior to the withdrawal of the funds.

Allegation 3(e) – ML/CM

- [60] On or about December 23, 2009 the Respondent entered into a retainer agreement with CM through his immigration consultant ML.
- [61] On or about December 23, 2009 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent takes the position that this was deposited by mistake.
- [62] On or about January 7, 2010 the Respondent deposited a further \$1,120 into his pooled trust account. Again, the Respondent takes the position it was deposited into the pooled trust account by mistake.
- [63] On or about January 7, 2010 the Respondent withdrew some of the money he received from ML.
- [64] The Respondent could provide no evidence that he rendered a bill prior to withdrawing the funds.
- [65] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to CM prior to the withdrawal of the funds.

Allegation 3(f) – ML/XM

- [66] On or about December 23, 2009 the Respondent entered into a retainer agreement with XM through his immigration consultant ML.
- [67] On or about December 23, 2009 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent takes the position that he deposited the funds into the pooled trust account by mistake.

- [68] On or about January 7, 2010 the Respondent deposited a further \$1,120 from ML into his pooled trust account.
- [69] On or about January 7, 2010 the Respondent withdrew some or all of the money from the trust account.
- [70] The Respondent could produce no evidence that he had rendered a bill to the client prior to the withdrawal of the funds.
- [71] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to XM prior to the withdrawal of the funds.

Allegation 3(g) – JH

- [72] On or about December 2009 the Respondent was retained by JH. He did not enter into a retainer agreement with JH.
- [73] The Respondent states that, on or about December 13, 2009, he billed JH \$5,000 for legal services rendered. The Respondent could not provide any evidence of such a bill.
- [74] On or about December 15, 2009 the Respondent received \$600 cash from JH and deposited \$400 into his pooled trust account. The Respondent takes the position the funds were deposited by mistake.
- [75] On or about January 2010 the Respondent withdrew from trust some or all of the \$1,000 he had deposited into his pooled trust account on behalf of JH.
- [76] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to JH prior to the withdrawal of the funds.

Allegation 3(h) – ML/LX

- [77] On or about January 22, 2010 the Respondent entered into a retainer agreement with LX.
- [78] On or about January 22, 2010 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent takes the position he deposited the funds into the trust account by mistake.
- [79] On or about January 22, 2010 the Respondent withdrew some or all of \$1,000 he received from LX.

[80] The Respondent could provide no evidence that he had rendered a bill prior to withdrawing the funds.

[81] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to LX prior to the withdrawal of the funds.

Allegation 3(i) – ML/LF

[82] On or about January 22, 2010 the Respondent entered into a retainer agreement with LF.

[83] On or about January 22, 2010 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent states he deposited the funds by mistake.

[84] On or about January 22, 2010 the Respondent withdrew some or all of \$1,000.

[85] The Respondent can provide no evidence that he rendered a bill prior to withdrawing the funds.

[86] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to LF prior to the withdrawal of the funds.

Allegation 3(j) – ML/ZN

[87] On or about January 22, 2010 the Respondent entered into a retainer agreement with ZN.

[88] On or about January 22, 2010 the Respondent deposited \$1,000 received from ML into his pooled trust account. The Respondent takes the position he deposited the funds into the pooled trust account by mistake.

[89] On or about January 22, 2010 the Respondent withdrew some or all of \$1,000 retainer he received from ML.

[90] The Respondent could provide no evidence that he rendered a bill prior to withdrawing the funds.

[91] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to ZN prior to the withdrawal of the funds.

Allegation 3(k) – ML/LP

- [92] On or about January 22, 2010 the Respondent entered into a retainer agreement with LP.
- [93] On or about January 22, 2010 the Respondent deposited \$1,000 received from ML in connection with this matter into his pooled trust account. The Respondent's position is that this deposit was made by mistake.
- [94] On or about January 22, 2010 the Respondent withdrew some or all of the \$1,000.
- [95] The Respondent could not provide evidence that any bills were rendered to the clients prior to the withdrawal of the funds.
- [96] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to LP prior to the withdrawal of the funds.

Allegation 3(l) – ML/CH

- [97] On or about January 22, 2010 the Respondent entered into a retainer agreement with CH.
- [98] On or about January 22, 2010 the Respondent deposited \$1,000 received from ML in connection with this matter into his pooled trust account. The Respondent states that he deposited into the pooled trust account by mistake.
- [99] On or about January 22, 2010 the Respondent withdrew some or all of the \$1,000.
- [100] The Respondent cannot provide evidence that he rendered a bill prior to withdrawing the trust funds.
- [101] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to CH prior to the withdrawal of the funds.

Allegation 3(m) – SH/LQ

- [102] On or about February 2010 the Respondent was retained by SH.
- [103] On or about February 10, 2010 the Respondent deposited \$1,310 received from SH in connection with this matter into his pooled trust account.
- [104] On or about March 9, 2010 the Respondent deposited a further \$1,575 received from SH in connection with this matter into his pooled trust account.

[105] The Respondent states that the deposits were made by mistake.

[106] On or about February 10, 2010 and March 9, 2010 the Respondent withdrew some or all of the \$2,885.

[107] The Respondent cannot provide evidence that he rendered a bill to the client prior to the withdrawal of the funds.

[108] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to LQ prior to the withdrawal of the funds.

Allegation 3(n) – SH/CJ

[109] On or about February 4, 2010 the Respondent entered into a retainer agreement with CJ.

[110] On or about February 10, 2010 the Respondent deposited \$1,310 received from SH in connection with this matter into his pooled trust account. The Respondent states that these deposits were made by mistake.

[111] On or about March 9, 2010 the Respondent deposited a further \$1,575 received from SH in connection with this matter into his pooled trust account.

[112] On or about February 10, 2010 and March 9 2010 the Respondent withdrew some or all of the \$2,885.

[113] The Respondent could provide no evidence that he rendered a bill prior to withdrawing the funds from the trust account.

[114] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to CJ prior to the withdrawal of the funds.

Allegation 3(o) – WX/PY

[115] On or about April 19, 2010 the Respondent entered into a retainer agreement with PY.

[116] On or about April 23, 2010 the Respondent deposited \$1,000 received from WX in connection with this matter into his pooled trust account.

[117] The Respondent states that the deposit into the trust account was made by mistake.

[118] On or about April 23, 2010 the Respondent withdrew some or all of the \$1,000.

[119] The Respondent could provide no evidence that he rendered a bill prior to withdrawing the trust funds.

[120] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to PY prior to the withdrawal of the funds.

Allegation 3(p) – WX/CK

[121] On or about April 19, 2010 the Respondent entered into a retainer agreement with CK.

[122] On or about April 23, 2010 the Respondent deposited \$1,000 received from WX in connection with this matter into his pooled trust account. The Respondent states that he deposited this into his pooled trust account by mistake.

[123] On or about April 23, 2010 the Respondent withdrew some or all of the \$1,000.

[124] The Respondent could provide no evidence that he rendered a bill prior to the withdrawal of the funds.

[125] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to CK prior to the withdrawal of the funds.

Allegation 3(q) – FE

[126] On or about September 14, 2010 the Respondent entered into a retainer agreement with FE.

[127] On or about September 30, 2010 the Respondent received \$1,950 from FE and deposited the amount into his pooled trust account. The Respondent states that the deposit into the pooled trust account was made by mistake.

[128] On or about September 30, 2010 the Respondent withdrew some or all of the \$1,950.

[129] The Respondent could provide no evidence that he rendered a bill prior to the withdrawal of the funds.

[130] The Law Society does not dispute the Respondent's claim that the Respondent had rendered legal services to FE prior to the withdrawal of the funds.

Allegation 4 – failure to maintain books and accounts in accordance with Division 7, Part 3 of the Law Society Rules

4(a) Failure to record all funds received and disbursed

[131] The Respondent prepared a manual ledger for December of 2009, when he opened his practice.

[132] From December 1, 2009 to December 31, 2010 the Respondent kept no trust ledger showing separately for each client all funds received and disbursed. GG never created such a ledger since he was advised by the Respondent that there were no trust funds in 2010. This stance was taken despite the fact that the Respondent deposited funds from clients into his pooled trust account in 2010.

[133] A general book of entry was not prepared for December 2009.

[134] A copy of all billings issued to clients was not maintained in a client file. The Respondent says that this explains the Respondent's inability to produce bills relating to the services rendered prior to withdrawing funds from either trust or general accounts.

[135] As of March 2012 the Respondent had not prepared any client ledgers for 2009 and 2010 trust account activity.

Allegation 5 – payments from trust when records not current

[136] The facts outlined above review the withdrawals from the Respondent's trust account. The facts outlined above also indicate that in 2009 and 2010 the Respondent failed to maintain current records of his trust account.

ONUS AND STANDARD OF PROOF

[137] The onus of proving the allegations is on the Law Society. There is no dispute about that. The standard of proof in this proceeding is the balance of probabilities; *Law Society of BC v. Schauble*, 2009 LSBC 11.

THE ISSUES

[138] The majority of the allegations relate to improper billing and accounting practices. One of the allegations relates to failing to notify the Executive Director of an unsatisfied monetary judgment contrary to Rule 3-44. This Panel must determine

whether the allegations in the citation as listed above are made out and, if so, whether that constitutes professional misconduct.

Allegation 2 – alleged breach of Rule 3-44

[139] Rule 3-44 provides as follows:

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

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

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

[140] The decision in *Tungohan and Learlaw Tungohan & Company v. RG* was handed down on April 15, 2011. In that decision the Registrar ordered the Respondent to pay RG an amount owing and costs of the hearing.

[141] Rule 3-44 clearly states that the commencement of an appeal does not change the requirement under Rule 3-44(1). Therefore, the fact that Mr. Tungohan filed a Notice of Appeal of the decision does not change his obligation under the rule. Mr. Tungohan never provided an explanation to the Law Society or to the Panel during the course of the hearing as to why he failed to report the monetary judgment.

[142] This Panel finds that Mr. Tungohan breached Rule 3-44 by failing to report a monetary judgment against him as required.

Allegations relating to billing and accounting

[143] The allegations relating to billing and accounting are, generally speaking, allegations that funds that were or ought to have been trust funds were improperly withdrawn from trust or were not paid into trust. There is no allegation that the work was not done. The concern is the failure to properly account for trust funds and the failure to bill for the services that were rendered prior to paying money out of a trust account.

[144] Throughout the hearing, Mr. Tungohan spent a great deal of time trying to impress upon the Panel the fact that he did perform work for various clients prior to receiving funds from the client.

[145] Division 7 of the Law Society Rules deals with requirements relating to trust accounts. The specific provisions of the Rules applicable to these allegations are as follows:

- (a) Rule 3.51 requires a lawyer who receives client trust funds to deposit them in a pooled trust account as soon as practicable.
- (b) A lawyer must not withdraw trust funds unless the funds meet the criteria set out in Rule 3-56, which provides that trust funds may be transferred out if the funds are in the account as a result of a mistake.
- (c) Rule 3-56(3) provides that the withdrawal of trust funds for the payment of fees must be made with a cheque payable to the lawyer's general account.
- (d) Rule 3-57 deals with the payment of fees from trust. The Rule provides that a lawyer who withdraws trust funds in payment for the lawyer's *fees must first prepare a bill for those fees and immediately deliver the bill to the client.* [emphasis added]
- (e) Rule 3-63(2) provides that client funds may be deposited directly into a lawyer's general account only when paid expressly on account of fees earned and *billed ...* by the day the funds are received. [emphasis added]
- (f) Rule 3-63(3) requires a receipt be issued to the client for any funds deposited directly into a lawyer's general account.
- (g) Rule 3-59(1) requires that a lawyer must record all funds received and disbursed in connection with his or her practice.
- (h) Rule 3-63 requires a lawyer to record each trust or general transaction promptly on the client trust ledgers and general ledger which he/she is required to maintain.

[146] We will deal with each of the allegations separately.

Allegation 1 – RG

[147] Allegation 1 involves allegations dealing with trust funds related to the client RG in a real estate litigation matter. The central issue in the RG allegation was whether any of the money paid by RG was trust funds and whether Mr. Tungohan had properly dealt with the money paid, in accordance with the Law Society Rules.

- [148] The Respondent's position is that the funds received from RG were not trust funds but payments for legal services rendered. The difficulty with the Respondent's position is that the Respondent never issued a bill or invoice to RG, and therefore, pursuant to the Rules cited above, was not permitted to withdraw the funds from the trust account.
- [149] Mr. Tungohan had taken the position that he had properly billed RG. That issue was considered and dealt with by Registrar Sainty in *Tungohan v. RG* wherein Registrar Sainty found that the October 14, 2009 "bill" was not a bill within the meaning of the *Legal Profession Act*. Registrar Sainty also found that the total amount paid by RG to Mr. Tungohan was \$19,250, which included \$250 cash for filing fees.
- [150] During the hearing and in the Respondent's submissions, he continues to take the position that the amounts paid by RG were not trust funds but payments for legal services rendered and that, thus, he was justified in depositing that payment into his general account. Mr. Tungohan does not appear to comprehend that he cannot deposit payments from clients into his general account unless and until he has rendered a proper bill to his client and that he must properly record the transaction.
- [151] This Panel finds that Mr. Tungohan failed to properly deal with his client's money, failed to deposit funds paid to him on account properly into his trust account and failed to properly record the transactions accurately, if at all, in his trust and general ledger accounts.
- [152] The matter that is of most concern to this Panel is that, throughout the protracted hearing on this issue, the Respondent appeared to fail to comprehend his obligations under Division 7 of the Rules, and particularly, failed to understand that he could not take client funds without properly billing the client, even when he had rendered the services in question.

Allegation 3 – withdrawing funds prior to delivering a bill on 17 occasions

- [153] The Law Society alleges that the Respondent withdrew client funds from his pooled trust account on 17 occasions prior to rendering a legal bill. Again, there is no allegation that the Respondent did not provide the legal services at issue or that the amount was not warranted. The Respondent's position was that the monies were deposited in trust by mistake or were properly deposited into his general or personal account. They were monies paid for services rendered and could therefore be deposited directly into his general or personal account.

[154] The Respondent provided evidence of retainer agreements entered into with many of the clients whose funds are the subject of these allegations. Some of the copies of the retainer agreements are unsigned since the Respondent is unable to locate signed copies of those retainer agreements.

[155] All the retainer agreements are substantially the same and are based on a standard form agreement provided on the Law Society website. The agreements provide as follows with respect to fees:

Based on our consideration of the materials and information you have provided to us ... we estimate that our fee for filing the application for judicial review excluding disbursements will be: _____ which shall be payable as follows:

(a. _____ upon the signing of this Agreement representing legal services for the study of the files, preparation of legal opinion and determination of the propriety of judicial review.

(b. _____ upon ...

[156] The retainer agreement also included the following discussion of a retainer:

7. Retainer

Before we begin work on your behalf, we require a retainer in the amount of \$_____. The retainer will be placed in our trust account and will serve as a source of payment for all or part of our account or accounts when rendered. You will be asked to replenish the retainer from time to time. Any unused portion will be returned to you upon the completion or termination of our services.

[157] The Respondent takes the position that he and the clients had agreed that the fees were received as payment for services rendered and not as trust funds. His view is that the retainer agreements were receipts evidencing payment for services rendered.

[158] This Panel is of the view that, although there is some ambiguity in the language of the retainer agreements, those agreements were indeed retainer agreements. As such, the purpose of the agreement was to set out the services to be rendered and the amounts to be paid for those services. The retainer agreements were not receipts for payments for services already rendered.

[159] As a result, the Respondent was under an obligation to deposit those funds into trust. Those funds should have been deposited into trust and, contrary to the Respondent's position, were not deposited into trust by mistake.

[160] The Respondent rendered services to the clients. However, the Respondent failed to provide any evidence that he billed the clients prior to withdrawing the funds from the trust account.

[161] There were clients with whom the Respondent did not enter into a retainer agreement. It is clear in those instances that the Respondent deposited money appropriately into his trust account. He withdrew money once he had rendered services to the client, but failed to render any bill.

[162] This Panel finds that the Respondent did breach Law Society Rule 3-56 and Rule 3-57(2) on all of the 17 occasions alleged.

Allegation 4

[163] This Panel further finds that, between December 1, 2009 and December 31, 2010, the Respondent failed to maintain books, accounts and records in accordance with Division 7 of Part 3 of the Law Society Rules.

Allegation 5

[164] This Panel further finds that, between December 1, 2009 and December 31, 2010, the Respondent made payments from his trust account when the trust accounts were not current, contrary to Rule 3-56(1.2) of the Law Society Rules.

DETERMINATION OF PROFESSIONAL MISCONDUCT

[165] The Panel must determine whether the Respondent's conduct constitutes professional misconduct. The fact that the Panel has determined that the Respondent breached the Law Society Rules does not necessarily mean what he did constitutes professional misconduct.

[166] This Panel must take into account a number of factors, including "the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the Respondent's conduct." (*Law Society of BC v. Lyons*, 2008 LSBC 09)

[167] This Panel relies on the case of *Law Society of BC v. Martin*, 2005 LSBC 16, in which the hearing panel referred to the test as "whether the facts as made out

disclose *a marked departure* from that conduct the Law Society expects of its members ...” (*emphasis added*).

Allegation 2 – failure to report

[168] The Panel is mindful of the fact that the requirement to report unsatisfied monetary judgments is an important rule and “an essential component in the financial requirement set out in Part 3, Division 6 of the Rules of the Law Society ...” (*Law Society of BC v. Lessing*, 2012 LSBC 19).

[169] The Panel also takes into account the fact that there is only a single instance of failure.

[170] However, the Panel is concerned that Mr. Tungohan knew of the requirement and the fact that the filing of an appeal did not affect the requirement. Notwithstanding that, he chose to wilfully ignore the Rule and has provided no explanation at any time as to why that was so. He appears to take the position that, since the matter was later settled and he paid the settlement amount, the failure to adhere to the Rule is not relevant. This is a flagrant disregard for the Rules and troubles the Panel.

[171] This Panel therefore finds that Mr. Tungohan’s failure to report as required pursuant to Rule 3-44 is a marked departure from the conduct expected of lawyers and, therefore, constitutes professional misconduct.

Allegations 1, 3, 4 and 5

[172] All of the remaining allegations relate to either the handling of client funds or the maintenance of appropriate books, accounts and records of client funds.

[173] The Respondent began his own private practice in December of 2009 and clearly was not fully cognizant of all his obligations under the Rules with respect to the recording of monies in trust and in his general account. It was not until the summer of 2010 that the Respondent hired an accountant to assist in setting up his entire accounting system. The Respondent made mistakes in how he handled the billing of clients and how he handled money in his trust account and his general account. He was of the view that, once he had provided the services, he could withdraw money from his trust account. He failed to provide the clients with a bill for the services rendered.

[174] Of concern to the Panel is the fact that, during the course of the entire five-day hearing, the Respondent was staunchly of the view that his actions were not contrary to the Rules.

[175] The Respondent breached the Rules 17 times. He never acknowledged that he had been required to render a bill prior to withdrawing funds. He never acknowledged that to the Law Society nor to this Panel. Only in his written argument did the Respondent appear to argue that his retainer agreements were, in fact, bills.

[176] This Panel finds that each of the numerous breaches relating to the withdrawal of trust funds and the failure to maintain appropriate books, accounts and records of client funds is a marked departure from the conduct expected of lawyers and, therefore, constitutes professional misconduct.