2016 LSBC 45
Decision issued: December 12, 2016
Citation issued: May 29, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a s. 47 Review concerning

LEONIDES TUNGOHAN

APPLICANT

DECISION OF THE REVIEW BOARD

Review date:	March 16, 2016
Review Board:	Gregory Petrisor, Chair Don Amos, Public representative Jeff Campbell, QC, Bencher Woody Hayes, Bencher Carol Hickman, QC, Lawyer John Hogg, QC, Lawyer Linda Michaluk, Public representative
Discipline Counsel:	Alison Kirby
Appearing on his own behalf:	Leonides Tungohan

DECISION UNDER REVIEW

[1] On January 14, 2015, a hearing panel issued its Decision on Facts and Determination (2015 LSBC 02) and found that:

(a) the Applicant had failed to properly deal with clients' 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;

(b) the Applicant breached Rule 3-44 of the Law Society Rules by failing to report a monetary judgment against him as required;

(c) the Applicant breached Rule 3-56 and Rule 3-57(2) of the Law Society Rules by withdrawing client funds from his pooled trust account prior to rendering a legal bill in 17 instances;

(d) between December 1, 2009, and December 31, 2010, the Applicant failed to maintain books, accounts, and records in accordance with Division 7 of Part 3 of the Law Society Rules;

(e) between December 1, 2009 and December 31, 2010, the Applicant 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.

[2] The hearing panel concluded that the failures or breaches described above constituted a marked departure from the standard of conduct that the Law Society expects of lawyers and therefore constituted professional misconduct contrary to s. 38 of the *Legal Profession Act*.

[3] The hearing panel issued its decision on Disciplinary Action on June 5, 2015 (2015 LSBC 26) and ordered the Applicant to:

(a) pay a fine in the amount of $3,000 in slightly under three months;

(b) produce to the Law Society a report from an accountant approved by the Law Society Compliance Audit Department, on a quarterly basis, stating that the Applicant's general account and trust account are in compliance with the Law Society accounting rules, until the Practice Standards Committee of the Law Society determines such reporting is no longer necessary; and

(c) pay costs in the amount of $29,200 within one year.

[4] The Applicant seeks a review of the decisions of the hearing panel. In particular, he seeks that the decision on Facts and Determination and the decision on Disciplinary Action be set aside, that the hearing panel's order with respect to costs be stayed, and that the Law Society pay costs to the Applicant in respect of this Review.

[5] In his Amended Notice of Review, the Applicant framed his grounds for review as follows:

Issue 1: Did the Hearing Panel err in law by neglecting to conduct a determination of the nature, extent, and meaning of the [Applicant's] admission?

Issue 2: Did the Hearing Panel err in law in refusing to apply the standard of proof which is "clear and cogent" evidence?

Issue 3: Did the Hearing Panel err in law by neglecting to conduct a meticulous examination of facts?

Issue 4: Did the Hearing Panel err in law by neglecting to conduct a full and fair examination of the evidence of the [Applicant]?

Issue 5: Did the Hearing Panel err in law regarding its interpretation of the retainer agreements?

Issue 6: Did the Hearing Panel err in law in its application of principles on withdrawal of admissions and abuse of process?

Issue 7: Did the Hearing Panel err in law in its findings of professional misconduct including failure to apply the *Kienapple* principle?

Issue 8: Did the Hearing Panel err in law in not granting the [Applicant] sufficient time to comment on the bill of costs submitted by the Law Society?

Issue 9: Did the hearing panel commit palpable and overriding factual errors in ordering the [Applicant] to pay a fine and submit a quarterly Accountant's Report and in concluding that the Bill of Costs sumitted [sic] by the Law Society is reasonable?

Issue 10: Did the [Chambers] Bencher err in law by neglecting to conduct a determination of "the legal import and effect of the acceptance of the "the [sic] referral of the [G] complaint from the Investigations, Monitoring & Enforcement (Professional Conduct) Department for inclusion in Mr. Tungohan's practice standards file"?

Issue 11: Did the [Chambers] Bencher err in law by neglecting to conduct a determination of the "legal import and effect of the acceptance of the referral of the Auditor's Report by the Practice Standard Committee"?

Issue 12: Did the [Chambers] Bencher err in law by stating that the Practice Standards Committee is not an adjudicative body?

Issue 13: Did the [Chambers] Bencher err in law and/or commit palpable and overriding factual errors in stating that "there have been no prior judicial or quasi-judicial proceedings at which findings of fact or law have been made on issues similar to the issues on which the hearing panel would be asked to rule, which would give rise to the application of the doctrines of abuse of process or *res judicata*"?

HEARING AND FINDINGS OF THE HEARING PANEL

[6] The Law Society forwarded a Notice to Admit to the Applicant, pursuant to Rule 4-20.1 of the Law Society Rules (now Rule 4-28). The Applicant issued a response admitting to the authenticity of certain documents and also admitting the truth of certain facts alleged in the Notice to Admit. Based in part on the Applicant's admissions, the Law Society presented its case to the hearing panel.

[7] Toward the end of the Applicant's case, after the conclusion of the Law Society's case, the Applicant applied to revoke his admissions. The hearing panel refused to allow the Applicant to withdraw those admissions and relied on those admissions in reaching its decision.

[8] The hearing panel heard testimony from the Applicant and from the Applicant's former accountant GG.

[9] The hearing panel found the following facts:

(a) in respect of allegations 1 and 2 in relation to a matter referred to as RG:

(i) the Applicant received a $2,000 cheque on October 14, 2009, deposited it into a joint chequing account owned by the Applicant and his wife on October 22, 2009, and failed to record the receipt of funds in his law firm records;

(ii) the Applicant received a $2,000 cheque on December 9, 2009, deposited it into his pooled trust account on December 15, 2009, and failed to record the receipt of funds in his law firm records;

(iii) the Applicant received $250 in cash on January 20, 2010, used the cash to pay filing fees, and failed to issue a receipt or record the receipt of funds in this law firm records;

(iv) the Applicant received a $5,000 cheque on January 20, 2010, but it could not be determined where the funds were deposited or used, and the Applicant failed to record the receipt of funds in his law firm records;

(v) the Applicant received a $10,000 cheque on March 24, 2010, deposited it into his firm general account, and after September, 2010, recorded the receipt of funds in his law firm's general ledger;

(vi) the Applicant received a $600 cheque on November 12, 2010 and did not deposit it or record the receipt of funds in his law firm records;

(vii) the Applicant gave a "bill" to the client on or about October 14, 2009, but upon review by a Registrar of the Supreme Court, the Court found that the document rendered by the Applicant did not constitute a bill, and the Court ordered that the Applicant pay the client $18,627.03 of the $19,250 received (which excludes the $600 cheque that was never deposited);

(viii) the Applicant paid the amount due to RG approximately four months after it was demanded on behalf of RG and approximately three and a half months after receiving a Certificate of Fees in respect of the amount owed to RG;

(ix) the Applicant did not report the unsatisfied Certificate of Fees to the Executive Director of the Law Society and provided no explanation to the hearing panel for that failure;

(b) in respect of allegations in relation to withdrawals from trust:

(i) in 2011 an accountant retained by the Applicant created "bills" for clients for accounting purposes, but those "bills" were never forwarded to clients;

(ii) the Applicant maintained that funds deposited into his pooled trust account during the relevant time period were not actually trust funds and were deposited into trust by mistake;

(iii) the Applicant maintained that he did not need to render bills prior to withdrawing client funds for his own use other than the retainer agreement letters he sent to clients;

(c) in respect of allegation 3(a) in relation to a matter referred to as NR:

(i) on or about December 15, 2009, the Applicant received $1,000 from NR, and deposited it into his pooled trust account;

(ii) the Applicant maintained that those funds were deposited into trust by mistake;

(iii) the Law Society did not dispute that the Applicant performed work on NR' s behalf prior to the withdrawal of funds;

(iv) the Applicant, through his accountant, did prepare a bill for the services rendered to NR, but only after the fact, and never provided that bill to NR;

(d) in respect of allegation 3(b) in relation to a matter referred to as LR:

(i) in or about December 2009, the Applicant entered into a retainer agreement with LR;

(ii) on or about December 15, 2009, the Applicant received $500 from LR and deposited it into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on behalf of LR prior to withdrawing the funds;

(v) on or about December 23, 2009, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to LR prior to withdrawing the funds;

(e) in respect of allegation 3(c) in relation to a matter referred to a JL:

(i) on or about December 4, 2009, the Applicant entered into a retainer agreement with JL and, on or about December 15, 2009, deposited $1,500 from JL into his pooled trust account;

(ii) the Applicant maintained that the funds were deposited into trust by mistake;

(iii) the Law Society did not dispute that the Applicant performed work on JL's behalf prior to withdrawal of the funds;

(iv) the Applicant provided no evidence he rendered a bill prior to withdrawing the funds;

(f) in respect of allegation 3(d) in relation to a matter referred to a ML/ZS:

(i) the Applicant entered into a retainer agreement with ZS through ZS's immigration consultant ML;

(ii) the Applicant deposited $1,000 from ML on or about December 23, 2009 and $1,120 from ML on or about January 7, 2010, into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on ZS 's behalf prior to the withdrawal of funds;

(v) on or about January 7, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could not provide evidence he rendered a bill to ML prior to withdrawing the funds;

(g) in respect of allegation 3(e) in relation to a matter referred to as ML/CM:

(i) the Applicant entered into a retainer agreement with CM through CM's immigration consultant ML on or about December 23, 2009;

(ii) the Applicant deposited $1,000 on or about December 23, 2009, and $1,120 on or about January 7, 2010, from ML into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed the work on CM's behalf prior to the withdrawal of funds;

(v) on or about January 7, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could provide no evidence that he rendered a bill prior to withdrawing the funds;

(h) in respect of allegation 3(f) in relation to a matter referred to as ML/XM:

(i) the Applicant entered into a retainer agreement with XM through XM's immigration consultant ML on or about December 23, 2009;

(ii) the Applicant deposited $1,000 on or about December 23, 2009, and $1,120 on or about January 7, 2010 from ML into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on XM's behalf prior to withdrawing the funds;

(v) on or about January 7, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(i) in respect of allegation 3(g) in relation to a matter referred to as JH:

(i) in or about December 2009, JH retained the Applicant, but the Applicant and JH did not have a written retainer agreement;

(ii) the Applicant testified that, on or about December 13, 2009, he billed JH $5,000 for services rendered, but he could not provide documentary evidence to support that oral testimony;

(iii) on or about December 15, 2009, JH paid the Applicant $600 in cash, and the Applicant deposited $400 of that into his pooled trust account;

(iv) the Applicant maintained those funds were deposited into trust by mistake;

(v) the Law Society did not dispute the Applicant's claim that he performed work on JH's behalf prior to the withdrawal of funds;

(vi) in or about January, 2010, the Applicant withdrew some or all of the funds held in trust;

(j) in respect of allegation 3(h) in relation to a matter referred to a ML/LX:

(i) the Applicant entered into a retainer agreement with LX on or about January 22, 2010;

(ii) the Applicant deposited $1,000 from ML into his pooled trust account on or about January 22, 2010;

(iii) the Applicant maintained that he deposited the funds into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on LX's behalf prior to the withdrawal of funds;

(v) on or about January 22, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(k) in respect of allegation 3(i) in relation to a matter referred to as ML/LF:

(i) the Applicant entered into a retainer agreement with LF on or about January 22, 2010;

(ii) the Applicant deposited $1,000 from ML into his pooled trust account on or about January 22, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on LF's behalf prior to the withdrawal of funds;

(v) on or about January 22, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(l) in respect of allegation 3(j) in relation to a matter referred to as ML/ZN:

(i) the Applicant entered into a retainer agreement with ZN on or about January 22, 2010;

(ii) the Applicant deposited $1,000 from ML into his pooled trust account on or about January 22, 2010;

(iii) the Applicant maintained the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on ZN's behalf prior to the withdrawal of funds;

(v) on or about January 22, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(m) in respect of allegation 3(k) in relation to a matter referred to as ML/LP:

(i) the Applicant entered into a retainer agreement with LP on or about January 22, 2010;

(ii) the Applicant deposited $1,000 from ML into his pooled trust account on or about January 22, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on LP's behalf prior to the withdrawal of funds;

(v) on or about January 22, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(n) in respect of allegation 3(l) in relation to a matter referred to as ML/CH:

(i) the Applicant entered into a retainer agreement with CH on or about January 22, 2010;

(ii) the Applicant deposited $1,000 from ML into his pooled trust account on or about January 22, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on CH's behalf prior to the withdrawal of funds;

(v) on or about January 22, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(o) in respect of allegation 3(m) in relation to a matter referred to as SH/LQ:

(i) the Applicant was retained by SH on or about February, 2010;

(ii) on or about February 10, 2010, the Applicant deposited $1,310 from SH and, on or about March 9, 2010, a further $1,575 from SH, into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on LQ' s behalf prior to the withdrawal of funds,

(v) on or about February 10, 2010 and March 9, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(p) in respect of allegation 3(n) in relation to a matter referred to as SH/CJ:

(i) the Applicant entered into a retainer agreement with CJ on or about February 4, 2010;

(ii) the Applicant deposited $1,310 from SH on or about February 10, 2010, and a further $1,575 from SH on or about March 9, 2010, into his pooled trust account;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on CJ's behalf prior to the withdrawal of funds;

(v) on or about February 10, 2010 and March 9, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(q) in respect of allegation 3(o) in relation to a matter referred to as WX/PY:

(i) the Applicant entered into a retainer agreement with PY on or about April 19, 2010;

(ii) the Applicant deposited $1,000 from WX into his pooled trust account on or about April 23, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on PY's behalf prior to the withdrawal of funds;

(v) on or about April 23, 2016, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(r) in respect of allegation 3(p) in relation to a matter referred to as WX/CK:

(i) the Applicant entered into a retainer agreement with CK on or about April 19, 2010;

(ii) the Applicant deposited $1,000 from WX into his pooled trust account on or about April 23, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on CK's behalf prior to the withdrawal of funds;

(v) on or about April 23, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(s) in respect of allegation 3(q) in relation to a matter referred to as FE:

(i) the Applicant entered into a retainer agreement with FE on or about September 14, 2010;

(ii) the Applicant deposited $1,950 from FE into his pooled trust account on or about September 30, 2010;

(iii) the Applicant maintained that the funds were deposited into trust by mistake;

(iv) the Law Society did not dispute the Applicant's claim that he performed work on FE's behalf prior to the withdrawal of funds;

(v) on or about September 30, 2010, the Applicant withdrew some or all of the funds held in trust;

(vi) the Applicant could produce no evidence that he rendered a bill to the client prior to withdrawing the funds;

(t) the Applicant kept no trust ledger showing funds received and disbursed for each client from when he opened his practice on December 1, 2009 to December 31, 2010;

(u) copies of billings issued to clients were not maintained in a client file by the Applicant;

(v) a general book of entry was not prepared for December, 2009;

(w) as of March, 2012, the Applicant had not prepared any client ledgers for 2009 and 2010 trust account activity; and

(x) the Applicant failed to maintain current records of his trust account in 2009 and 2010.

STANDARD OF REVIEW

[10] The standard of review for some issues is well-established and uncontroversial. For questions of law, the standard of review is correctness: *Kay v. Law Society of BC*, 2015 BCCA 303 at para. 41.

[11] For findings of fact, the standard of review is reasonableness: *Law Society of BC v. Hordal*, 2004 LSBC 36 at paras. 11-12; *Law Society of BC v. Berge*, 2007 LSBC 07 at para. 21. Findings of fact are not interfered with unless there is a clear error.

[12] For the reasons and decision of the hearing panel as a whole, the standard of review is less certain. It has been the subject of conflicting views in recent Law Society cases. A number of Law Society cases over many years have described the standard of review as correctness: see *Berge*; *Law Society of BC v. Foo*, 2015 LSBC 34; *Hordal*. The British Columbia Court of Appeal, however, has referred with approval to authority that the standard of review should be reasonableness: see *Mohan v. Law Society of BC*, 2013 BCCA 489 at para. 31; *Kay*, at para. 40.

[13] Some Law Society cases have considered that *Mohan* and *Kay* have revised the standard of review: see for example *Re: Applicant 8*, 2016 LSBC 12; *Law Society of BC v. McLean*, 2016 LSBC 10 at paras. 44, 56-57; *Law Society of BC v. Perry*, 2015 LSBC 55 at para. 32. In other cases decided after *Mohan* and *Kay*, however, review boards have continued to apply a correctness standard of review: see *Law Society of BC v. Harding*, 2015 LSBC 45 at para. 23; *Law Society of BC v. Dent*, 2015 LSBC 04 at para. 18.

[14] Whether the standard of review is reasonableness or correctness, however, it is our view that the decision of the hearing panel should be confirmed. It is our view that the decision of the hearing panel was not only reasonable, but also correct.

ANALYSIS

[15] The key points raised by the Applicant in his submissions are as follows:

(a) the hearing panel should not have relied on his admissions, and it made its findings without a sufficient evidentiary basis;

(b) his retainer agreements with his clients functioned as bills and enabled him to take funds from clients as payment towards outstanding accounts, and accordingly, he was not required to handle clients' funds as trust funds in those circumstances;

(c) any trust transactions were conducted by mistake, and the Applicant should not be held to maintain trust records when his transactions with client funds could have been conducted without placing the funds in his pooled trust account;

(d) he was not bound to report the order issued by the Registrar that he pay his former client because he had filed a Notice of Appeal;

(e) his being cited and sanctioned for withdrawing client funds from a pooled trust account prior to rendering a bill, and also being cited and sanctioned for making payments from his trust account when the accounts were not current, amounts to being cited and sanctioned twice for the same act, and offends the rule against multiple convictions expressed in *R. v. Kienapple*, [1975] 1 SCR 729, and also offends the doctrine of *res judicata*;

(f) the Applicant's prior involvement with the Practice Standards Committee and Practice Standards staff precludes his being cited or sanctioned for the acts giving rise to that involvement with the Practice Standards Committee.

[16] We find that the hearing panel properly considered the admissions made by the Applicant. The Applicant did not provide reasonable justification for his request to withdraw his admissions. It was not a breach of natural justice or an abuse of process for the hearing panel to refuse to allow the Applicant to withdraw his admissions after the Law Society had concluded presenting its case. Allowing the Applicant to withdraw his admissions at that point in the hearing would have been unfair to the Law Society. The Law Society, as a party to the hearing, was, like the Applicant, entitled to a fair hearing. The hearing panel's decision refusing to allow the Applicant to withdraw his admissions was, in our view, correct.

[17] Before us, the Applicant argued that the hearing panel made its findings without a proper evidentiary basis. We accepted documents tendered by the Applicant, and heard testimony from the Applicant. However, we find that the evidence provided by the Applicant before us does not justify any variation of the findings and determinations made by the hearing panel.

[18] The hearing panel had before it a substantial body of evidence, including admissions made by the Applicant, documentary evidence, the testimony of the Applicant, and the testimony of an accountant who had been employed by the Applicant.

[19] The hearing panel correctly held that the standard of proof required is a balance of probabilities. The hearing panel correctly placed the onus of proof on the Law Society.

[20] The evidence is overwhelming that the Applicant failed to account properly for client funds he handled. He consistently failed to record properly transactions, and failed to maintain records regarding funds received for clients, funds held in trust for clients and his handling of those funds.

[21] The evidence shows that the Applicant failed to consistently deposit client funds into a trust account. The Applicant maintains that deposits that were made into trust were made by mistake, and those funds were not trust funds. As noted by the hearing panel, however, the Applicant could not deposit payments from clients into his general account unless and until he rendered a proper bill.

[22] The evidence clearly establishes that the Applicant withdrew funds from his pooled trust account when his trust accounts were not current. The evidence clearly establishes that the Applicant withdrew client trust funds without rendering accounts to his clients.

[23] The hearing panel concluded that the evidence showed the Applicant appeared to fail to comprehend his obligations to his clients under Part 3, Division 7 of the Law Society Rules (rules relating to trust funds and accounting).

[24] The hearing panel was justified in making the findings of fact it made on the evidence before it. We agree with the hearing panel's findings of fact.

[25] The hearing panel found that the Applicant breached Rule 3-44 by failing to report a monetary judgment against him as required. That finding was clearly supported by the evidence. The filing of an appeal did not relieve the Applicant of his obligations to report the judgment to the Law Society. This was brought to his

attention at the time by opposing counsel. We agree with the finding of the hearing panel that there was a breach of Rule 3-44.

[26] The hearing panel found that the Applicant's retainer agreements with clients do not constitute "bills" that enabled the Applicant to withdraw client funds from his trust account. We agree with the finding of the hearing panel. In our view, that finding of the panel was correct. The allegations against the Applicant arose from a systematic failure to properly maintain books, accounts and records. In addition, the Applicant encountered difficulties, in respect of a review of his fees by the Supreme Court, and in respect of allegations made in this proceeding, arising from his not rendering bills to his clients.

[27] A "bill" is defined in Rule 3-72(3), (formerly Rule 3-63(3)), of the Law Society Rules. A bill must contain sufficient particulars to identify the services performed and disbursements incurred on behalf of a client. The retainer agreement letters provided to clients by the Applicant in very general terms set out that the Applicant requires a retainer to be paid upon signing of the agreement "representing legal services for the study of the files, preparation of legal opinion, and determination of the propriety of judicial review." Those letters do not purport to describe services already rendered, and do not provide any meaningful description of the services rendered and disbursements incurred, or any calculation of fees, disbursements and taxes.

[28] It is not only performance of work on behalf of a client that allows a bill to be rendered. It is also the delivery of a bill to the client, as set out in Rules 3-65(20) and 3-72(3), (formerly Rules 2-57(2) and 3-63(3)), of the Law Society Rules that allows a lawyer to withdraw funds from a pooled trust account to pay the lawyer's fees. Funds paid by a client to a lawyer are trust funds held for the client until a proper bill is rendered to the client. Based on the evidence and the Applicant's submissions before the hearing panel and the Review Board, the Applicant suffers a profound lack of understanding of, or simply refuses to acknowledge, the importance of his rendering a bill to his clients before taking trust funds to pay for his fees.

[29] The Applicant also submits that his being cited and found to have committed professional misconduct for instances of:

(a) failing to render a bill to clients prior to withdrawing trust funds, and

(b) withdrawing funds from his trust account when the account was not current;

offends the ***Kienapple*** principle or the doctrine of *res judicata*. We cannot accept this argument. The *Kienapple* rule is meant to avoid multiple findings of guilt for the same conduct. It applies where the same (or substantially the same) elements make up different offences. The elements of the rules that the Applicant was found to have infringed are not the same. Separate rules exist for different allegations faced by the Applicant:

(a) Rules 3-64 and 3-65(2) (formerly 3-56 and 3-57(2)) require the rendering of a bill to a client before withdrawing the client's trust funds to pay for fees;

(b) Division 7 of Part 3 of the Rules requires the proper maintenance of books, accounts and records;

(c) Rule 3-64(3) (formerly 3-56(1.2)) prohibits the withdrawal of funds from a trust account that is not current;

(d) Rule 3-50 (formerly 3-44) requires the reporting of a monetary judgment that is outstanding for more than seven days.

[30] Those are distinct statutory provisions, and the elements of one rule are different from the elements of other rules that the Applicant was found to have breached.

[31] Similarly, we do not accept the Applicant's argument that the Practice Standard Committee is a quasi-judicial body and its prior involvement with him precludes his being cited or sanctioned for the misconduct described in the citation. The Practice Standards Committee is not a disciplinary body and does not sanction members for misconduct. Its involvement with lawyers is remedial in nature. The Applicant's involvement with the Practice Standards Committee and staff did not expose him to the risk of any disciplinary penalty or sanction.

[32] In summary, we agree with the hearing panel's reasons and decision as a whole in respect of facts and determination.

[33] Given the findings made by the hearing panel, its determination that the Applicant had committed the misconduct alleged in the citation was justified. The hearing panel correctly determined that the Applicant's conduct constituted a marked departure from that expected by the Law Society of lawyers and therefore constituted professional misconduct.

[34] In its determination of disciplinary action, the hearing panel considered:

(a) the importance of Law Society trust accounting rules, and the importance of lawyers following those rules;

(b) the misconduct alleged occurred during the Applicant's first year of practice as a sole practitioner;

(c) the Applicant's previous discipline history;

(d) the impact of the Applicant's conduct upon his former client RG;

(e) the Applicant gained little if any advantage by his conduct, as he had already performed the work for which he paid himself from client funds;

(f) the number of instances of misconduct, and the time-frame over which they occurred;

(g) the Applicant's refusal to acknowledge any concern over his billing practices or to indicate any willingness to change his billing practices;

(h) the Applicant's apparent failure to comprehend that he must send a bill to clients before he can make use of retainer funds and the Applicant's apparent unwillingness to hire a bookkeeper or use accounting software designed for law firms;

(i) the impact upon the Applicant of sanctions; and

(j) the need for specific or general deterrence in the public interest.

[35] The hearing panel was sensitive to disciplinary sanctions potentially being restrictive enough to severely limit the Applicant's ability to practise. At the same time, the panel sought to protect the public interest, including public confidence in the integrity of the legal profession.

[36] The hearing panel determined the appropriate sanction to be a fine of $3,000, payable by the Applicant in just less than three months.

[37] In respect of the fine imposed, we find that the hearing panel appropriately considered relevant factors and previous decisions. We agree that the fine imposed by the hearing panel was appropriate in the circumstances.

[38] The hearing panel ordered that the Applicant must produce to the Law Society, from an accountant (approved by the Law Society Compliance Audit Department), on a quarterly basis, a report stating the Applicant's general account and trust

account are in compliance with the Law Society Accounting rules, continuing until the Practice Standards Committee determines it to be no longer necessary.

[39] In respect of the practice conditions imposed on the Applicant, the hearing panel considered the public interest but also considered the potential impact of practice conditions on the Applicant. We agree that the conditions imposed by the hearing panel upon the Applicant are reasonably necessary to monitor the Applicant's compliance with Law Society accounting rules, particularly in the face of his failure or refusal to understand or acknowledge his accounting obligations respecting client funds. The Applicant's compliance with those rules must be ensured to protect the public interest and public confidence in the legal profession.

[40] The disciplinary action imposed by the hearing panel was global in nature. Given the circumstances, including the apparent failure of the Applicant to recognize and commit to reforming his misconduct, the amount of the fine and the conditions imposed by the panel were appropriate.

[41] In respect of costs, the hearing panel considered the Tariff of Costs in Schedule 4 of the Law Society Rules. The panel noted that the units claimed under each heading with a range of units were at the lower end of the range.

[42] The Applicant argues that costs awarded should not necessarily provide full indemnification of the cost of litigation. We note that the Tariff of Costs does not necessarily provide full indemnification.

[43] The Applicant argues that the costs awarded by the hearing panel are disproportionate compared to the fine imposed, and as a result, the costs awarded are punitive. We note that the costs incurred by the hearing were largely attributable to how the Applicant conducted the hearing. The Applicant spent a good deal of time before the hearing panel trying to justify his actions, for example, by trying to prove that he performed work for his clients before he withdrew their trust funds. Another example is the Applicant's attempt to withdraw admissions. The Applicant was largely responsible for the time required to complete the hearing before the hearing panel. As a consequence, the amount arrived at through application of the Tariff of Costs is higher than it would have been otherwise.

[44] The award of costs is discretionary. We cannot find fault with the hearing panel's exercise of discretion in that respect. The hearing panel's award of costs against the Applicant, and the amount, are appropriate in our view.

DECISION

[45] For the reasons stated above, we decline to set aside or vary any of the orders made by the hearing panel.

COSTS

[46] In respect of costs of this Review, if the parties are unable to agree on costs, they are at liberty to provide written submissions by January 25, 2017.