2017 LSBC 01
Decision issued: January 16, 2017
Citation issued: February 10, 2016 and
amended June 1, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GREGORY LOUIS SAMUELS

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	October 5 and 6, 2016
Panel:	Herman Van Ommen, QC, Chair Carol Gibson, Public representative Peter Warner, QC, Lawyer
Discipline Counsel:	Alison Kirby
Counsel for the Respondent:	Robin N. McFee, QC and Jessie I. Meikle-Kahs

[1] This hearing primarily concerns the handling of funds the Respondent received in trust for his client ML on the settlement of a personal injury action in Washington State. These funds were equal to the medical expenses incurred by the Ministry of Health in providing ML with care and treatment.

[2] A citation was authorized on January 28, 2016, issued on February 10, 2016, served on February 11, 2016, and amended on June 1, 2016.

[3] The citation as amended contains six allegations against the Respondent as follows:

(a) improper withdrawal of $9,690.05 US from his trust account;

(b) breaching his duty to his client, the Ministry of Health, by failing to forward its subrogated share of the settlement proceeds;

(c) in the alternative, if the Ministry of Health is not his client, then he breached his professional obligation to the Ministry of Health by failing to forward its subrogated share;

(d) misrepresenting to his client in his statement of account that a portion of the settlement ($10,202.20 CDN) would be paid to the Ministry of Health, and subsequently failing to correct that misrepresentation or otherwise keep his client properly informed when he determined that he would not forward the proceeds to the Ministry;

(e) failing to respond to seven letters from the Ministry of Health;

(f) commencing an action in the Superior Court of the State of Washington in the name of ML without instructions.

[4] The Hearing took place on October 5 and 6, 2016. Closing arguments were, with the agreement of the parties, conducted in writing.

[5] At the commencement of the hearing the Law Society applied to further amend the citation. The application was opposed.

[6] Counsel for the Respondent submitted that, if the amendments were granted, an adjournment would be necessary. The Law Society, although seeking the amendment, asserted that, if the Panel were to grant an adjournment as a term of allowing the amendment, the Law Society would prefer to proceed without the amendment.

[7] The Panel declined to grant the amendment sought and the hearing proceeded.

[8] The Law Society called Marc Belanger, who, at the material times, was an associate employee with the Respondent responsible for the day-to-day handling of the file under the supervision of the Respondent. The Law Society also called lawyer Peter Lawless with the Ministry of Health, who is involved in their subrogated claims.

[9] The Respondent was called by the Law Society and also testified on his own behalf. In addition, the Respondent tendered an expert report of a lawyer in

Washington State. The Law Society did not require the expert to attend for cross-examination.

BURDEN OF PROOF

[10] The onus of proof in a discipline hearing is on the Law Society. The standard of proof is on a balance of probabilities.

[11] In *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 43 the hearing panel summarized the onus and standard of proof as follows:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency." *FH v. McDougall*, 2008 SCC 53.

BACKGROUND

[12] The Respondent was called to the bar in British Columbia in September 1994. Prior to that he was admitted to the Washington State Bar in 1990. His practice focuses on cross border disputes with an emphasis on personal injury cases.

[13] His client ML, a resident of BC, was injured while walking on a road in Point Roberts, Washington State on March 28, 2006. She suffered serious injuries. She was treated at the scene and was then transferred to Delta Hospital where she was stabilized. She later underwent restorative surgery in the Royal Columbia Hospital in New Westminster. The Ministry of Health incurred costs of $15,303.30 treating her.

[14] ML retained the Respondent on May 3, 2006. The retainer agreement, which was signed in British Columbia, refers to the BC Law Society Rules.

[15] On May 2, 2006, the Ministry of Health wrote to ML seeking information about the accident from her and advising her that the Ministry attempts to collect from the responsible party the costs of her hospital and medical care.

[16] On August 30, 2006, the Respondent wrote to the Ministry of Health on ML's behalf stating:

> I will protect your account for these expenses and any others from the proceeds of any settlement or judgment obtained on ML's behalf, subject to the following conditions:
>
> 1. That the Ministry of Health will agree to pay my attorney's fee on any sums collected and remitted; and
>
> 2. In the event of settlement for less than full value of ML's claim, the Ministry will waive its right to subrogation.

[17] The Respondent testified that the second condition arose from the "made-whole doctrine" applicable in Washington State. That doctrine provides that an insurer is not entitled to recover anything until the insured has been made whole, i.e. obtained full recovery of all her losses resulting from the accident.

[18] ED at the Ministry of Health responded on October 19, 2006 agreeing to pay up to 33 and 1/3 per cent of the amount recovered for attorney's fees but in respect of the second condition stated:

> If our costs have been included in your client's claim and she receives a reduced settlement, (say 50%) we are prepared to accept a reduced settlement of our claim, based on the same percent (50%). We are not willing to waive our claim.

[19] The Respondent did not respond to this letter to advise that he did not agree with that condition. Instead, two years later on October 6, 2008, he wrote to the attention of the Records Custodian seeking information about the true costs of ML's medical care. He stated, without referring to his earlier correspondence:

> ... If provided this information, this office will agree to protect your subrogated interest, and we would be grateful to receive your updated payout reports.

[20] At this time Mr. Belanger began working on the file. Mr. Belanger was called to the bar in British Columbia in 2009. He had been admitted to the Washington State bar in 2003. He began his employment with the Respondent in 2008 before his call. He was employed after his call until 2010, at which time he became a partner. He left the partnership in May 2013.

[21] Mr. Belanger wrote the Ministry of Health on October 16, 2008 seeking the same information that Mr. Samuels had sought. He wrote as follows:

> ... If MSP would provide us with the amount paid for medical services, this office will agree to protect your subrogated interest, and we would be grateful to receive your updated payout reports. ...

[22] On November 5, 2008 SN from the Ministry of Health wrote back to Mr. Belanger enclosing some of the information requested stating that the total amount owed to the Ministry of Health was $15,303.30 CDN. She also wrote:

> We understand the attorney fee established in the United States is 33 1/3%, plus costs, for the recovery of a subrogated lien. We agree to the one-third recovery fee however, the Plan usually does not pay additional legal fees, costs or any disbursements. The usual procedure to follow when reimbursing the Plan is to retain the appropriate percentage of the money recovered and forward the balance. Please make the cheque payable to the Ministry of Health. …

[23] Between January 2009 and June 2010, Mr. Belanger negotiated with the Washington insurers. He ultimately agreed to a settlement of $95,000 US on June 21, 2010. On that day he wrote to SN at the Ministry of Health stating:

> We have settled this claim. I will forward payment as per the usual mailing address and payor information. Please confirm the same and advise if you require otherwise. ...

[24] TB at the Ministry of Health wrote Mr. Belanger on June 22, 2010 referring to the email the day prior confirming "The proposed settlement, as outlined in our email to SN, confirming the payment in full of the health care costs, is approved. I look forward to receipt of a cheque for the agreed amount … ."

[25] A final account dated June 29, 2010 was signed by the Respondent. It is not clear in the evidence who gave instructions to staff to prepare it. It is clear that it was prepared in accordance with Mr. Belanger's understanding of the settlement and the obligations to the Ministry of Health that he agreed to as an employee of the Respondent and that it was signed by the Respondent.

[26] The account shows a payment to "MSP Third Party Liability" of $10,202.20 which is the amount left after taking 33 1/3 per cent from the total Ministry of Health claim of $15,303.20.

[27] The settlement proceeds of $95,000 US were received in the Respondent's US dollar trust account in British Columbia on July 30, 2010. On the same day he withdrew $36,169.01 for his fees and disbursements, transferring that amount to his

US dollar general account. In addition, the sum of US $10,988.91, which was the US dollar amount of two Canadian accounts owing including the Ministry of Health, was also transferred to his US dollar general account. These amounts all correspond to the account the Respondent signed.

[28] The sum of US $10,988.91 withdrawn from the US trust account was not paid directly to the intended recipients. The funds were in fact transferred to his US dollar general account. The Respondent said he did this in order to obtain the exchange from US dollars to Canadian dollars at a preferred rate. He did not proceed to transfer these funds to his Canadian dollar general account.

[29] Although funds to pay the Ministry of Health were transferred from his US dollar trust account to his US dollar general account, the Respondent did not pay those funds to the Ministry of Health.

[30] On August 8, 2010 the Respondent signed a cheque in the amount of $11,128.68 drawn on his Canadian dollar general account payable to the Ministry of Finance. This cheque included the sum of $10,202.20 for the Ministry of Health expenses on the ML claim. The cheque was not delivered at that time.

[31] The Respondent testified that sometime between signing the cheque and November 22, 2010 he made the decision not to pay those funds to the Ministry of Health. It was his view that ML had not been made whole and that the Ministry of Health was not entitled to the funds.

[32] The Respondent testified that he advised Mr. Belanger that, in his view, ML had not been made whole and that therefore the Ministry of Health was not entitled to any money. He said this conversation would have occurred in late August 2010.

[33] Mr. Belanger testified that he did not recall discussing the Ministry of Health's entitlement to the funds he had agreed to pay to them with the Respondent. He testified that he believed that he would have remembered such a conversation. Mr. Belanger in cross-examination conceded that, given the passage of time, he did not have complete recall of all the conversation. He was however, certain that a conversation of that type would be remembered.

[34] The Respondent testified that he believed Mr. Belanger would have advised the Ministry of Health of his decision not to pay them any part of the subrogated claim. The Respondent says that it was an oversight that the funds remained in his general account.

[35] We do not accept that evidence of the Respondent. He says that he initiated the transfer from his US dollar trust account to his US dollar general account in order to give his client a preferred exchange rate. That however is not true. He converted the US dollars to CDN dollars on the account to his client, not at this preferred rate, but at the Bank of Canada rates applicable for that day. This preferred rate would then have benefitted only the Respondent personally.

[36] Further, if the Respondent had told Mr. Belanger that he believed he had made an error, the Respondent would have expected to see subsequent activities such as advice to the client that she might be entitled to a further $10,202.20 CDN and advice that she could expect to receive a claim from the Ministry of Health for breaching her agreement to pay them their agreed upon lien amount.

[37] None of these events occurred, and these matters would have come to his attention after he asserts he spoke to Mr. Belanger advising him that he had made an error in not applying the made-whole doctrine.

[38] On November 22, 2010 a cheque for $926.48 CDN was issued and sent to the Ministry of Health in respect of another unrelated claim for a different client. The $10,202.20 remaining from the August 8, 2010 cheque for $11,128.68 was not dealt with.

[39] If he had expected Mr. Belanger to advise the Ministry of Health that they would not be paid, he would have expected some response by that time. It would also have been apparent to him when cancelling the August cheque to the Ministry of Health and issuing a new one for a smaller amount that there were funds in his general account that ought not to be there.

[40] Mr. Belanger testified that he had no discussions with the Respondent about this file after August 2010. He believed that the Ministry of Health had been paid in accordance with his view of the settlement consistent with the account signed by the Respondent.

[41] Mr. Belanger remained practising with the Respondent until May 2013, not knowing that the Respondent had withheld those funds from the Ministry of Health and had not accounted to the client for those funds. The events between early August 2010 and late November 2010 are not consistent with Mr. Belanger being told he had made an error. If he had been told he would have taken steps to deal with the money held in trust, and he would have taken steps to inform the Ministry that he was not going to honour the agreement he had reached with them to pay them their subrogated interest funds.

[42] The sum of $9,690.05 US remained in the Respondent's US dollar general account until July 13, 2015, when the sum of $10,202.20 was put into his Canadian dollar trust account. He did not at that time consider payment of interest or the difference between the applicable exchange rates at the different times. One day after the hearing he deposited the sum of $2,164.24 to make up the different exchange rate applicable at the time of transfer in 2015.

[43] The Respondent's general accounts were in an overdraft position at the relevant time in 2010 (i.e., drawn on his credit lines in those accounts).

[44] The Ministry of Health wrote to the Respondent's office, to the attention of Mr. Belanger on October 4, 2013 and November 7, 2013, seeking payment of their subrogated claim.

[45] Sometime before December 18, 2013, Mr. Samuels, in response to a telephone message left for him, called Mr. Lawless at the Ministry of Health.

[46] Mr. Lawless forwarded the earlier correspondence to the Respondent by email on December 18, 2013 and the Respondent replied to the substance of the matter on December 18, 2013. He promised to find earlier correspondence and forward it to him in the New Year.

[47] The Respondent and Mr. Lawless engaged in an exchange of emails between January and March 2014. The Ministry of Health complained to the Law Society in February 2015.

[48] In July 2015 the Respondent commenced declaratory proceedings in Washington State Court in the name of ML, asserting that the Ministry of Health was not entitled to the funds withheld from ML's settlement.

[49] The Respondent did not advise ML of this. The Respondent waived any limitation defence she might have under Washington law without advising her of his intention to do so or being instructed to do so.

[50] ML was finally advised on March 2, 2016 by the Respondent that the sum of $10,202.20 withheld from her settlement proceeds had not been paid to the Ministry as shown in her statement of account. She was also advised a declaratory action had been commenced. She was not told that the funds withheld had not been held in trust from 2010 to 2015 or that any limitation defence in respect of the declaratory action had been waived.

PROFESSIONAL MISCONDUCT

[51] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook*, nor in the *Code of Professional Conduct* for British Columbia.

[52] The test for whether conduct constitutes professional misconduct was established in the *Law Society of BC v. Martin*, 2005 LSBC 16. The test is:

> 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.

[53] The panel also observed 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.

ALLEGATION 1

[54] Allegation 1 asserts that the Respondent improperly withdrew, or authorized the withdrawal, of $9,690.05 US from his trust account contrary to Rule 3-64(1).

[55] The only provision on which the Respondent could rely to withdraw the funds is Rule 3-64(1)(a) which allows a withdrawal of funds if "properly required for payment to or on behalf of the client."

[56] It is clear that the withdrawal would have been permitted to pay that sum to the Ministry of Health. That did not occur. The funds were transferred to his US dollar general account. He was not authorized or permitted to pay those funds to himself.

[57] His explanation that he intended the transfer to his general account as the first step to obtaining a preferred exchange rate is not accepted as discussed previously.

[58] The issue in relation to allegation 1 is whether the Respondent's conduct was merely a breach of a Rule or whether it is also professional misconduct. In *Law Society of BC v. Lyons*, 2008 LSBC 09 the panel considered the distinction between a breach of the Rules and one that constitutes professional misconduct. The panel found at paragraphs 32 and 35:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[59] The justification given by the Respondent for transferring funds from trust to general was that it was a step taken to obtain a favourable exchange rate for the client. As we have found, that is not true. The exchange rate used on the client account is the standard Bank of Canada rate.

[60] What occurred is that funds were transferred from trust to general the day after receipt. A cheque payable to the Ministry of Health for those funds was signed on August 8, 2010 but not delivered. At the time the decision was made to not deliver the cheque, the Respondent had to have known that the funds transferred from trust needed to be returned.

[61] The improper transfer of funds from trust to a lawyer's general account is a very serious transgression. Clients and the public need to be assured that trust monies are always properly dealt with and that lawyers do not transfer funds to themselves except in circumstances where they are entitled to do so. Further, the wrongful transfer was not corrected until 2015 and at that time it was only partially corrected.

[62] We find that the Respondent committed professional misconduct by transferring those funds in these circumstances.

ALLEGATIONS 2 AND 3

[63] Both allegations assert a breach of the Respondent's duty to the Ministry of Health by failing to forward its subrogated share of the settlement proceeds. The

difference between them is that Allegation 2 asserts that the Ministry of Health was his client.

[64] It is clear that the Respondent and the Ministry of Health did not reach an agreement in 2006. Although he did not reply, the disagreement between them on the consequences of ML not being made whole was fundamental.

[65] However in 2008, when Mr. Belanger began working on the file, he offered to "protect" their subrogated share on payment of attorney's fees. The Ministry agreed to pay fees up to 33 1/3 per cent.

[66] Mr. Belanger's understanding was that he had agreed to pay the Ministry of Health the remaining two-thirds of Ministry of Health costs on settlement. As an employee lawyer, responsible for the day-to-day handling of the file he had the authority to make that commitment on behalf of the Respondent. Mr. Belanger testified that he did not know whether he was acting for the Ministry or just protecting their interest. The Respondent denied that his firm was acting, and Mr. Lawless asserted that it was.

[67] We are not prepared on the evidence before us to find that the Ministry of Health became a client of the Respondent's firm with all the attendant consequences. Nor is it necessary in this case to make a finding on that issue. It is clear that Mr. Belanger, on behalf of the firm, agreed to "protect" their subrogated interest, which would mean at a minimum to hold the funds received in trust until all parties agreed on their disposition or a court ruled on it.

[68] The Respondent argues that the made-whole doctrine applies to the Ministry of Health's claim. He argues further that, because in his view ML was not made whole, the Ministry of Health is not entitled to a subrogated interest in the settlement proceeds. As a result, he says there was no obligation to forward funds to them. Whether the *Health Care Cost Recovery Act* applies in these circumstances has not been decided by any court.

[69] The Respondent's position ignores the fact that Mr. Belanger agreed to pay the Ministry of Health two-thirds of the amount claimed by the Ministry of Health on settlement. Even if the made-whole doctrine applies, counsel acting for ML could agree that she was made whole and that therefore the subrogated interest exists and the obligation to forward the funds arises. This is what Mr. Belanger did. ML also agreed and instructed the Respondent's firm to pay that sum to the Ministry of Health by her acceptance of her share of the settlement proceeds and her account from the Respondent.

[70] Mr. Lawless testified to the standard BC practice on this issue, saying "If settlement is below policy limits we get our share, period, because if you accept an offer below the policy limit, you are "whole" – if you feel you are not made whole you can go to trial for more."

[71] In relation to these allegations, the Respondent, without discussing the matter with Mr. Belanger, his client ML, the Ministry or the defendant's lawyer, withheld funds that ought to have been paid to the Ministry of Health. The Respondent testified that "I don't recall telling Mark (Belanger) to inform the Ministry. …"

[72] Even if he had believed an error had been made and steps were taken to set aside the agreement made by Mr. Belanger, the Respondent was obliged to keep the disputed funds in trust, which he did not do.

[73] As a result of his conduct, he continued to hold personally funds that ought to have been in trust and failed to pay funds to the Ministry of Health that his associate lawyer had agreed to do. Mr. Belanger testified that "We agreed on the amount, we settled their lien, when you agree, the dispute is resolved, we have an agreement."

[74] We find that the Respondent committed professional misconduct by failing to forward the sum of $10,202.20 as alleged in allegation 3.

ALLEGATION 4

[75] Allegation 4 asserts that the Respondent misrepresented to the client that a portion of the settlement proceeds would be paid to the Ministry of Health and the Respondent failed to correct that misrepresentation when he decided not to pay.

[76] The Respondent submits that, at the time the account was prepared and delivered, he intended to pay the funds as shown on the account and as a result there was no misrepresentation at that time.

[77] He agrees that, when he decided not to pay the funds to the Ministry of Health, ML ought to have been informed. He says though that, because Mr. Belanger had day-to-day conduct of the file, it was Mr. Belanger that he expected to have informed ML about the outstanding funds being retained.

[78] As noted above, we do not accept the Respondent's evidence that he advised Mr. Belanger that he had erred in accepting that ML had been made whole, we accept instead the evidence of Mr. Belanger who denied having received any such advice.

[79] The Respondent ought to have known when holding back the cheque in August and when reissuing a new cheque for a smaller amount in November that he was holding excess funds. He also had to have known that both the Ministry of Health and his client needed to be advised.

[80] Although it became clear to the Respondent in December 2013 that Mr. Belanger had not advised the Ministry of Health that they were not going to be paid, he either did not review the file to see if the client had also not been told, or else he decided not to inform her. In July 2015 when he put the sum of $10,202.20 in his Canadian dollar trust account he did not then write to her to advise her that she might be entitled to further payment.

[81] It was not until March 2016 that he advised ML that he was holding the sum of $10,202.20 in trust and that the Ministry of Health had not been paid.

[82] The Respondent submits that it was Mr. Belanger who ought to have advised the client that the funds would be withheld. As we have found, the Respondent did not advise Mr. Belanger that he believed an error had been made, and as a result that submission fails.

[83] It was of some significance to the client to know that she was potentially entitled to a further $10,202.20. Accounting to clients for all funds received and disbursed on their behalf is a key obligation of all lawyers.

[84] In this case, the Respondent retained $10,202.20 in his general account without his client knowing about it for almost six years. We find this to be professional misconduct.

ALLEGATION 5

[85] Allegation 5 asserts that the Respondent did not respond to letters from the Ministry of Health dated June 22, 2010, October 4, 2013, November 7, 2013, December 19, 2013, January 22, 2014, January 29, 2014 and February 21, 2014.

[86] The letters dated June 22, 2010, October 4, 2013 and November 7, 2013 were addressed to Mr. Belanger. Mr. Belanger was still at the firm on June 22, 2010 and would be the person expected to respond to the letter of that date.

[87] The letters dated October 4, 2013 and November 7, 2013 were also addressed to Mr. Belanger, who was no longer at the firm. The evidence is not clear as to when those letters came to the Respondent's attention. The Respondent started communicating with the Ministry of Health after receiving a call from Mr. Lawless

just prior to December 18, 2013. Thereafter he responded to the Ministry's letters and emails. Although he may not have responded to all of the points in the communications and was slow in responding to some of them, we do not find that there was a failure to respond in respect of those matters.

ALLEGATION 6

[88] Allegation 6 asserts that the Respondent commenced an action in the Superior Court of Washington State in the name of ML without her instructions. The Respondent, although acknowledging that he ought to have advised ML of that action, says his retainer agreement provided him with the authority to do so without specific instructions.

[89] His retainer letter states, under the "Scope of Retainer":

> The above mentioned fees cover all work deemed necessary by the lawyer to be done for the purpose of settlement or litigation.

[90] This clause, in our view, only provides that all of the necessary work is included in the fee. It does not authorize the Respondent to commence proceedings without the client's knowledge or authorization.

[91] The action was commenced on July 16, 2015, and ML was not advised of it until March 2, 2016. The Respondent suggests that, because she did not forthwith instruct him to withdraw the action, she has affirmed his commencing it. We do not agree. Furthermore, he did not advise her of the potential claim against her by the Ministry and how that might affect her interests.

[92] The Respondent commenced proceedings in his client's name without her knowledge or instructions as a step in his dispute with the Ministry of Health. He did not give her the option, after giving her appropriate legal advice, of deciding whether or not to simply agree to pay the Ministry of Health.

[93] Commencing proceedings in the name of a client without her knowledge or instructions is a very serious matter, which we find constitutes professional misconduct.

CONCLUSION

[94] We have found that the Respondent committed professional misconduct in relation to allegations 1, 3, 4 and 6 of the citation. Allegations 2 and 5 are dismissed.