2017 LSBC 15
Decision issued: May 18, 2017
Citation issued: May 9, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DONALD FRANKLIN GURNEY

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	November 29, 30, and December 1, 2016 January 20, 2017
Panel:	Phil Riddell, Chair Glenys Blackadder, Public Representative[1] Gillian Dougans, Lawyer
Discipline Counsel:	J. Kenneth McEwan, QC and Trevor Bant
Counsel for the Respondent:	Paul E. Jaffe

INTRODUCTION

[1] Donald Franklin Gurney (the "Respondent") is a practising member of the Law Society of British Columbia (the "Law Society"). The citation was authorized on May 5, 2016 and issued on May 9, 2016. The citation states:

[1] Ms. Blackadder did not participate in the preparation of these reasons, and was not a member of the panel of January 20, 2017.

> Between May 2013 and November 2013, you [the Respondent] used your trust account to receive and disburse a total of $25,845,489.87[2] on behalf of your client, C Inc. without making reasonable inquiries about the circumstances, including the subject matter and objectives of your retainer, and without providing any substantial legal services in connection with the trust matters. In particular, you did one or more of the following:
>
> (a) in May 2013, you received and disbursed $5,849,970 in connection with your client's matter with G Capital;
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> (b) between July 2013 and August 2013, you received and disbursed $6,361,121.67 in connection with your client's matter with I Ltd.;
>
> (c) in July 2013, you received and disbursed $7,439,445 in connection with your client's matter with A LLC or in the alternative with D Inc.;
>
> (d) in November 2013, you received and disbursed $6,239,953.20 in connection with your client's matter with Q Group.
>
> This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Law Society case was entered by way of a Notice to Admit, and the Respondent's case was entered by way of a Notice to Admit and the *viva voce* evidence of the Respondent.

[3] The authorization and service of the citation were admitted by the Respondent.

[4] The Respondent made a preliminary application to have the citation quashed on the basis of vagueness and abuse of process. That application was dismissed and our reasons follow.

COMPOSITION OF THE HEARING PANEL

[5] Ms. Blackadder was a member of the hearing panel for the first three days of the hearing, but had to withdraw not only from this hearing panel, but also from the hearing panel pool as a result of health issues. On January 5, 2017 the President of the Law Society made an order pursuant to Rule 5-3(1) that the hearing continue

[2] All references to specific amounts of money are in Canadian funds unless otherwise indicated.

with the remaining panel members. Ms. Blackadder did not participate in this decision.

RULING ON APPLICATION TO QUASH CITATION

[6] When the matter came on for hearing before us, the Respondent advised that he was making a preliminary motion to quash the citation.

[7] Counsel for the Respondent advised that notice of this application was not required, but in fact he had advised counsel for the Law Society that he was bringing this application. Both parties were prepared to argue it on the first day of the hearing.

[8] The hearing of the application to quash occupied the first day of the hearing.

[9] On the second day of the hearing we dismissed the application to quash the citation with reasons to follow. These are the reasons for dismissing the application to quash the citation.

[10] The Respondent sought to have the citation quashed on the basis of vagueness and abuse of process and violation of the Respondent's rights under section 7 of the *Canadian Charter of Rights and Freedoms*.

[11] In respect of the *Charter* argument, the Panel determined that the Respondent was required to give notice to the Attorney General pursuant to the *Constitutional Question Act*, RSBC 1996, c. 68, section 8(2), which states:

> If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) *an application is made for a constitutional remedy*,
>
> the law must not be held to be invalid or inapplicable *and the remedy must not be granted* until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> [emphasis added]

[12] The Respondent advised the Panel that he would not proceed with the *Charter* argument at that time. We ruled that the Respondent could raise the *Charter*

argument at some later point in the hearing, if he elected to, but he did not and so the *Charter* argument was not made.

Submissions of the Respondent

[13] Counsel for the Respondent posed several questions: What is the Respondent obliged to defend? What is the evil? What is the underlying social protection? What did he do wrong?

[14] The Respondent argued that the purpose of this hearing should be to make a legal determination of professional misconduct based on specific criteria and not a policy debate.

[15] The Respondent quoted the test for professional misconduct from *Law Society of BC v. Martin,*[3] as set out in *Law Society of BC v. Derksen*[4] at para. 13:

> What constitutes professional misconduct is not defined in the Act or the Rules or described in the *Code of Professional Conduct*. Since the decision by the hearing panel in *Law Society of BC v. Martin*, the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the lawyer in question exhibited a "marked departure" from the standard of conduct the Law Society expects of lawyers. This is a subjective test that must be applied after taking into account *decisions of other hearing panels, publications by the Law Society, the accepted standards for practice* currently accepted by the members of the legal profession in British Columbia and what, at the relevant time, is required for *protection of the public interest*.
>
> [emphasis added]

[16] The Respondent submits that, without any parameters for the test in *Martin* the hearing will be a "standardless sweep". The Respondent says money laundering was suggested by the Law Society, but the citation does not allege money laundering or any particular misuse of the trust account.

[17] The Respondent argued that the standard of conduct must not be the subjective view of what the Panel members personally think is a best practice and they must exercise their authority within a legal framework. Put another way, the Panel must not legislate standards for practice after the fact but must adjudicate using standards that are known or ascertainable in advance.

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[3] 2005 LSBC 16
[4] 2015 LSBC 24

[18] The Respondent says there are three problems with the citation:

(a) First, the wording of the citation does not specify the specific acts and/or omissions constituting the alleged misconduct. The specific phrases in the citation that are at issue are "without making reasonable inquiries" and "without providing any substantial legal services." No specific misconduct is alleged and none is evident from the wording of the citation;

(b) Second, it is not clear if the citation alleges one or two offences; i.e. is the word "and" conjunctive or disjunctive; and

(c) Third, the citation is void of any context in which to understand the charge and does not refer to a breach of a particular rule. The term "professional misconduct" is not defined in Rule 38(4).

[19] The Respondent argues that the citation is an abuse of process if the alleged evil is money laundering or terrorist financing activity. The Respondent says that issue was decided in the *Federation of Law Societies*[5] case in which the Supreme Court of Canada decided that the rules enacted by the law societies across Canada reflected an effective standard of practice in response to the risk of money laundering and/or terrorist activity financing. The Respondent claims it is an abuse of process to revisit the findings in the *Federation of Law Societies* case.

[20] The Respondent argues that he does not know the case he faces and that is a violation of procedural fairness. The Respondent says he is unable to make a full answer and defence.

The decision of the President's designate on an application for the disclosure of the circumstances

[21] On September 30, 2016 the Respondent made an application for disclosure of details of the misconduct alleged in the citation pursuant to Rule 4-35. That application was dismissed on November 3, 2016 with reasons issued on November 23, 2016 by the President's Designate. Those reasons set out the following:

(a) The Respondent made a request for particulars on June 29, 2016 and, by letter of the same date, counsel for the Law Society referred counsel for the Respondent to the disclosure of the Law Society's case and provided

[5] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401

examples to support the allegation that the Respondent provided no substantial legal services in connection with the subject transactions;

(b) On July 20, 2016 the Law Society served a Notice to Admit on the Respondent, and the Respondent provided his Response on August 8, 2016;

(c) The President's Designate found that further particulars had been delivered by the Law Society, both in the letter to counsel for the Respondent of June 29, 2016 and in the extensive Notice to Admit dated July 20, 2016;

(d) There is no requirement to allege that a respondent has contravened a specific provision of the *Act*, Rules or *Handbook* and that professional misconduct may be found in conduct outside the scope of any specific provision of the *Act*, Rules or *Handbook* as set out in *Law Society of BC v. Christie*;[6]

(e) The Respondent's application for particulars was dismissed and the President's Designate found that the allegations contained in the citation, together with the letter of June 29, 2016 and the Notice to Admit dated July 20, 2016 provided the Respondent with sufficient details of the circumstances of the alleged misconduct and reasonable information about the act or omission to be proven.

Submissions of the Law Society

[22] The Law Society's position on this preliminary application is that the President's Delegate has already found the citation to be valid; that the citation and the correspondence between counsel has provided the Respondent with sufficient details of the alleged misconduct; and that whether the Respondent's conduct amounts to professional misconduct is a question of law that depends on whether it represents a "marked departure from that conduct the Law Society expects of its members": *Martin*.

[23] The Law Society's letter of June 29, 2016 advised the Respondent of the following:

(a) That the Respondent had already been provided with disclosure of the Law Society's case including the four complete client files and the transcript of Mr. Gurney's interview with Mr. Wedel, which together

[6] 2006 LSBC 38

provided a complete picture of the services rendered by the Respondent in connection with the four transactions set out in the citation;

(b) That the allegation of "no substantive legal services" was based on the Respondent's services that consisted solely of receiving and immediately disbursing $26 million in offshore funds by converting the funds into bank drafts. In particular:

(i) That the Respondent made only pro forma inquiries about the transactions,

(ii) That the Respondent knew little about the borrower, its business, its principal, the purpose of the loans, the relationship between the borrower and B House, the lenders, their businesses, their principals, their relationship to B House or C Inc.;

(c) That the above services were done in circumstances that should have raised the Respondent's concerns about the transactions for the following reasons, which would form the basis for "reasonable inquiries":

(i) newly incorporated borrower,

(ii) substantial offshore funds,

(iii) unknown lenders,

(iv) lack of security,

(v) mistakes in the line of credit agreements,

(vi) loans arranged through a former lawyer involved with past securities fraudsters,

(vii) short turn-around time, and

(viii) the legal fee was based on a percentage of the money flowing through the Respondent's trust account;

(d) That the Respondent made only pro forma inquiries about the transactions. "In other words, anything to explain why companies in Nevis/Marshall Islands/Belize would lend a total of $26 million to a newly incorporated BC company with, as far as he knew, no assets and no plans."

[24] The Law Society's Notice to Admit dated July 20, 2016 set out the evidence on which the Law Society would rely to prove the citation. This provided the Respondent with further particulars of the case he would have to meet. Forty-three documents and 184 facts that included hypothetical inquiries the Law Society would allege the Respondent could have made as "reasonable inquiries": paras. 85 to 95, 99,101, 140, 141, 149, 157 and 158.

[25] The Respondent's counsel, Mr. Jaffe, wrote to the Law Society on August 8, 2016. In that letter Mr. Jaffe rejected the Law Society's letter of June 29, 2016 as argument and repeated his complaint that the citation did not refer to any specific rule(s) that the Respondent allegedly broke and asked if the use of the word "and" in the citation was disjunctive (meaning that there were two separate charges in the citation – use of the trust account without providing substantial legal services and a failure to make reasonable inquiries). The Law Society responded in a letter dated September 6, 2016, referring Mr. Jaffe to the Commentary to rule 3.2-7 and making clear that the Respondent was alleged to have done one thing wrong – he allowed his trust account to be used without making reasonable inquiries and without rendering any substantial legal services.

[26] In response to the argument that this hearing would be an abuse of process as a re-litigation of the *Federation of Law Societies* case, counsel for the Law Society said that it would be an astounding proposition if the Respondent was saying that he only needs to meet the no-cash and client ID requirements for the use of his trust account.

[27] The Law Society's case is that the Respondent failed to exercise his role as a gatekeeper for his trust account. The Law Society does not have to prove that any particular use was made of the Respondent's trust account.[7]

[28] The Respondent's preliminary application to quash the citation is essentially the same complaint as the demand for particulars except that he asks that the citation be set aside as a nullity.

[29] The Panel is not bound by the decision of the President's Delegate, nor was the Panel was asked to review the decision. We were free to come to our own decision.

[30] Rule 4-18 of the Law Society Rules provides as follows:

Contents of citation

4-18 (1) A citation may contain one or more allegations.

[7] *Elias v. Law Society of British Columbia* (1996), 26 BCLR (3d) 359, 1996 CanLII 1359 (CA)

(2) Each allegation in a citation must

(a) be clear and specific enough to give the respondent notice of the misconduct alleged, and

(b) contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proven against the respondent and to identify the transaction referred to.

[31] The Respondent was previously advised that the use of the word "and" in the citation was conjunctive and therefore the citation referred to one act of misconduct – that of using his trust account to receive and disburse a total of $25,845,489.87 on behalf of one client without making reasonable inquiries about the circumstances and without providing any substantial legal services.

[32] The Respondent was given several hypothetical examples of "reasonable inquiries".

[33] The case the Respondent must meet is clear. In respect of the four transactions listed, the Law Society must prove that he failed to make reasonable inquiries, which will depend on the Respondent's evidence of what he did or did not do; and that he did not provide any substantial legal services, which, again, will depend on the Respondent's evidence of what he did or did not do. After that, it is a legal issue as to the sufficiency of the inquiries and the substance of the legal services provided and whether the Respondent's conduct represents a "marked departure from that conduct the Law Society expects of its members."

[34] We reject the argument that this hearing would be an abuse of process as a re-litigation of the issues decided in the *Federation of Law Societies* case. That case examined the right of the federal government to enact legislation requiring lawyers to report on trust account activity involving their clients and the issues were solicitor client privilege and section 7 rights under the *Charter*. This hearing is to decide if the Respondent committed professional misconduct in respect to four transactions involving his trust account.

[35] In the *Federation of Law Societies* case, the Supreme Court of Canada specifically decided that the FINTRAC rules did not apply to lawyers or law firms (and their trust accounts) because the legal profession has developed practice standards relating to the subject of the federal legislation that are evidence of a strong consensus in the profession as to what ethical practices are required. The trial judge stated, "Given the law societies' ongoing mandate and commitment to regulate their members in the public interest, including through specific measures

to combat money laundering and terrorist financing, further intrusion has not been demonstrated to be necessary or appropriate."[8]

[36] It is clear from the decisions in the *Federation of Law Societies* case[9] that the ability of a law society to regulate lawyers' use of trust accounts has been preserved and not limited to the no-cash and client identification rules.

[37] We find that the citation, together with the disclosure made by the Law Society, meets both parts of the test in Rule 4-18. The citation is clear and specific enough to give the Respondent notice of the misconduct alleged, which is that he used his trust account to receive and disburse a sum of money without making reasonable inquiries about the circumstances including the subject matter and objectives of his retainer, and that he did so without providing any substantial legal services in connection with the trust matters.

[38] The Respondent has been given enough further detail of the circumstances of the alleged misconduct so as to have reasonable information about the act or omission to be proved and the citation sets out the four particular trust transactions in issue.

[39] The Respondent's application to quash the citation is dismissed.

FACTS

[40] The case for the Law Society was put in by way a Notice to Admit; the Respondent also filed a Notice to Admit. The findings of fact are divided into facts from the Notices to Admit and the facts found from the *viva voce* evidence. The findings of fact based upon the Notices to Admit are set out below.

[41] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 15, 1968.

[42] The Respondent practised with a lawyer, EF, from 1982 to 1989 at the law firm of GH. EF left the law firm of GH in 1989. In 1995 EF was suspended from the practice of law for one year after being found to have committed professional misconduct. In 1999 the Respondent acted for EF with regard to his application for reinstatement and wrote a letter of recommendation to the Law Society Credentials Committee dated February 17, 1999 stating that he had known EF for 18 years, that he had known him to be a person of good character and that he displayed a good grasp of legal matters referred to the Respondent over the four years since EF

[8] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, at para. 209
[9] See also *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147

ceased to be a member of the Law Society.[10] EF's application for reinstatement was subsequently withdrawn.

[43] EF is currently the sole director of B House. Since EF's suspension, EF had instructed the Respondent with regard to a number of legal matters involving businesses in which EF was involved.

[44] B House is an entity that provides private banking services and some managerial advisory services. Private banking was understood by the Respondent to mean offshore banking that is having "corporations set up offshore that hold assets, money belonging to individuals rather than holding that money with your financial institutions in the country."

[45] The Respondent has no background in securities law or offshore banking. The Respondent's practice experience is in commercial real estate, business law, conveyancing and a "smattering" of foreclosures. He has currently an active commercial lending practice acting for mortgagors and mortgagees and acting for three mortgage investment corporations. The mortgage investment corporations are winding up, having had $30 to $35 million to loan out to the private sector at their peak.

[46] C Inc. is a British Columbia company that was incorporated in December, 2012 and whose sole shareholder as of May 1, 2013 is IJ.

[47] The transactions that form the basis of the citation can be summarized as the Respondent acting for C Inc. to receive funds through his trust account in regard to four line of credit agreements in which C Inc. was the borrower. The line of credit agreements were all unsecured, and the agreements were executed by all contracting parties when received by the Respondent. The agreements were all one page in length and were remarkably similar, except for the parties, the loan value and the choice of forum in the jurisdictional clause. The total amount received and disbursed by the Respondent was $25,845,489.87 as a result of the four line of credit agreements.

May 2013 Client File [number] re: G Capital

[48] On May 15, 2013 the Respondent received an email, purportedly from IJ, seeking to retain him to prepare a demand loan in the amount $850,000 between B House and K Equity as the lender to receive and disburse the loan proceeds. The domain name from which the email was sent is one known to the Respondent as being used

[10] Exhibit #2 Law Society Notice to Admit, Tab 9

by EF, his brother and a number of people at B House. The Respondent did not know if the email came from IJ or EF, and it did not matter to the Respondent as he assumed EF was giving instructions on behalf of C Inc. Later on that date the Respondent received a telephone call from EF about the loan between C Inc. and K Equity. The Respondent advised that his fees would be 0.1 per cent of the net funds received and disbursed through his trust account. The Respondent understood that EF had arranged the loan for C Inc. The Respondent advised EF that the lender (K Equity) would be preparing the loan documentation.

[49] On May 16, 2013 the Respondent received an email from C Inc. attaching an executed line of credit agreement in the amount of $9 million between C Inc. and K Equity with an execution date of May 15, 2013, and copies of C Inc.'s certificate of incorporation, register of directors, register of shareholders, directors resolutions and IJ's driver's licence. The line of credit agreement was a one-page document that showed that K Equity was based in Nevis, it was an unsecured demand loan, C Inc. could borrow up to $9 million, interest was payable at 5 per cent per annum, and the court of Nevis would have jurisdiction over any legal action. On May 24, 2013 the Respondent received an email from C Inc. attaching a new line of credit agreement in the amount of $9 million between C Inc. and G Capital. This agreement had an execution date of May 15, 2013 and was identical in terms to the previous agreement, but for the parties.

[50] On May 28, 2013 the Respondent received a wire transfer in the amount of $5,849,970 into his trust account on behalf of C Inc. The ordering customer was G Capital. The Respondent then purchased a bank draft in the amount of $5,843,418 payable to C Inc., from the funds held on behalf of C Inc. in his trust account.

[51] On May 29, 2013 the Respondent met with EF and IJ at the offices of B House, which are also the registered office of C Inc. Prior to attending at the meeting, the Respondent had reviewed the executed line of credit agreement between C Inc. and G Capital. The Respondent reviewed the minute book of C Inc., viewed IJ's driver's licence, obtained a business card and confirmed his contact information. The Respondent was told that the source of the loan monies was "stocks" and that there was "no illegal purpose." The Respondent had IJ sign, in his personal capacity and in his capacity as a signatory of C Inc., an indemnity agreement indemnifying the Respondent in the event the wire transfer of the loan proceeds was reversed. The Respondent then delivered the bank draft in the amount of $5,843,418 to IJ with his statement of account in the amount of $6,552.

[52] Prior to the Respondent meeting IJ on May 29, 2013, he had met IJ at a few Christmas parties held at the offices of B House, and had not done any prior work

for him. The Respondent knew that IJ operated a printing business but "basically knew nothing about him." He did not know anything about the printing business or any of IJ's other business ventures.

[53] It was not until the meeting of May 29, 2013 that the Respondent considered C Inc. to be his client. C Inc. was not the Respondent's client prior to that date.

June - August 2013 Client File [number] re: I Ltd.

[54] On June 27 or 28, 2013 the Respondent received a telephone call from EF in relation to a line of credit agreement between C Inc. and I Ltd., a Belize company. The Respondent then opened a file in relation to the matter. On either June 27 or 28, 2013 the Respondent met with EF and IJ at the offices of B House. At that meeting IJ told the Respondent that the line of credit was for "corporate business purposes including investments and the making of loan," "startup loans debt financing to startup companies in the oil and gas and resource industry," and for "no illegal purpose." EF told the Respondent that the loan was arranged by him, and that he provided "banking services to the lender and he was aware of the source of proceeds of the loan, where the money came from and he indicated that it came from stocks and he confirmed that there was no illegal purpose involved in connection with it." The Respondent asked EF and IJ if the funds had anything to do with money laundering or were the proceeds of crime, and was advised that they did not and were not. The Respondent made no other inquiries about I Ltd. such as who the principals or owners were, the status of its incorporation, the identity of the authorized signatories, the source of funds or the existence of additional agreement or guarantees associated with the line of credit agreement.

[55] On June 29, 2013 the Respondent received an email from C Inc. attaching a one-page executed line of credit agreement with an execution date of May 15, 2013 between C Inc. and I Ltd. in the principal amount of $7.6 million. The email advised that the Respondent would be receiving $1,750,000 USD to the Respondent's trust account on July 2, 2013. The Respondent was asked to deliver a bank draft to C Inc. at the offices of B House, less his fees. On July 2, 2013 the Respondent prepared a statement of account in the amount of $2,049.60. On July 3, 2013 the Respondent received a wire transfer in the amount of $1,831,359.30 in his trust account for the benefit of C Inc. On July 3, 2013 the Respondent issued a trust cheque and used it to purchase a bank draft payable to C Inc. in the amount of $1,829,309.70. On that day the Respondent delivered the bank draft and his account to C Inc. care of B House. On July 4, 2013 the Respondent issued a trust cheque to pay his account.

[56] On July 19, 2013 the Respondent received an email from C Inc. stating that he would receive $1.5 million USD to the benefit of C Inc. in his trust account. These funds were to be advanced by I Ltd. on July 22, 2013. On July 22, 2013 C Inc. advised the Respondent by email that the advance would be increased to $1.6 million USD. On July 22, 2013 the Respondent received a wire transfer of $1,637,584.65 into his trust account. On that date the Respondent issued a trust cheque in the amount on $1,635,736.65 to C Inc., which he used on July 23, 2013 to purchase a bank draft payable to C Inc. The Respondent prepared his statement of account in the amount of $1,848 on July 23, 2013. The Respondent delivered the bank draft to C Inc. care of B House and issued a trust cheque to pay his account on July 23, 2013.

[57] On August 5, 2013 the Respondent received an email from C Inc. advising that there would be a further advance in the amount of $1.75 million USD to C Inc. from I Ltd. The funds were advanced on August 6, 2013. On August 7, 2013 the Respondent received a wire transfer into his trust account in the amount of $1,799,859.57 to the benefit of C Inc. The Respondent then prepared his account in the amount of $2,016. On August 7, 2013 the Respondent prepared two trust cheques, one to satisfy his account and one in the amount of $1,797,843.57 payable to C Inc., which he immediately converted into a bank draft. On August 7, 2013 the Respondent delivered the bank draft and his account to C Inc. care of B House.

[58] On August 20, 2013 the Respondent received an email from C Inc. advising that there would be a further advance in the amount of $1.01 million USD to C Inc. from I Ltd. on August 21, 2013. On August 21, 2013 the Respondent received a wire transfer to his trust account in the amount of $1,047,318.15 to the benefit of C Inc. On that date the Respondent prepared his account to C Inc. in the amount of $1,176, issued a trust cheque to satisfy his account, and a trust cheque in the amount of $1,046,142.15 payable to C Inc., which he immediately converted to a bank draft payable to C Inc. On August 22, 2013 the Respondent delivered to C Inc. care of B House his account and the bank draft payable to C Inc.

July 2013 Client File [number] re: A LLC

[59] On July 25, 2013 the Respondent received an email from B House attaching a one-page line of credit agreement in the amount of $8.9 million between C Inc. and A LLC of Nevis, and advising that $7.29 million USD would be wired to his trust account on July 26, 2013. On July 25, 2013 the Respondent spoke to IJ and EF about the A LLC transaction. The Respondent made no inquiries regarding the source of funds or inquiries regarding A LLC. The Respondent opened a file regarding A LLC on this date. On July 29, 2013 the Respondent received a wire

transfer in the amount of $7,439,445 in his trust account to the credit of C Inc. On July 29, 2013 the Respondent issued his account in the amount of $8,344 to C Inc. On July 30, 2013 the Respondent issued three trust cheques: one to pay his account; one in the amount of $6,441,101 payable to C Inc., which he immediately converted to a bank draft payable to C Inc.; and one in the amount of $990,000 payable to C Inc., which he immediately converted to a bank draft payable to C Inc. Later on that date he delivered the two bank drafts payable to C Inc. and his account to C Inc. care of B House.

November 2013 Client File [number] re: Q Group

[60] On November 13, 2013 the Respondent received an email from C Inc. attaching a one-page line of credit agreement between C Inc. and Q Group of Nevis, executed on November 8, 2013, in the amount of $6.4 million. $6 million USD would be wire-transferred to the Respondent's trust account on November 14, 2013. The proceeds were to be disbursed to pay the Respondent's fees and the balance to be issued in two "cheques/bank drafts" payable to C Inc., divided one-third, two-thirds and delivered to C Inc. care of B House. The Respondent spoke to IJ and EF on the phone regarding the transaction. The Respondent made no inquiries regarding the source or use of the funds. The Respondent opened a file on November 13, 2013.

[61] On November 15, 2013 $6,239,953.20 was received by wire transfer into the Respondent's trust account to the benefit of C Inc. On the same date the Respondent prepared an account in the amount of $7,056 to C Inc. The Respondent then issued three trust cheques: a cheque in the amount of $7,056 to satisfy his account; a cheque in the amount of $2,077,632.40 payable to C Inc., which he immediately converted to a bank draft payable to C Inc., and a cheque in the amount of $4,155,264.80 payable to C Inc., which he immediately converted to a bank draft payable to C Inc. On November 15, 2013 the Respondent delivered his account and the two bank drafts to C Inc. care of B House.

[62] The fee arrangement that was in place for each of these transactions was 0.1 per cent of the value of funds passing through the Respondent's trust account. The Respondent justified this fee based upon "the amount involved and the risk involved."

[63] On a review of the Notices to Admit of the Law Society and of the Respondent, there is no dispute as to the mechanics of the transactions that are subject to the citation in that there is no issue as to when emails were received, when meetings took place, the nature of the documents exchanged, and the amounts involved in and the timing of the financial transactions. The matter at issue is the nature of the

inquiries conducted by the Respondent regarding the parties to the transaction, and the sources and uses of the funds that flowed through his trust account. As mentioned in these reasons, the Respondent gave *viva voce* evidence at the hearing, and he was also interviewed as a part of the Law Society investigation on July 11, 2014 (the "Interview"). The Interview was tendered as an admission against interest by the Law Society.

[64] A review of the Interview reveals the following:

(a) The Respondent met IJ a few times at the B House Christmas party eight to ten years previously and had seen him at the party over the years;

(b) The Respondent knew nothing about IJ's business except that he owned a printing company;

(c) The Respondent had no dealings with IJ outside of his dealings with B House and those dealings began in May 2013;

(d) A month prior to the Interview the Respondent was advised by EF that B House had made loans in the oil and gas industry;

(e) The Respondent did not "follow up with what they've [B House] done with the money (the loan proceeds). I [the Respondent] had no personal knowledge of that";[11]

(f) The Respondent has known EF for approximately 30 years. When EF was a lawyer, they had practised together for five to six years at the firm of GH. The Respondent knew that EF had been suspended by the Law Society for breach of an undertaking in 1995, and was aware EF was no longer a lawyer;

(g) The Respondent described his relationship with EF as being "a friend, at least more of an acquaintance, we don't get together socially";[12]

(h) The Respondent understood that B House "provides private banking services and also I understand also it provides some managerial advisory services to various companies and individuals. Other than that I can't tell you in detail …";[13]

[11] Interview, p. 10
[12] Interview p. 19
[13] Interview p. 19

(i) The Respondent understood EF to be a principal of B House, but he was unaware of the involvement of others, if any, in the entity;

(j) The Respondent claimed that neither B House nor EF had ever been his client;

(k) The Respondent understood B House to provide "private banking" services, which he understood to mean "I'm referring to offshore banking, have corporations set up offshore that hold the assets, the money belonging to individuals rather than holding that money with your financial institution in the country";[14]

(l) The Respondent could not provide examples of the services he understood B House to provide. He had not been involved in offshore banking, and had no training or practice experience in the area of securities law;

(m) C Inc. was the Respondent's client at all material times;

(n) EF advised the Respondent that I Ltd. was "an investment company and that its assets are liquid are basically the result of dealings in the stock market and that EF is aware of the nature of those proceeds and where they come from by reason that he provides banking services to I Ltd."[15] He did not know who the principals or owners of I Ltd. were or its place of operation. The Respondent was not aware of the corporate business purpose apart from making loans that caused C Inc. to enter into the line of credit agreement.

(o) The Respondent's role in the four files that are subject of the citation involved the following:

    (i) He did what he "was requested to do," which was to "[r]eceive funds and disburse them primarily,"[16]

    (ii) He did not recall providing any specific legal advice, but he would have provided legal advice if asked to;

[14] Interview p. 22
[15] Interview p. 27
[16] Interview p. 31

(iii) He described his role as facilitating the receipt and disbursement of loan advances, and converting the funds from US dollars to Canadian dollars;

(iv) In response to questions as to whether there needed to be a lawyer involved in the transactions, the Respondent stated: "From my point of view, it could have been structured in a different way where a lawyer did not need to be involved, different clients, but that client so desired";[17]

(v) The Respondent wondered why he was involved in the transactions. He was not necessarily suspicious of the transactions, but he thought that he had to ask a few questions. This was due to the fact that the transactions were offshore transactions and to their size. He was not uncomfortable about acting after his "due diligence," which consisted of the in-person meetings with EF and IJ and the questions he asked;

(vi) The Respondent's "due diligence" captured in his file notes and consisted of obtaining client verification documents, asking about beneficial ownership and asking if there were any illegal purposes. Specifically he asked IJ and EF if the money was proceeds of crime or from any illegal activity. Both replied that it was not. When asked where the money come from, EF said it was from stocks, and the Respondent did not ask for any further details.

(p) The Respondent acknowledged that the loan transactions were "not a conventional type of loan transaction," but he thought about it and "if the parties agreed to it, private parties, there was not much I was going to say about it";[18]

(q) The Respondent purchased bank drafts from the net loan proceeds from each transaction to avoid the eventuality that the bank might reverse the wire transfer. The purchasing of the bank draft removed the funds from his trust account, so if the wire transfer were reversed the funds were no longer in his trust account;

(r) The Respondent had not been involved in files similar to the transaction involving B House previously in his legal career.[19]

[17] Interview p. 33
[18] Interview p. 48
[19] Interview p. 61

[65] In addition to the Notices to Admit filed by the Law Society and the Respondent, the Respondent gave *viva voce* evidence, and based upon that evidence we make these additional findings of fact.

[66] The Respondent in his *viva voce* evidence stated:

(a) "If you were dealing in offshore money, you would obviously ... have a concern too that money isn't tainted by illegality";[20]

(b) Through the years a number of people who have used the services of EF have become the Respondent's clients;

(c) Prior to 2013 the Respondent had not been involved in any dealings with EF involving offshore money;

(d) In 2013 the Respondent was involved in a couple of real estate transactions involving offshore money. He assumed that EF was involved in the transactions;

(e) Due to his knowledge of EF through the years, the Respondent understood that EF was involved in placing money earned offshore in offshore financial institutions based in countries where there are minimal tax implications;

(f) The Respondent had no concerns regarding the money coming from offshore in that EF was involved. He had known EF for years, all the dealings were positive and there had been no problem. He had no reason to disbelieve EF;

(g) Through the years EF would phone the Respondent with regard to various issues. There would be the occasional lunch;

(h) In 1999, EF had had the Respondent assist him in his dealings with the Law Society, after EF's suspension in 1995. The Respondent dealt with the possible reinstatement of EF, and the possible unauthorized practice of law. This is the evidence that he gave in his evidence in chief, and that should be contrasted against his evidence in cross-examination where his recollection of his dealings with EF and his recollection of his representation of EF was much less precise and the Respondent appeared reluctant to repeat the evidence he had given in chief on this point;

[20] Transcript Day 1, p. 9

(i) The Respondent in his Notice to Admit included an article from a magazine that showed IJ receiving an award on November 25, 2013 which post-dates the last transaction that is the subject of the citation. The Respondent was not aware of the article until he saw it as part of the Law Society disclosure in this proceeding. The article was irrelevant to the Respondent's knowledge of IJ at the time of the subject matter of the citation;

(j) The Respondent stated that C Inc. did not ask to use his trust account for any of these transactions. As was pointed out in cross-examination, since the Respondent was being asked to receive and disburse funds on behalf of C Inc., then the only way that he could do that and comply with the accounting rules was to do so through his trust account. The Respondent was also directed to various emails in which he was asking how much would be deposited to his trust account and when those deposits would be made. The position of the Respondent on this point reflects adversely on his credibility. The Respondent also resisted suggestions that his fees were based upon the amount of funds that passed through his trust account. He acknowledged the fee was based upon the amount of money that he received and disbursed. The only way in which he could deal with the funds he received was via his trust account. Despite the Respondent's resistance, we find that the fee structure was based on one tenth of one per cent of the funds passing through his trust account; it is clear that this was the basis of his fee. We find the Respondent's resistance to the proposition adversely affects his credibility. The Respondent continually emphasized in his evidence that he complied with the Law Society client verification rules. It should be noted that the Law Society did not take a contrary position on this issue;

(k) The Respondent's stated concerns about the transactions was the "issue of large sums of money coming from offshore by wire transfer," a concern that there would be no suspicious activity, and to ensure the money would arrive and the transaction would not be reversed. He was concerned about the risk he was taking with regard to the amount of the transaction being in excess of his insurance. He had not stated that he knew the parties and was satisfied of the circumstances involving the transaction;

(l) The Respondent carried out what he repeatedly called his "due diligence" in an essentially identical manner with regard to all four transactions, which included obtaining copies of various portions of

minute books of C Inc., obtaining client identification and verification information from IJ, recording EF's phone number and obtaining the following information:

(i) That there were no illegal purposes or activity involved in transactions;

(ii) EF advised the source of the funds were "stocks" without any specifics; and

(iii) IJ at one point advised the funds were going to be used for investment in the petroleum industry.

(m) The Respondent made no inquiries into the principals behind the various lenders. He did not know the state of C Inc.'s assets on May 24, 2013. He did not know when various documents were drawn. He did not know anything of IJ's printing business other than it was "successful", or of his other business activities;

(n) The Respondent acknowledged that the transactions that are the subject of the citation were "unconventional";

(o) The Respondent was confident that EF would tell him if there was anything wrong or tainted with the transactions. He relied upon IJ, whom he had only met three or four times at Christmas parties prior to the first transaction, to reply to him accurately when he asked if there was anything "illegal" involved in the transaction;

(p) The Respondent refused to acknowledge an obvious proposition that, once he issued a trust cheque to purchase a bank draft, the funds had left his trust account. He continually took the position that he could reverse the bank draft and the funds would be returned to his trust account. His own evidence acknowledges implicitly that the funds had left his trust account when he purchased a bank draft with them. Otherwise, why would he have to reverse the purchase of the bank draft to return the funds to his trust account? The failure to acknowledge this obvious proposition we find adversely affects the Respondent's credibility;

(q) The Respondent did not participate in the negotiation of any of the transactions, but he said "I knew EF on the one side, and I knew that IJ on the other side, and that's the bargain that was struck";[21]

[21] Transcript Day 2, pp. 162-63

(r) The Respondent placed reliance upon EF and his previous dealings with EF. In his examination in chief he stated that, other than the disciplinary action with the Law Society, he knows of no other discreditable conduct on the part of EF. He was examined regarding the lawsuit that named the law firm in which he and EF were partners, and took the position that the lawsuit was not a concern of his or the firm given that the insurer was dealing with it. He said he would have been concerned with the firm's reputation. He said that he paid no attention to the lawsuit, which revolved around EF's breach of undertaking. This is the same breach of undertaking that led to EF's one-year suspension from the practice of law. Given that the law firm had a relatively small partnership we find it difficult to accept that, in that environment, a partner would not take an interest in a lawsuit involving one of his partners for a breach of undertaking, even to the extent that such a lawsuit could adversely impact the reputation of the firm. EF resigned from the partnership in 1989 and subsequently applied to re-enter the partnership. The partners did not allow this to occur. We do not find the position taken by the Respondent to be reasonable in light of the size of the firm, and the nature of the allegations against EF. In light of these facts we do not accept the evidence of the Respondent that he had little or no knowledge of EF's actions as they dealt with the lawsuit and his subsequent suspension;

(s) The Respondent was vague with regard to his representation of EF in his attempts to obtain reinstatement to the Law Society after EF's suspension. He was evasive in cross-examination with regard to the nature of the activities of EF that were of interest to the Law Society at the time.

[67] We find that Respondent was not credible in his evidence to the Panel, in particular when it deal with issues of:

(a) His knowledge of EF's previous misconduct, and the fact that EF's previous misconduct did not make the Respondent suspicious of offshore dealings involving EF. We question how a partner in a small law firm that is being sued for the misconduct (the breach of an undertaking) of another partner would not take any interest in the litigation, leaving it in the hands of the insurer. This strains credibility, and we rely upon *Faryna v. Chorny*[22] and the comments of O'Hallaran, JA who stated:

[22] [1952] 2 DLR 354, 1951 CanLII 252 (BCCA)

> "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." The Respondent's evidence on this issue is not "in harmony with the preponderance of probabilities";

(b) We find that the Respondent was evasive in his evidence with regard to calculation of his fees based upon the amount of money flowing through his trust account;

(c) We note that, throughout portions of his evidence, particularly under cross-examination, he was evasive in that he would not answer questions put to him and was self-serving with regard to his knowledge of the Law Society accounting rules.

[68] Regardless of our findings on credibility the issue to now be decided is whether the Law Society has proved its case.

SERVICE OF CITATION

[69] Rule 4-19 requires the Law Society to serve the Respondent with the citation. This was done on May 11, 2016.

PRINCIPLES

[70] The Law Society bears the onus of proof on the balance of probabilities: *Law Society of BC v. Ben-Oliel*.[23]

[71] In determining if the Respondent's conduct constitutes professional misconduct the test was set out in *Martin*:

> 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.

[23] 2016 LSBC 31, at para. 7

ANALYSIS

[72] The Respondent has argued that the citation issued in this matter deals with an issue of policy versus standards. He has relied upon the decision of the Newfoundland Court of Appeal in *Council for Licensed Practical Nurses v. Walsh*[24] to support this stated proposition that "[t]he applicable standard of conduct is not to be invented in response to the circumstances of any given case."[25] The difficulty with this argument is that the courts have confirmed that the legislature has delegated to the Law Society the power to determine whether a lawyer is guilty of professional misconduct or of conduct unbecoming.[26] There are provisions in the *Code of Professional Conduct for British Columbia* (the "*Code*") and case law that pre-existed the issuance of the citation that deal with the obligation on a lawyer regarding the use of trust accounts.

[73] Counsel for the Law Society set out the relevant provisions of the *Code* in his final submission, and we set out those sections below:

> 2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> **Commentary**
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> 3.2-7 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.
>
> **Commentary**
>
> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[24] 2010 NLCA 11, para. 43 to 45
[25] Respondent's Final Submissions at para. 35
[26] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at p. 889 and 890; *Elias*; *Foo v. Law Society of British Columbia*, 2017 BCCA 151.

> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services ...
>
> [3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.
>
> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter ...

[74] The position of the Law Society regarding the duties of a lawyer regarding the use of his trust account was set out as follows:

(a) Trust accounts must only be used for the legitimate commercial purpose for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as a legal advisor and facilitator. The Respondent had no such role; he was merely a convenient and apparently legitimate conduit for funds;[27]

(b) Where the circumstances of a proposed transaction are such that a lawyer should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the lawyer on an objective test that the transaction is legitimate;[28]

[27] *Law Society of BC v. Skogstad*, 2008 LSBC 19 at para. 61
[28] *Elias*, at para. 9, quoting the Bencher review decision

(c) A finding of professional misconduct can be established in the absence of a finding that the source of funds came from an illegitimate source. It is the objectively suspicious nature of the transaction that gives rise to the duty to carry out inquiries. A lawyer cannot delegate the duty to enquire to someone else;[29]

(d) A lawyer's duty of loyalty to his client requires him to take appropriate steps to ensure his services are not being used for "improper ends";[30]

(e) Solicitor-client privilege is available to foster open and candid communication between solicitor and client. The solicitor is bound by the privilege. It is said to be the only "absolute" privilege. This creates a situation in which transactions flowing through a solicitor's trust account are cloaked in solicitor-client privilege.[31]

[75] The position taken by the Respondent in his submissions on the issues that have not been already discussed deal with the following issues, and we use the headings used by the Respondent in his final submission:

The Irrational Charge

(a) There has to be a causal connection between the use of a trust account and some kind of wrongdoing;

(b) The use of the trust account must facilitate the wrongdoing;

(c) How the funds being in the Respondent's trust account could possibly have enabled fraudulent or dishonest purpose remains a mystery;[32]

(d) There is no evidence the use of the Respondent's trust account could have facilitated wrongdoing;

(e) The use of the Respondent's trust account to receive and disburse funds could not obscure the use of funds;

(f) FINTRAC would have recorded the deposit of funds into the Respondent's trust account;

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[29] *Law Society of BC v. McCandless*, 2010 LSBC 03 para. 43, 51; *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD 44 para. 25-27; *Holy v. Law Society*, [2006] EWHC 1034 para. 23, 24, 35
[30] *Federation of Law Societies* (SCC), para. 93
[31] *R. v. McClure*, 2001 SCC 14, [2001] 1 SCR 445, para. 31-33; *Andrews v. Law Society of BC*, [1989] 1 SCR 143, at pp. 187-188.
[32] Respondent's final submission para. 39.

(g) The Respondent kept the accounting documents required by the Law Society trust accounting rule.

The FLS (Federation of Law Societies) Litigation

(a) The Respondent agrees with the Law Society that: "It would be perverse if the *Federation* cases, which affirmed the importance and effectiveness of robust self-regulation by the Law Society, had the effect of limiting the Law Society's power to regulate the legal profession in the public interest";

(b) The Law Society has acknowledged that the same rules that were in effect at the time the Supreme Court of Canada dealt with the FLS Litigation are in effect now;

(c) Both directly and by adopting the FLS's position, the Law Society successfully asserted that the rules that it has enacted (which it admits the Respondent complied with) effectively ensured that lawyers are not a gateway for money laundering;[33]

(d) This is an abuse of process because the Law Society is now taking a position that, although the Respondent complied with the rules that were at issue in the FLS litigation, he has now professionally misconducted himself.

Other Law Society Publications

(a) Reference is made to a variety of Law Society publications that set out the effectiveness of the client identification and verification "scheme";

(b) A publication that states: "Our rules also specify that a lawyer can only accept electronic transfers from banks in countries that have adopted similar anti-money laundering measures." This publication must mean the source of funds in this case had already been subject to regulatory scrutiny before arriving in Canada.[34]

[33] Respondent's final submission para. 59
[34] Respondent's final submissions para. 68 and 69.

"Suspicious" and "Use of your trust account"

(a) The submissions dealing with these two headings which we have incorporated into one deal with an analysis of the evidence.

Substantive legal services

(a) The Respondent gave evidence that he used his trust account in conjunction with providing legal services;

(b) There is no definition of "legal services" in any British Columbia enactment or case law.

Culpability principle

(a) Does the Respondent's conduct display the degree of culpability that can be the basis for a finding of professional misconduct?

[76] The Respondent has repeatedly raised the effect of the decisions for the various courts in the *Federation of Law Societies* and has tried to use the argument of the decisions as they deal with the client identification and verification rules and the "no-cash" rule to argue that compliance with those rules in conjunction with the Law Society trust accounting rules are the full scope of a lawyer's obligation with respect to the use of his trust account. The underlying difficulty with this argument is that these rules (client identification and verification and the "no-cash" rule) were found "to augment long-standing law society rules prohibiting lawyers from engaging in illegal activity by preventing lawyers from being unwittingly involved in money laundering and terrorist financing, while maintaining the long-standing principles underlying the solicitor-client relationship."[35] Gerow J. then went on to say: "Given the law societies' ongoing mandate and commitment to regulate their members in the public interest, including through specific measures to combat money laundering and terrorist financing, further intrusion has not been demonstrated to be necessary or appropriate."[36]

[77] The *Federation of Law Societies* decision does not limit the ability of the Law Society to govern lawyers' professional conduct, in particular with regard to the use of a lawyer's trust account.

[35] At para. 23
[36] Para. 209. Quoted with approval by BCCA at para. 145

[78] We find that lawyers have a number of duties to fulfill before allowing their trust accounts to be used. We accept the submissions of the Law Society with regard to these duties. The Respondent's submissions with regard to these duties have been dealt with above, and we find that those submissions on the law limiting lawyers' duties to compliance with the client identification and verification, "no-cash" and trust accounting rules were not supported by the authorities cited in those submissions.

[79] We find lawyers' duties with regard to the use of their trust accounts are contained in the *Code* provisions that were set out above as part of the Law Society submission, and more particularly encompass the case law cited by the Law Society in its submissions. They are:

(a) A lawyer's trust accounts are to be used for legitimate commercial purposes for which they are established, the completion of a transaction, where the lawyer plays the role of legal advisor *and* facilitator. They are not to be used as a convenient conduit.[37] Even where other authorities, such as FINTRAC, may be aware of the source of the funds entering an account, the effect of solicitor-client privilege is that the parties to whom the funds are disbursed and the purpose for which the funds are disbursed are shielded by the privilege. It is for this reason that a lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction. This is the requirement to provide legal services.

(b) The Court of Appeal in *Elias*, quoted the Bencher review decision at para. 9: "where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an *objective* test that the transaction is legitimate." [emphasis added] It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.

(c) The lawyer's duty to investigate arises when, on an objective basis, he becomes suspicious that the transaction is illegitimate. Professional misconduct can be found even if the underlying transaction cannot be

[37] *Skogstad*, at para. 61; *Code* 3.2-7

proved to be illegitimate. A lawyer cannot delegate the duty to inquire to a third party such as a client and rely upon the client's assurance as to the legitimacy of the transaction.[38]

[80] A lawyer has a gatekeeper function with regard to trust accounts. This function arises, in part, from the fact that transactions that occur through a lawyer's trust account are protected by solicitor-client privilege. The privilege means that, while the authorities may be aware of the source of funds entering into the trust account, the facts regarding to whom funds are disbursed, the amounts and the purposes are shielded from the authorities by the privilege. The purpose of the privilege is to allow open and candid communications between a lawyer and client. The purpose of the privilege is not to facilitate suspicious transactions. The gatekeeper function requires a lawyer to use trust accounts for legitimate commercial purposes for which the lawyer is a legal advisor and facilitator. Prior to the lawyer becoming involved in a transaction, if there is a reasonable suspicion that the transaction may involve illegal activities in Canada or abroad the lawyer has a duty to make reasonable inquires. An objective test is applied to the lawyer's conduct. In order for professional misconduct to be found, illegal activities do not have to be proved.

[81] We find that, in the case of the Respondent, there were a number of factors that gave rise to the series of transactions being objectively suspicious, including:

(a) The Respondent had no previous professional dealings with IJ or C Inc.;

(b) The Respondent's practice did not involve unsecured commercial lending;

(c) The Respondent's understanding of "private banking" was that monies were invested in jurisdictions with a more favourable tax rate than in Canada. The Respondent at no point turned his mind to the tax consequences of these funds coming into Canada;

(d) All of the transactions dealt with offshore lenders to a new client;

(e) The Respondent's fee was based upon a percentage of the funds received and disbursed through his trust account;

(f) All of the transactions involved the Respondent receiving executed, one-page line of credit agreements; no security;

[38] *McCandless*, 2010 LSBC 3, at paras. 43; *Di Francesco*, at paras. 25-27; *Holy*, at paras. 23, 35

(g) The transactions involved millions of dollars and did not require the use of a lawyer's trust account to complete;

(h) The lenders, in the case of some of the transactions, changed from one entity to another;

(i) The executed line of credit agreements did not identify the signatories;

(j) No legal advice was sought from the Respondent. The Respondent did testify that he reviewed the agreements and would have advised C Inc. if he had any concerns; and

(k) The first transaction involving G Capital was a transaction in which the funds were deposited to the Respondent's trust account, and the Respondent had issued a statement of account, purchased a bank draft payable to C Inc., issued a trust cheque to himself to satisfy his account before he was retained by C Inc.

[82] These are illustrations of some of the flags that were present when the Respondent became involved in these transactions. On a review of all of the evidence we are satisfied that there was an objective basis to suspect the transactions set out in the citation were suspicious.

[83] The next issue to address is did the Respondent made reasonable inquiries to satisfy himself that he was not becoming involved in some form of illegal transaction. On a review of the evidence we find that he did not. The basis for this conclusion includes:

(a) On the transaction involving G Capital, funds were deposited into and disbursed from the Respondent's trust account before he considered himself retained. Prior to his first meeting with his client, the Respondent obtained by facsimile a copy of documents from the minute book of C Inc. and a copy of IJ's driver's licence. Not only did the Respondent know nothing of his client's business prior to entering into this transaction, but he also knew nothing of the source of the lender's funds. His inquiry upon meeting this client was to ask if the funds came from an "illegal source", to ask as to the ownership of his client and the use the client was going to make of the money, and to deal with client verification information. He asked EF about the lender's source of funds and was told that the funds came from "stocks".

(b) On the other three transactions particularized in the citation, the Respondent obtained client verification information and engaged in the same questioning regarding whether the funds would be used for "illegal purposes". The questioning embarked upon by the Respondent in no way could be considered probing and was no more than superficial. The questioning was described by counsel for the Law Society as "pro forma", and that is an apt description.

(c) The Respondent relies on his inquiries of EF to say that he made reasonable inquiries. This is fraught with difficulties in that it depends upon EF being a reliable and credible source of information and on EF having made the reasonable inquiry. We do not have to deal with the character and reliability of EF because the law is clear that the Respondent cannot delegate his duty to make reasonable inquiries to a third party.

[84] This is a case in which the nature of the transactions raises a reasonable suspicion that the transactions may involve illegality. A review of the facts causes an objective observer to be suspicious. This is one of those circumstances in which one would have to ignore the sea of red flags that were raised by these transactions.

[85] In assessing if a reasonable inquiry has been made, the first step to be taken is an examination of the Respondent's file and the notes contained in that file. The notes for all four transactions are remarkably similar and include client verification and identification information and the answers to the pro forma questions, including who is the beneficial owner of the client and are funds for an illegal purpose. No inquiry regarding who the principals of the lender are, the source of their funds, and the use of the funds by the client are made and recorded. The Respondent failed to make reasonable inquiries.

[86] The Respondent provided no substantial legal services.

[87] It is not a defence for the Respondent to argue that the Law Society has not proved the existence of an illegal purpose. The Law Society is not required to prove this to prove professional misconduct.

[88] The test to determine if a lawyer has committed professional misconduct is found in *Martin*: "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." For a lawyer to ignore the flags that raise a reasonable suspicion and to make minimal inquiries beyond dealing with client verification and the asking of

"pro forma" questions in the circumstances of this case leads to the inexorable conclusion that the Respondent has committed professional misconduct. This is a case in which the Respondent has shown a gross culpable neglect to his duties to make reasonable inquiries, and we also find that the Respondent used his trust account in the absence of providing legal services.

[89] We find that the Law Society has proved on a balance of probabilities that the Respondent committed professional misconduct in the manner set out in the citation.