2017 LSBC 23
Decision issued: June 26, 2017
Citation issued: September 8, 2009

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 Review concerning

ROBERT COLLINGWOOD STROTHER

APPLICANT

DECISION OF A REVIEW PANEL
OF THE BENCHERS

Review:	January 24, 2017
Benchers:	Philip Riddell, Chair Pinder Cheema, QC Craig Ferris, QC Steven McKoen Elizabeth Rowbotham Sarah Westwood
Discipline Counsel:	Henry C. Wood, QC
Counsel for the Applicant:	Robert W. Grant, QC

INTRODUCTION

[1] On February 26, 2015, a hearing panel found that the Applicant committed professional misconduct (*Law Society of BC v. Strother*, 2015 LSBC 07). In the decision of the hearing panel on disciplinary action (2015 LSBC 56), the panel summarized their decision as follows:

> … the Respondent's actions in failing to advise his client M Corp. that he had a financial interest in a potential commercial enterprise in the unique circumstances pertaining to his financial interest, failing to advise M Corp.

that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered and failing to advise M Corp. of a favourable tax ruling constituted professional misconduct.

[2] This is a Review initiated by the Applicant of the decision of the hearing panel finding professional misconduct.

[3] After this review commenced, one member of the review panel was unable to continue with the hearing for medical reasons. This review is being conducted under the *Legal Profession Act* as it was in 2009 when the citation was issued. At that time, section 47(4.1) of the Act provided that if

> (a) a bencher who is hearing a review under this section is unable for any reason to complete the bencher's duties in respect of the review, and
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> (b) at least 5 benchers remain to hear the review,
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> the remaining benchers may continue to hear the review and make a final decision, and the vacancy does not invalidate the review.

On that authority, this review was conducted by the remaining six benchers

FACTUAL BACKGROUND AND COURT DECISIONS

[4] Aspects of the matter before us have been the subject of lengthy litigation. A civil claim was brought against the Applicant by a former client, which resulted in a 42-day trial before the Supreme Court of British Columbia. The decision of that court (2002 BCSC 1179) was overturned by the British Columbia Court of Appeal (2005 BCCA 35). Leave was then granted to appeal the case before the Supreme Court of Canada (SCC), and while that court concurred with the Court of Appeal on its finding of a breach of a fiduciary duty by the Applicant, it allowed the appeal of the amount of the award of compensation against the Applicant. (2007 SCC 24).

[5] The events that gave rise to this matter occurred mainly in late 1997, 1998 and early 1999.

[6] Until 1999, the Applicant was a tax partner at Davis & Company in Vancouver. His largest client was M Corp., which represented over half of his billings.[1]

[7] In 1996 and 1997, M Corp. had a written engagement letter with the Applicant and Davis, which provided that the Applicant would advise M Corp. with respect to

[1] SCC, paras. 5-6

tax-assisted production services funding (TAPSF) investments. Before the hearing panel, the Applicant described this as the "tax shelter business".[2] The 1997 engagement letter also prohibited the Applicant and Davis from acting for clients other than M Corp. with respect to the tax shelter business.[3] The 1997 engagement terminated at the end of that year.[4]

[8] In November of 1996, the TAPSF tax shelter business for film finance began to come to an end because the federal government amended the *Income Tax Act* to implement new rules that took away the ability of M Corp. and its competitors to structure tax shelters as they had been doing in the past. Those new rules took effect at the end of October 1997.[5]

[9] M Corp., because of those changes, wound down its tax shelter business and laid off several employees by the end of 1997, including PD, the former chief financial officer of M Corp.

[10] At this point in the chronology it is important to be aware of two separate streams of work that the Applicant engaged in. First, in 1998 M Corp. continued to seek advice from the Applicant, though its written engagement agreement ended at the end of 1997. The majority decision of the Supreme Court of Canada adopted the trial judge's finding that:

> In 1998, Mr. Strother's contact with M Corp. was quite limited but, arising out of suggestions he made during 1997 regarding the possibility of exploring *alternative tax-assisted business opportunities*, he was consulted to some extent by Mr. K and Mr. C.
>
> …
>
> During the latter part of 1997, those at M Corp. looked to Mr. Strother for ideas on what, if anything, they could do with M Corp's resources in light of the fact that tax-sheltered financing and their production services investment business was ended. Mr. Strother suggested some *alternative tax-assisted business opportunities* that could be explored. A decision was taken [by Mr. Strother] to defer consideration to the new year and that led to Mr. K, and then later Mr. C, consulting Mr. Strother in 1998.
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> [Emphasis added [by SCC]; paras. 32 and 96.] [6]

[2] Hearing record, Tab 2, pp. 103-104
[3] SCC, para. 2
[4] SCC, para. 6
[5] SCC, para. 8
[6] SCC, para. 40

[11] The Applicant met with M Corp. in 1998 on eight occasions: January 15, 21, 27, May 19, June 26, July 24, and August 4, along with a chance meeting in mid-September. An M Corp. executive testified that, during those meetings, M Corp. discussed with the Applicant what business opportunities might be available to it now that the new tax rules had taken effect.[7] The Applicant discussed a number of different potential businesses with M Corp., including using labour-sponsored venture capital corporations to finance films, income trusts, and sale and leaseback transactions to create a tax shelter business in the UK.[8] Binnie J. also noted that the Applicant "… did not tell M Corp. about the possibility of a revival in the film production services business at any time."[9]

[12] Around the same time, the Applicant was also discussing film finance business opportunities with PD, who had approached the Applicant in late 1997 to explore potential tax-assisted business models. The Applicant testified before the hearing panel that he recalled a meeting with PD in January 1998 where the mechanics of tax credits were discussed.[10] PD was hoping to develop a tax credit business for film finance, as opposed to the pure tax shelter business that M Corp. had been engaged in.[11] The Applicant testified before the hearing panel that a memo that he had prepared for the management of his firm accurately described their discussions as follows:

> During the late fall of 1997, PD and I met several times to discuss the possibility of forming a company to carry out production services … accounting, production coordination and related activities, United States film and television producers in connection with film and television productions in Canada. Revenues would be derived from a negotiated share of the federal and provincial refundable tax credits that would be earned in connection with the Canadian labour expenditure incurred in the making of the film or television productions.[12]

[13] After the "traditional" tax shelter business ended due to the changes in tax law, the Federal government had introduced a refundable tax credit system that was applicable to the film industry. The Applicant testified that PD had come up with an idea where a hybrid between tax shelters and tax credits could be used to do film financing transactions: in the Applicant's words: "credits with a side of shelter."[13]

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[7] SCC, para. 15
[8] Hearing transcript, 26 May 2014, pp. 23-24
[9] SCC, para. 13
[10] Hearing transcript, 26 May 2014, pp. 14-15
[11] SCC, para. 12
[12] Hearing record, Tab 2, pp. 110
[13] Hearing transcript, 26 May 2014, p. 18

The Applicant advised PD that a tax ruling would be required before those transactions could be pursued.[14]

[14] The Applicant and PD also discussed how the application for a tax ruling would be paid for. A written agreement between the Applicant and PD on the Applicant's personal letterhead, dated January 30, 1998, shows the deal they struck. In short, the Applicant agreed to do the work to prepare and submit an application for a tax ruling for a transaction based on PD's proposed structure, and in exchange the Applicant would split the profits from the resulting transaction (after paying Davis' legal fees) as follows: on the first $2,000,000, 45 per cent to PD and 55 per cent to the Applicant, and thereafter 50:50. If they were unsuccessful in getting a ruling, disbursements would be split on the same basis, and no legal fees would be charged. All of this was subject to approval from Davis' management.[15]

[15] The SCC noted that, while "… the trial judge found as a fact that Strother honestly felt throughout 1997 and even after learning of PD's proposal that the TAPSF shelter was dead for good, Strother was obviously persuaded that PD's scheme was worth a try …"[16] apparently due to his willingness to enter into the foregoing compensation structure and do the work of preparing and submitting the proposal.

[16] The Applicant submitted a draft proposal to Revenue Canada (as it was then known) on March 3, 1998. Revenue Canada responded on May 26, 1998 with a request for further information, and the Applicant provided that information on July 21, 1998.[17]

[17] Before Revenue Canada ruled on the proposal, however, the Applicant and Davis became concerned about the possibility of a conflict in their representation of S Corp., the name PD had chosen for the venture that was the subject of the contract between the Applicant and PD, if the Applicant held a financial interest in that company.

[18] In August of 1998, the Applicant wrote a memo to the management committee of Davis describing the S Corp. retainer. Binnie J., writing for the majority of the SCC, described it this way:

> On August 4, 1998, Strother wrote a memorandum to the management committee of Davis about a possible conflict of interest with respect to acting simultaneously for M Corp. and S Corp./PD. He said that S Corp.'s

[14] Hearing transcript, 26 May 2014, p. 19
[15] Record, Tab 9, p. 565
[16] SCC, para. 13
[17] Record, Tab 9, pp. 568 -587

prospects were highly speculative and uncertain. He stated that during *the late fall of 1997* he met with PD several times to discuss the possibility of forming a company to carry out film production services transactions (although in examination for discovery, Strother claimed that the meetings did not occur until 1998). The memo referred, inaccurately[18], to Strother only having "*an option* to acquire up to *50%* of the common shares" of S Corp. [emphasis added]. Strother also described a conversation with an official of the Law Society of British Columbia that resulted in Strother acknowledging that because of his financial interest in S Corp. he was "potentially in technical breach" of Chapter 7 of the Law Society's *Professional Conduct Handbook* which provides:

> 1. Except as otherwise permitted by the *Handbook*, a lawyer shall not perform any legal services for a client in a matter in which:
>
> (a) the lawyer has a direct or indirect financial interest, or
>
> (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest which would reasonably be expected to affect the lawyer's professional judgement.
>
> 2. A lawyer shall not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest which would reasonably be expected to affect the lawyer's professional judgment.

The managing partner of Davis, DB, told Strother that he would not be permitted to own any interest in S Corp. Strother did not provide DB with a copy of the January 30th Agreement.19

[19] In his testimony before the hearing panel, the Applicant indicated he was disappointed with this result but that he accepted it and told PD that he was not permitted by Davis to have an equity interest in S Corp. while he remained a partner there.[20] On August 11, 1998, the managing partner of Davis wrote a memo

[18] It should be noted that, while Binnie J. indicates that the memo was inaccurate in this regard, the contract between the Respondent and PD did provide for 50:50 ownership of the voting rights in S Corp. It was only the first $2,000,000 in profit that was to be split 55:45. Record, Tab 9, p. 565
[19] SCC, para. 17
[20] Record, Tab 2, pp. 123 & 124

to the Applicant indicating that the Applicant had advised him that day that he would not have an ownership interest in S Corp.

[20] In testimony before the hearing panel, the Applicant stated that, on August 11, 1998, he remained unconvinced of S Corp.'s prospects for a positive ruling from Revenue Canada: "… my views had not changed. I had nothing that would indicate to me that my skepticism, my cynicism, my concern about the attainability of the ruling had changed."[21] He also confirmed that, at that point, he had not considered communicating any change in his previous advice to M Corp.[22]

[21] However, as noted by the hearing panel, this testimony has to be viewed in light of the August 4, 1998 memo that indicates that the Applicant was not entirely negative respecting S Corp.'s prospects of success when he communicated with management of Davis. The hearing panel pointed out that, in the August 4 memo, the Applicant stated that he had not discussed the S Corp. retainer with management of Davis earlier because:

(a) … he did not want to raise a controversial topic 'unless and until the venture had some potential for economic gain.' He had always intended to disclose his interest in [S Corp.], 'if and when it became apparent that the transaction had some prospect of success.'

(b) The prospects of [S Corp.] were 'highly speculative and uncertain,' but following Revenue Canada's May 26, 1998 letter '[p]reliminary indications [were] hopeful.'[23]

[22] On October 6, 1998, Revenue Canada issued a favourable advance tax ruling on the S Corp. transaction structure.[24]

[23] In the second half of January 1999, PD and the Applicant again discussed the Applicant joining S Corp. for a 50 per cent interest in the company. On February 18, 1999, the Applicant gave notice to Davis that he would be resigning from the partnership effective March 31, 1999. In February and March 1999, a PD affiliate loaned $785,000 to the Applicant, which was repaid by setoff against future management fees from S Corp. The Applicant joined S Corp. as a 50 per cent equity partner on April 1, 1999.[25]

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[21] Record, Tab 2, p. 126
[22] Record, Tab 2, p. 127
[23] Decision on Facts and Determination, para. 33
[24] Record, Tab 9, p. 602
[25] Record, Tab 2, pp. 138-145

[24] M Corp. remained a client of Davis until it severed the relationship in early 1999.[26]

[25] As indicated above, M Corp. brought a civil claim against the Applicant and Davis for failing to inform it of the business opportunity that was ultimately pursued by S Corp. At trial, Lowry J. dismissed this claim, and Binnie J., writing for the majority of the SCC, described his ruling as follows:

> Lowry J. held that after 1997, Strother was not obliged to provide any advice to M Corp. that was not specifically sought and that he agreed to give. Strother was not, on any account, required to disclose information of a competitive nature pertaining to the basis of the S Corp. advance tax ruling request. Strother was free to be consulted by PD in January 1998, and Davis was free to act for S Corp. thereafter.
>
> Lowry J. observed that solicitors do not generally carry an ongoing obligation to alter advice given under a concluded retainer because of a subsequent change of circumstances provided the advice, when given, was correct.[27]

[26] While Binnie J. did accept the factual findings of Lowry J. that the 1998 retainer was limited to advising on alternative tax-assisted business opportunities, he did not accept Justice Lowry's interpretation of the legal implications of the M Corp. retainer:

> I believe, as did the Court of Appeal, that the trial judge erred in drawing so narrowly the *legal* effect of his *factual* finding that the retainer dealt with tax-assisted business opportunities, alternative or otherwise.
>
> …
>
> M Corp.'s tax business was in a jam. Strother was still its tax lawyer. There was a continuing "relationship of trust and confidence." M Corp. was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell", and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.
>
> In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate U.S. studio

[26] Decision on Facts and Determination, para. 34
[27] SCC, paras. 24-25

> film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled M Corp. to be told that Strother's previous negative advice was now subject to reconsideration.
>
> It is this contractual duty that came into conflict with Strother's personal financial interest when he took a major stake in S Corp. which was, as Newbury J.A. pointed out, a competitor in a small market where experience showed that, even limited, competition could lead to a rapid erosion of market share.[28]

THE PANEL'S DECISION

[27] The citation in this matter set out the Law Society's allegations as follows:

> In or about 1998, you took a personal financial interest in a new client, S Corp., which was a potential commercial competitor of another client, M Corp. … in a business market involving tax shelters related to film production services. You breached your duty of loyalty to M Corp. by failing to do one or more of the following:
>
> (i) to provide material disclosure to M Corp. of your financial interest in a potential commercial competitor;
>
> (ii) to advise M Corp. that your previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered;
>
> (iii) to advise M Corp. of a favourable advance tax ruling.
>
> In so doing, you failed to zealously represent M Corp.'s interest, withheld proper, timely and candid legal advice, failed to provide even-handed representation, and/or preferred your personal interest in the success of S Corp. over the interests of M Corp.

[28] Throughout, the Applicant has challenged the citation by stating that at a key moment in time, namely October 6, 1998 when the tax ruling was made, he had no financial interest in S Corp.

[29] The hearing panel described the Applicant's position with respect to the facts at issue as follows:

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[28] SCC, paras. 41-44

Mr. Strother says that he did not have a financial interest in S Corp. except that:

1. He may have had a contingent financial interest in S Corp., but only until August, 1998 when he was advised not to have any interest in S Corp.

2. He did not have any financial interest in S Corp. between August 11, 1998 and the end of February, 1999.

3. By the end of February, 1999, M Corp. was no longer a client of Davis & Co. and no duty was owed when Mr. Strother left Davis & Co. and joined S Corp.[29]

[30] The hearing panel did not accept that position and found that, at all relevant times, the Applicant had a financial interest in S Corp.:

> Mr. Strother argues that he did not have any interest in S Corp. after August 11, 1998 when he was instructed by the managing partner to have no kind of ownership interest. However, the fact is that Mr. Strother always had the ability to leave Davis & Co. and join S Corp. if the new venture was successful. Of course, that is exactly what he did in 1999. The significant loans from S Corp. to Mr. Strother (later converted to management fees) while he was still at Davis & Co. indicate that he continued to have a potential interest in S Corp., even though he was not a shareholder at any point until April, 1999.
>
> We find as fact that Mr. Strother always had a financial interest in S Corp.'s success. If the company was successful, he could leave the practice of law and join S Corp. This aspect was described by Binnie J at para. 67:
>
> > Strother had *at least* an "option" interest in S Corp. from January 30th until at least August 1998 (when he was told by Davis to give up *any* interest). This was during a critical period when M Corp. was looking to Strother for advice about what tax-assisted business opportunities were open. The precise nature of Strother's continuing financial interest in S Corp. between August 1998 and March 31, 1999 (when Strother left Davis) is unclear, but whatever it was it came to highly profitable fruition in the months that

[29] Decision on Facts and Determination, para. 46

> followed. The difficulty is not that S Corp. and M Corp. were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success. By acquiring a substantial and direct financial interest in one client (S Corp.) seeking to enter a very restricted market related to film production services in which another client (M Corp.) previously had a major presence, Strother put his personal financial interest into conflict with his duty to M Corp.
>
> [emphasis in original]

We find that Mr. Strother took a contingent financial interest in the financial success of S Corp. as of January 30, 1998 and kept that interest during the entire period from January 30, 1998 until he left Davis & Co. as of March 31, 1999.[30]

[31] Further, the hearing panel cited with approval Binnie J.'s findings at para. 69-70 of the SCC majority decision:

> … It is therefore my view that Strother's failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in S Corp. breached his duty of loyalty to M Corp. The duty was further breached when he did not advise M Corp. of the successful tax ruling when it became public on October 6, 1998.
>
> … The unfortunate inference is that Strother did not tell M Corp. because he did not think it was in his personal financial interest to do so.[31]

[32] The hearing panel summarized its findings in its decision as follows:

> In accepting the retainer, the Respondent placed himself in a fiduciary relationship with M Corp, and obliged himself to provide to M Corp:
>
> (a) undivided loyalty;
>
> (b) full disclosure of any circumstances relevant to his ongoing representation of M Corp.; and
>
> (c) candid advice.

[30] Decision on Facts and Determination, paras. 37-39
[31] Decision on Facts and Determination, para. 40

It is clear that the Respondent had a duty of loyalty to M. Corp., and he breached that duty by failing to:

(a) provide material disclosure to M Corp. of his financial interest in a potential commercial competitor;

(b) advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered; and

(c) advise M Corp. of a favourable tax ruling.

M Corp. was a significant client of the Respondent. His professional, fiduciary, relationship with M Corp. spanned approximately six years. As stated previously, M Corp. relied heavily on the Respondent.

The Respondent's failure to provide material disclosure to M Corp. of his financial interest in a potential competitor deprived M Corp. of any opportunity to consider whether it wanted to continue to retain and rely on the Respondent despite that financial interest, or whether it wanted to retain a new solicitor. As stated, the Respondent breached his duty to M Corp. in favour of his own financial interest. The Respondent's failure to provide that disclosure to M Corp. persisted for approximately one year.

In the circumstances of:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s level of reliance on the Respondent;

(c) M Corp.'s loss of an opportunity to make a properly informed decision as to whether or not it wished to continue to rely on the Respondent;

(d) the Respondent's favouring his own financial interest over his duty to M Corp.; and

(e) the length of time during which the Respondent failed to make appropriate disclosure to M Corp.,

the Respondent's failure to provide material disclosure to M Corp. of his interest in a potential competitor, as set out in allegation 2(i) of the citation, constitutes professional misconduct.

The Respondent's failure to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* negatively impacted M Corp.'s opportunity to consider re-entering into the tax-assisted film production business in a timely way. The prospects of the venture in which the Respondent was involved initially appeared to have a small chance of success. However, over time, the venture's prospects improved, and eventually its success was certain. It is reasonable to infer that the Respondent, but for his interest in S Corp., would have advised M Corp. that his earlier opinion needed to be reconsidered. The Respondent's failure to advise M Corp. to revisit his earlier advice took place over a period of time, when:

(a) M Corp. had an ongoing retainer agreement with the Respondent, and continued to look to him for advice on tax-assisted business opportunities; and

(b) the Respondent had a direct financial interest in keeping M Corp. out of the tax-assisted film production business.

In the circumstances, including:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s ongoing retainer of the Respondent for advice on matters related to the opinion he should have advised M Corp. to reconsider;

(c) the impact of the Respondent's conduct on M Corp.'s opportunity to re-enter the tax-assisted film production business in a timely way;

(d) the significant period of time during which the Respondent knew or ought to have known his previous opinion needed to be reconsidered; and

(e) the Respondent's favouring his own financial interest in keeping M Corp. out of the tax-assisted films production business,

the Respondent's failure to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered, as set out in allegation 2(ii) of the citation, constitutes professional misconduct.

The Respondent's failure to advise M Corp. of the favourable tax ruling negatively impacted M Corp.'s opportunity to re-enter the tax-assisted film production business. On the evidence, a competitor of S Corp. heard of the Advance Tax Ruling within two days of its being released, and within approximately four to five months had obtained its own ruling and began marketing its syndication. As stated previously, it was in the Respondent's financial interest to keep knowledge of the favourable tax ruling from M Corp., in direct conflict with his retainer to provide tax advice to M Corp.

In the circumstances, including:

(a) the Respondent's relationship with M Corp.;

(b) M Corp.'s ongoing retainer of the Respondent;

(c) the impact of the Respondent's conduct on M Corp.'s opportunity to re-enter the tax-assisted film production business; and

(d) the Respondent's favouring his own financial interest in keeping M Corp. out of the tax-assisted film production business,

the Respondent's failure to advise M Corp. of the favourable tax ruling, as set out in allegation 2(iii) of the citation, constitutes professional misconduct.[32]

ISSUES

[33] The Review Board considered the following issues:

(a) whether the hearing panel erred by finding that the Applicant's failure:

(i) to provide material disclosure to M Corp. of his financial interest in a potential commercial competitor;

(ii) to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered; and

(iii) to advise M Corp. of a favourable advance tax ruling

[32] Decision on Facts and Determination, paras. 96-104

each constituted professional misconduct,

(b) whether the hearing panel's imposition of a five-month suspension was appropriate in the circumstances; and

(c) whether the hearing panel's award of costs at Scale B was appropriate in the circumstances.

STANDARD OF REVIEW

[34] The question of the appropriate standard of review to be applied by a review board in a s. 47 proceeding has been the subject of much discussion in recent Law Society decisions. Recently, the BC Court of Appeal released two decisions that have clarified the internal standard of review to be applied by a review board in a s. 47 proceeding: *Vlug v. Law Society of BC*, 2017 BCCA 172 and *Harding v. Law Society of BC*, 2017 BCCA 171.

[35] In *Harding*, the Court of Appeal concluded that it was reasonable for s. 47 review boards to use that same standard of review articulated in *Law Society of BC v. Hordal*, 2004 LSBC 36 and *Law Society of BC v. Berge*, 2007 LSBC 7 ("*Hordal/Berge*"):

> [6] … These decisions establish that the standard is correctness, except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact.
>
> [7] In *Hordal*, the review board described the standard of review as follows:
>
> > [9] In *Hops*, while considering the appropriate scope of review for "findings of proper standards of professional and ethical conduct", the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971) 10 DLR (3d) 446, at 452:
> >
> > > The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the

> Benchers conclude that the conduct in question is "contrary to the best interests of the public or of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province.

[10] It follows from that observation that the Benchers must determine whether the decision of the Hearing Panel was "correct", and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47(5) of the *Legal Profession Act*.

[11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[8] In *Berge*, the review board described the standard of review in this way:

> [19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin*, [2000] LSDD No. 12.
>
> [20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:
>
> (i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or
>
> (ii) whether the penalty imposed was appropriate.
>
> [21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are

> concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops*, [1999] LSBC 29 and *Law Society of BC v. Dobbin* (*supra*).

[36] In *Vlug*, the Court of Appeal stated at para. 2 that:

> … the standard of review articulated in the *Hordal/Berge* line of cases is the internal standard developed by review boards for s. 47 reviews and is reasonable. The *Hordal/Berge* review board decisions establish that *the internal standard is correctness, except where the hearing panel has heard viva voce evidence and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact*.
>
> [emphasis added]

[37] In deciding this matter, we have followed the approach in the *Hordal/Berge* line of cases and have, when reviewing the decision of the hearing panel in this matter as a whole, considered whether the decision is correct. Where the hearing panel had the benefit of hearing *viva voce* testimony, we have shown deference to the hearing panel subject to making a determination as to whether a clear and palpable error was made.

ANALYSIS

[38] We will examine each of the hearing panel's three findings of professional misconduct in turn. To do so, we will consider whether the hearing panel was correct in finding, in each of the three cases enumerated above, that, first, the Applicant breached his ethical or fiduciary duties and, second, that those breaches represented a marked departure from the conduct expected of lawyers.

Failure to disclose financial interest

[39] The hearing panel found that the Applicant took a contingent financial interest in the financial success of S Corp. as of January 30, 1998 when the Applicant entered into his personal contract with PD. Further, the hearing panel found that he kept that interest during the entire period from January 30, 1998 until he left Davis & Co. as of March 31, 1999.

[40] The Applicant argues that the panel made specific errors with respect to the facts relevant to finding that the Applicant had failed to disclose his financial interest in

a potential competitor, namely that, as of August 11, 1998, the Applicant argues that, to the extent he had a financial interest then, he ceased to have any financial interest in S Corp. on that date and did not have one again until February of 1999 when he gave notice that he was leaving Davis to join S Corp.

[41] The standard of review for findings of fact is deference to the hearing panel's determinations unless there has been a clear and palpable error. [33]

[42] The Applicant submits that the finding of the hearing panel was unreasonable because it found, despite the Applicant's evidence to the contrary, that the Applicant had a financial interest in S Corp. at all relevant times.

[43] The Applicant gave evidence that he was skeptical that there was any value in the S Corp. model until October 6, 1997 when the tax ruling came back positive. As such, the Applicant's position appears to be that he had no financial interest from January 30, 1997 through August 11, 1997, because there was either no or a highly speculative financial value to the model at that point. He further argues that his evidence shows that, after that time and until at least February 1999, he did not regain a financial interest in S Corp. until he announced his departure from Davis and that he was joining S Corp. He further testified that once he did have a financial interest he resigned from practice.

[44] The Applicant's testimony in this regard is at odds with the majority decision of the SCC. Binnie J. was clear that they found the Applicant had *at least* an "option" interest in S Corp. from January 30th until at least August 1998, and some sort of interest, though its nature was unclear, between August 1998 and March 31, 1999.[34]

[45] The hearing panel's findings concurred with the majority of the SCC on this point. Further at odds with his testimony is the position of the Applicant on the majority decision of the SCC. The Applicant's submissions before this Review Board stated that the Applicant did not challenge or contest the majority's finding in any way before the hearing panel.[35]

[46] Further, the Applicant's August 4, 1998 memo is not consistent with the Applicant's testimony. It is implicit in the statements in the memo that the Applicant became hopeful as to the success of PD's proposed transaction structure on May 26, 1998, when the initial response from Revenue Canada was not negative.

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[33] *Berge*, para. 21
[34] SCC, para. 67
[35] Respondent's submissions, para. 23

[47] We find that the evidence is consistent with the hearing panel's finding that the Applicant had a financial interest in S Corp. from January 30, 1998 until at least August 11, 1998. Therefore, we defer to the hearing panel's finding of fact, and we see no clear and palpable error in that finding.

[48] While the SCC went on to find that the Applicant also had an unspecified interest from August 11, 1998 to March 31, 1999, and the hearing panel concurred in that, we do not believe it is necessary to consider that period to find that the Applicant had a financial interest in a competitor of M Corp. and failed to make material disclosure of that fact. That failure to disclose at least occurred between January 30 and August 11, 1997, a period in which the evidence indicates that the Applicant met with M Corp. seven times. The evidence shows that the Applicant did not take the opportunity presented by any of those meetings to disclose his financial interest.

[49] The majority of the SCC summarized the issue as follows:

> The difficulty is not that S Corp. and M Corp. were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success. By acquiring a substantial and direct financial interest in one client (S Corp.) seeking to enter a very restricted market related to film production services in which another client (M Corp.) previously had a major presence, Strother put his personal financial interest in conflict with his duty to M Corp. The conflict compromised Strother's duty to "zealously" represent M Corp.'s interest ([*R. v.*] *Neil*, [2002 SCC 70] at para. 19), a delinquency compounded by his lack of "candour" with M Corp. "on matters relevant to the retainer" (*ibid.*), i.e. his own competing financial interest. [36]

[50] The hearing panel considered this same issue. They cited the Canons of Legal Ethics, which described, both in 1998 and today, a lawyer's duty of candour as follows:

> A lawyer should disclose to the client all circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, which might influence whether the client selects or continues to retain the lawyer.

[51] The hearing panel also cited Chapter 3, Rule 3 of the *Professional Conduct Handbook* in effect in 1998, which adds further elements to the duty of candour by stating that a lawyer has a duty to serve clients conscientiously and diligently, and a

[36] SCC, para. 67

lawyer's compliance with that duty could be measured by the extent that the lawyer keeps the client "reasonably informed" about a matter and he or she "discloses all relevant information to the client, and candidly advises the client about the position of a matter."[37]

[52] The hearing panel then considered cases where a lawyer had a financial interest relevant to their representation of a client that went undisclosed (see *Nocton v. Lord Ashburton*, [1914] AC 932 (HL); *Moody v. Cox and Hatt*, [1917] 2 Ch 71 (CA); *McGrath v. Goldman*, [1976] 1 WWR 743 (BCSC); *Jacks v. Davis*, [1980] 6 WWR 11 (BCSC); *Davey v. Woolley* (1982), 35 OR (2d) 599 (CA); *Szarfer v. Chodos* (1986), 54 OR (2d) 663, 27 DLR (4th) 388, (CA); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534; *Ramrakha v. Zinner*, 1994 ABCA 341, 157 AR 279; *Moffat et al. v. Wetstein et al.* (1996), 29 OR (3d) 371 (Ont. Ct. GD).

[53] The hearing panel found that the cases demonstrate:

> … at least two principles relevant to the matter before us. First, a lawyer's fiduciary obligations require that there be full disclosure of relevant information to a client no matter when that information arises. Secondly, those obligations require that a lawyer must not put him or herself in conflict with a client. The *Legal Profession Act* and the cases require that the public interest in the administration of justice be upheld by ensuring that lawyers act with integrity.

[54] We agree with the hearing panel that the Applicant had a financial interest relevant to his retainer by M Corp. that was not disclosed to M Corp., and find that the hearing panel was correct in determining the Applicant breached his fiduciary duty to M Corp. with that non-disclosure.

[55] If it were necessary for us to also consider the period between August 11 and March 31, 1998, we observe that the hearing panel adopted the SCC's finding of fact that a financial interest existed during that period and at no point did the Respondent disclose that to M Corp. Given that the Applicant has stated that he did not contest the majority's findings in any way, we believe it is appropriate to defer to the hearing panel's finding of fact here because no clear and palpable error has been shown.

[37] Decision on Facts and Determination, Record, para. 54

Failure to advise that previous opinion should be reconsidered

[56] The hearing panel found that the Applicant breached his ethical duties when he failed to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered.

[57] The Applicant argued that the hearing panel failed to consider that his duty of confidentiality to S Corp. precluded him from making such disclosure to M Corp., and that the cases cited above for the proposition that a lawyer must disclose all relevant information to a client are all distinguishable from the current matter on that basis. He argues that in none of the cases considered by the hearing panel did the lawyer in question have to reconcile his or her duty to disclose relevant information to the client with his or her duty to keep confidential information provided by another client.

[58] We do not believe that the conflict between the duty of candour to M Corp. and the duty of confidentiality to S Corp. in this matter distinguishes this case from the cases cited. The majority of the SCC considered the issue of whether the duty of confidentiality somehow precluded the Applicant from making any disclosure to M Corp. and stated:

> ... [S]ubject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate U.S. studio film production expenses to Canadian investors on a tax efficient basis, the 1998 retainer entitled M Corp. to be told that Strother's previous negative advice was now subject to reconsideration.[38]

[59] Binnie J., writing for the majority, went on:

> Of course, it was not open to Strother to share with M Corp. any *confidential* information received from PD. He could nevertheless have advised M Corp. that his earlier view was too emphatic, that there may yet be life in a modified form of syndicating film production services expenses for tax benefits, but that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to M Corp., he could not advise further except to suggest that M Corp. consult another law firm.[39]
>
> [emphasis in original]

[38] SCC, para. 43
[39] SCC, para. 47

[60] The Applicant's approach to dealing with M Corp. was to answer only the questions asked and to plan carefully worded responses to those questions.[40] Binnie J. stated that that approach was not sufficient to discharge the Applicant's duties:

> Strother could have managed the relationship with the two clients as other specialist practitioners do, by being candid with their legal advice while protecting from disclosure the confidential details of the other client's business. If the two are so inextricably bound together that legal advice is impossible, then of course the duty to respect confidentiality prevails, but there is nothing here to justify Strother's artful silence.[41]

[61] The Applicant had the ability to give partial disclosure to M Corp. that did not violate his duty of confidentiality to S Corp. The evidence before the hearing panel is that he did not make that partial disclosure, and we see no clear and palpable error in that finding of fact. Therefore, we find that the cases cited by the hearing panel were not distinguishable as the Applicant argues because the Applicant's duty of confidentiality would not have been violated if he had taken the course of providing partial disclosure. He did not do so. The hearing panel was correct in finding that the Applicant breached his duty of candour to his client by not advising that the opinion he had previously given should be reconsidered.

[62] When that breach occurred may be a matter of debate. The Applicant's position was that, until Revenue Canada's advance tax ruling of October 6, 1998, there was no basis on which to suggest that his advice be reconsidered. We find that the evidence indicates that, as early as May 26, 1998, the Applicant had begun to be hopeful that there was room for "credits with a side of shelter" under the new tax regime. In any event, as indicated by the majority of the SCC, M Corp. did not learn of Revenue Canada's October 6, 1998 tax ruling until February or March of 1999.[42] Regardless of when it occurred, however, the evidence is unequivocal that at no point did the Applicant disclose to M Corp. that his advice ought to be revisited. Therefore, we find that the hearing panel was correct in coming to the conclusion that the Applicant breached his duty of candour.

[63] The Applicant also argued that the hearing panel erred by interpreting the scope of the M Corp. retainer that was in operation in 1998 too broadly and more broadly than the majority of the SCC. He argues that the trial judge's narrow interpretation of the legal effect of the 1998 retainer to only apply to alternate tax shelter

[40] SCC, para. 46
[41] SCC, para. 65
[42] SCC, para. 90

opportunities is to be preferred, as opposed to interpreting the retainer more broadly to capture the category of tax-assisted business opportunities as the hearing panel did. We do not believe the narrow interpretation is correct. Binnie J., writing for the majority described the 1998 retainer as follows:

> Where a retainer has not been reduced to writing (as was the case with the 1998 retainer here) and no exclusions are agreed upon, as here, the scope of the retainer may be unclear. The court should not in such a case strain to resolve the ambiguities in favour of the lawyer over the client. *The subject matter of the retainer here was, as it had been for years, "tax-assisted business opportunities"*. It was not to sell an office building, draft an informatics contract or perform other legal services unrelated to the subject matter of the earlier advice. The trial judge exonerated Strother by placing the emphasis on M Corp.'s interest in "alternative" tax opportunities, but of course M Corp. only considered "alternative" tax opportunities because Strother had given categorical advice that the tax-assisted film production services business in which Strother had profitably been advising M Corp. since 1993 was unequivocally dead.[43]
>
> [emphasis added]

[64] The majority of the SCC found that the trial judge interpreted the legal effect of the 1998 retainer too narrowly, and yet it is that narrow interpretation that the Applicant argues the hearing panel erred by not accepting. The hearing panel, after an extensive review of the facts of this matter, adopted the findings of the majority of the SCC without variation[44] and in its decision relied on the same interpretation of the legal effect of the 1998 retainer as the majority of the SCC did.[45] We find that the hearing panel was correct in doing so.

Failure to advise M Corp. of a favourable advance tax ruling

[65] The hearing panel found that the Applicant breached his duty of loyalty to M Corp. when he failed to advise it of the favourable advance tax ruling obtained by S Corp.

[66] The Applicant argued that this finding was incorrect because it was based on a finding that the advance tax ruling became public shortly after it was issued. Instead, the Applicant argues, the ruling did not become public until later in 1999, after the Applicant had ceased to act for M Corp.

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[43] SCC, para. 40
[44] Decision on Facts and Determination, para. 26
[45] See Decision on Facts and Determination, paras. 71, 77 , 81 and 87

[67] The hearing panel found:

> Allegation 2(iii) asserts that the Respondent breached his duty of loyalty by failing to advise M Corp. of the favourable Advance Tax Ruling. The Respondent argues that the Ruling was not publicly known until later in 1999. As we have found, while a redacted version of the Ruling was not immediately available, the Ruling became, in effect, public knowledge shortly after the Ruling was issued. Given the Respondent's financial interest in the very attractive retainer that S Corp. entered into with him, it was not in the Respondent's interest to so advise M Corp. As a result he failed in his duty of loyalty, which obligated him to provide advice with respect to tax-assisted business opportunities. It was in his financial interest not to advise M Corp. of this possible tax-assisted business opportunity when the ruling in effect became public knowledge, as we have previously described.[46]

[68] With respect to its finding that the ruling had become public knowledge, the hearing panel stated:

> However, information about the Ruling did become available to the public. The companies that had been competitors to M Corp. learned of the S Corp. transactions through the film industry grapevine. As noted by Lowry J. (at para. 143):
>
> > … nothing about the fundamentals of any structure could be kept confidential once it became the subject of an advance tax ruling and formed the basis of marketing a tax shelter investment through a public offering. …

[69] This reference was clarified in the Court of Appeal Reasons for Judgment:

> In the marketplace, word had begun to spread in the summer of 1998 that, to quote from the testimony of Mr. B, A Corp.'s tax lawyer, "Mr. Strother was working on some kind of deal relating to production services". A Corp. heard about the ruling two days after it was issued, and within seven weeks, had prepared its own ruling application. It received a ruling in February 1999 and began marketing its syndications the next day.[47]

[70] The majority decision of the SCC is not helpful here. The Law Society and the Applicant agree that Binnie J. was mistakenly under the impression that the "…

[46] Decision on Facts and Determination, para. 87
[47] Decision on Facts and Determination, para. 38

advance tax ruling became public shortly after it was issued on October 6, 1998."[48] That is not correct. The ruling itself contemplates that it will only be made available to potential investors for review upon signing a confidentiality agreement, and the evidence indicates that it was only disclosed to a narrow group of potential investors.[49]

[71] The Applicant argued that the hearing panel erred by determining that the Applicant's duty of confidentiality ended when information respecting the advance tax ruling became known to industry participants through the "grapevine".

[72] We agree that the duty of confidentiality is not removed unless and until the subject information is in the public domain. Here, the hearing panel cited the following evidence as proof that the advance tax ruling had entered the public domain: (i) in the summer of 1998 other tax advisors heard rumours that the Applicant was working on a new deal related to production services; (ii) competitors heard of the ruling shortly after it was released because the people to whom S Corp. marketed their transaction informed S Corp.'s competitors; and (iii) the transaction was marketed to potential investors through "a public offering".

[73] We find that it was a clear and palpable error to find that the content of or the existence of the advance tax ruling was in the public domain on the basis of those findings. The rumours in the summer of 1998 preceded the date that the ruling was issued and therefore cannot be evidence that the ruling itself was in the public domain.

[74] The evidence shows that one or more competitors of S Corp. had heard of the ruling due to disclosure from potential parties to the S Corp. transaction who had been informed of the ruling. The argument is made that, because the universe of interested parties in the tax-assisted film financing community is small, that limited disclosure nonetheless put the advance tax ruling into the public domain. However, such disclosure was not, in our view, sufficient to remove the character of confidentiality from information a lawyer receives from his or her client. We do not make any finding as to what amount of disclosure is sufficient to remove the confidentiality of information received from a client, but it is more than the disclosure that occurred here.

[75] Finally, Lowry J. found that nothing could be kept confidential once a transaction was marketed in a public offering. While we accept that ruling, we note that here, the S Corp. offering memoranda were not part of a public offering. The terms of

[48] SCC, para. 93
[49] Record, Tab 9, p. 607

the offering memoranda dated February 15, 1999 and April 1, 1999 state clearly that the offering is only made to select investors who meet certain criteria and are required to keep the terms and content of the offering memoranda confidential. We also note that those offering memoranda are dated contemporaneously with the time that the Applicant resigned from his partnership and ceased to advise M Corp.

[76] For those reasons, we find that it was not correct for the hearing panel to find that the contents or existence of the advance tax ruling were required to be specifically disclosed to M Corp.

[77] However, that does not mean that the Applicant did not breach its duties to M Corp. in this context. On October 6, 1998, the Applicant became aware of the content of the advance tax ruling and knew that, at that point, what he had once been hopeful would occur was now a reality. S Corp. had a tax-assisted business opportunity available to it of the kind that the Applicant had been advising his current client, M Corp., was not available. By not telling M Corp. that his previously unequivocal advice should be revisited, he breached his duty of candour to M Corp.

[78] We do, however, observe that this breach forms a part of the breach described in paragraph (ii) of the citation and do not find that it constitutes an independent or unrelated breach of the Applicant's professional ethics.

[79] We also wish to be clear that the hearing panel's decision should not be read to imply that a lawyer must breach his or her duty of confidentiality to one current client in order to fulfill his or her duty of candour to another current client. A lawyer who is in the position of having two conflicting duties to two separate clients is not entitled to avoid her or his obligations. The lawyer must still seek to discharge both duties. If they cannot, it is their own fault for putting themselves in that position. Here, as the majority of the SCC stated, the Applicant had the option of discharging its duty of candour to M Corp. by informing M Corp. that the previous advice that had been given must be revisited.[50] The Applicant failed to do so.

[80] The Court of Appeal cited the following passage from *Moody* which illuminates this point:

> A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to

[50] SCC, para. 43

> his beneficiaries on the other; but *if he chooses to put himself in that position it does not lie in his mouth to say to the client "I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side*." The answer is that if a solicitor involves himself in that dilemma it is his own fault. *He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say — which would be much better — "I cannot accept this business.*" I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform. [at 81; emphasis added by BCCA.][51]

Professional misconduct

[81] We have upheld the hearing panel's findings that the Applicant breached his duties to a current client through failing to disclose a financial interest relevant to the matter that was the subject of the retainer and failing to advise that a previous opinion that is the subject of an ongoing retainer should be reconsidered.

[82] We have not upheld the hearing panel's finding that the existence of an advance tax ruling was required to be specifically disclosed to M Corp., but find that failing to do so forms part of the failure to inform the client that previous advice that is the subject of an ongoing retainer should be reconsidered.

[83] It now falls to us to consider whether the hearing panel was correct in finding that these breaches rose to the level of professional misconduct.

[84] The test for determining whether professional misconduct has occurred is laid out in *Law Society of BC v. Martin,* 2005 LSBC 16 at para. 171 as follows:

> The test that this Panel finds appropriate 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.

[85] As for the manner in which to apply this test, the hearing panel cited with approval the following passage from *Law Society of BC v. Lyons,* 2008 LSBC 09 at para. 35:

[51] BCCA, para. 25

> 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.

[86] Applying *Martin* and *Lyons*, the hearing panel found that the Applicant's conduct did amount to professional misconduct.

[87] The Applicant did not argue with the hearing panel's description of the appropriate test or the hearing panel's application of the *Lyons* factors. Rather, the Applicant argued that: (i) the hearing panel erred by making determinations that exceeded those found by the majority of the SCC; (ii) it could not be a marked departure from expected behaviour for the Applicant to fail to comply with what constitutes new law; and (iii) it could not be a marked departure for the Applicant to engage in behaviour that five judges found was not in breach of his duties to M Corp. under the 1998 retainer. We address each of these arguments below.

[88] First, the Applicant argues that the hearing panel erred because it found that the Applicant had a duty to disclose his financial interest, which the Applicant says goes far beyond what the majority of the SCC held was the Applicant's duty.

[89] We cannot agree with that submission. Binnie J. stated at para. 55 that the lack of disclosure of the Applicant's financial interest led directly to the impairment of the Applicant's ability to provide even-handed representation to M Corp.:

> Whether or not a real risk of impairment exists will be a question of fact. In my judgment, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother's personal *undisclosed* financial interest.
>
> [emphasis added]

[90] Further, Binnie J. found that the Applicant's failure to disclose his financial interest was a failure to disclose a matter relevant to his retainer with M Corp. and wrote at para. 67:

> Strother put his personal financial interest into conflict with his duty to M Corp. The conflict compromised Strother's duty to "zealously" represent M Corp.'s interest (*Neil*, at para. 19), a delinquency compounded by *his lack of "candour" with M Corp.* "on matters relevant to the retainer" (ibid.), i.e. *his own competing financial interest.*

> [emphasis added]

[91] As these passages show, the hearing panel's findings were entirely consistent with Binnie J.'s reasons.

[92] Second, the Applicant argued that the majority decision represented a change in the law, and therefore the Applicant could not be found to have engaged in professional misconduct by breaching a rule that was newly formulated. In his submissions, the Applicant described the alleged change as follows:

> Prior to the Majority's decision, a lawyer in the situation of Mr. Strother had no obligation to advise a client, *whose retainer for certain services had terminated*, that his previous advise [sic], correct at the time it was given during the course of the retainer, was possibly no longer correct.
>
> [emphasis added]

[93] Again, we cannot accept this argument. As the hearing panel noted, M Corp.'s retainer with Davis and the Applicant had not ended. It is true that it was no longer subject to a written retainer agreement, as of the end of 1997, but that does not mean that the retainer ended and the 1998 advice was to be treated as if given to an entirely different client. On the contrary, as pointed out by Binnie J. for the majority at para. 46:

> The issue here was not so much a duty to alter a past opinion, as it was part of Strother's duty to provide candid advice on all matters relevant to the *1998* retainer: *Neil*, at para. 19. It appears that Lowry J. turned his mind to this exception to the general rule [that an opinion does not need to be revisited] when he stated that a lawyer is not obligated to "alter advice given under a *concluded* retainer" (para. 121 (emphasis added)). Here M Corp.'s retainer of Davis was *not* a concluded retainer. The written 1997 retainer had come to an end but the solicitor-client relationship based on a continuing (if more limited) retainer carried on into 1998 and 1999.
>
> [emphasis in original]

[94] The hearing panel considered this issue as well and concluded, as discussed above, that the cases demonstrate that a lawyer has a duty, during a retainer, to provide all relevant information to a client. It is clear from the evidence that the Applicant's retainer with M Corp. was not concluded. He met with representatives of M Corp. numerous times during 1998, but at no point did he disclose information that was relevant to that ongoing retainer, namely that, after the May 26 correspondence

with Revenue Canada and as reflected in his memo to Davis' management of August 4, 2008, his outlook on the prospects for successfully developing a tax-assisted business related to film financing had moved from purely negative to hopeful. This matter is not analogous to a situation where a lawyer provides a discrete legal opinion and then has no further engagement with the client on the topic. Here, M Corp. was still engaged in discussions with the Applicant on the same topic. We find that the hearing panel was correct in determining not only that this breach occurred, but that it was not a breach of "new law".

[95] Finally, the Applicant argued that his behaviour could not represent a marked departure from the standards the Law Society expects to be upheld by lawyers because five judges, namely the trial judge and the minority of the SCC, determined that he had not breached a duty to provide ongoing legal advice to M Corp. The Applicant argues that it would be disrespectful to those judges to conclude that behaviour they found not to be in breach of a duty to provide all relevant information with respect to ongoing legal advice to constitute professional misconduct.

[96] The hearing panel addressed this argument in its decision on disciplinary action as follows at para. 12:

> We do agree that the trial judge, Mr. Justice Lowry, as he then was, concluded that the retainer did not involve the provision of ongoing advice with respect to tax assisted business opportunities. See paragraphs 102, 106 to 108 and 117 of the reasons for judgment in *3464920 Canada Inc. v. Strother*, 2002 BCSC 1179, [2002] BCJ No. 1982. However, in our view the dissent in *Strother v. 346920 Canada Inc.*, 2007 SCC 24, [2007] 2 SCR 177, does not reach the same conclusion. Instead it concludes that the findings of fact by the trial judge with respect to the scope of the retainer should not be interfered with. See paragraphs 119 and 134 of the dissent in particular. It is clear from reading those paragraphs that the minority was not prepared to interfere with the findings of fact of the trial judge. There was no analysis of the scope of the retainer, let alone an independent finding, that the retainer did not involve an ongoing obligation to M Corp. to provide advice with respect to tax assisted business opportunities. The conclusion we reached on the evidence before us was that the retainer did involve that ongoing obligation.

[97] We agree with the hearing panel that it is not proper to characterize the minority decision of the SCC as an independent determination of the scope of the 1998 retainer. Rather, the minority determined that interference with the trial judge's

decision was not warranted because the "… nature and scope of a lawyer's retainer is 'purely a factual question on which the findings of the trial judge should not ordinarily be upset on appeal…'."[52] Consequently, we do not concur with the Applicant's submission that a finding of professional misconduct would be somehow disrespectful to the minority of the SCC. Further, where, as here, the trial judge's determination as to whether a breach of a duty to a client has occurred is overturned by both the Court of Appeal and the majority of the SCC, we do not believe that the hearing panel should be constrained in its ability to reach a conclusion that is not the same as the trial decision.

[98] Having considered each of the Applicant's arguments with respect to the hearing panel's determination that the Applicant's behaviour represented a marked departure from the behaviour that the Law Society expects of lawyers, we find them to be without merit. Therefore, we see no reason to interfere with the hearing panel's application of *Martin* and *Lyons* and the hearing panel's finding that the Applicant's conduct did amount to professional misconduct.

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

[99] The Applicant has argued that the hearing panel erred both in determining whether discipline is warranted and in the magnitude of the discipline imposed. The standard of review applicable to discipline decisions is the subject of some debate in recent cases. In *Law Society of BC v. Nguyen*, 2016 LSBC 21, the review board summarized the review standard as follows at paras. 32-33:

> In ascertaining whether the panel has imposed an inappropriate disciplinary action, the standard of review has been variously described as correctness, correctness informed by reasonableness or correctness as reasonableness. The basic concept is said to be that most cases will give rise to a reasonable range of outcomes. Subject to the panel correctly applying the legal principles, if the disciplinary action imposed by the hearing panel is within the reasonable range, it should not be disturbed on review, even if the review board might prefer a different spot on the range. See *Law Society of BC v. Hordal*, 2004 LSBC 36, paras. 9, 18-20; *Law Society of BC v. Goldberg*, 2007 LSBC 55, paras. 8, 37; *Law Society of BC v. Chiang*, 2014 LSBC 55, para. 28; *Law Society of BC v. Foo*, 2015 LSBC 34, paras. 9-12; *Law Society of BC v. Vlug*, 2016 LSBC 58, paras. 13-14.

[52] SCC, para. 134.

[100] In *Vlug*, the Court of Appeal endorsed the articulation of the standard of review found in *Hordal* at para. 18:

> In considering questions regarding the correctness of the magnitude of a fine, or the duration of a suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a "range" of penalties that have been applied in similar situations in the past. This examination is often referred to as a "reasonableness" test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be "reasonable" or within the range of appropriate penalties for similar delicts. In other words, the "correctness" test is informed by the "reasonableness" test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension in those circumstances

[101] The Applicant made four arguments with respect to the discipline decision.

[102] First, the Applicant argued that, since the penalty decision was based solely on the findings of professional misconduct, and the Applicant argued that none of the findings of professional misconduct had been made out, therefore the penalty should be set aside.

[103] Since we have found that two of the three findings of professional misconduct should be upheld, this argument fails as its premise has not been met. We also find that, while one of the findings of professional misconduct was not made out, its absence does not affect our assessment of the discipline the hearing panel imposed. The failure to disclose the advance tax ruling was not specifically relied upon by the hearing panel in making its decision on discipline and therefore we do not believe that it not being made out affects our assessment of the hearing panel's disposition of this matter.

[104] Second, the Applicant argues that the hearing panel drew an adverse inference against the Applicant due to his inability to say when his obligation arose to make the disclosures the majority of the SCC found he failed to make. The Applicant argues that drawing an adverse inference in this manner is unfair and reveals a predisposition of the hearing panel against the Applicant.

[105] The adverse inference that the Applicant refers to arose as part of the hearing panel's application of the non-exhaustive list of factors in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. One of those factors is a consideration of whether the

Applicant has acknowledged his misconduct. Determining whether that acknowledgement has occurred is a question of fact, and as the hearing panel's determination deserves deference unless a clear and palpable error was made.

[106] The hearing panel wrote at para. 20 of the decision on disciplinary action that:

> … the Respondent has not acknowledged that the misconduct included the financial interest that he took in S Corp. The Respondent maintained during the course of the hearing that he had no financial interest until it was approved by Davis & Co. We found that the Respondent had a contingent financial interest as of January 1998 and kept that interest until he left Davis & Co. as of March 31 1999. (See paragraph 39 and 42 in the Facts and Determination decision). He breached his fiduciary duty to M Corp. as a result of that financial interest. His failure to acknowledge any misconduct in this regard also leads to the conclusion that rehabilitation is not a factor under the circumstances. In any event, the Respondent is no longer a practising lawyer and has no intention of returning to practice. The fact that the Respondent ceased to be a member of the Law Society is, in our view, a neutral fact under this heading, but the failure to acknowledge his financial interest and the impact of that on his failure to meet his fiduciary obligations to M Corp. leads to the conclusion that a significant disciplinary action should be imposed.

[107] The Applicant has maintained in these review proceedings that he ceased to have a financial interest in S Corp. from and after August 11, 1998. The majority of the SCC found that was not the case: "The precise nature of Strother's continuing financial interest in S Corp. between August 1998 and March 31, 1999 (when Strother left Davis) is unclear, but whatever it was it came to highly profitable fruition in the months that followed."[53] The hearing panel concurred with the SCC.

[108] Despite the majority of the SCC's finding and the hearing panel's finding, the Applicant has continued to maintain in these review proceedings that he did not have a continuing undisclosed financial interest in S Corp. As a question of fact, we find that the hearing panel did not make a clear and palpable error in determining that the Applicant has not acknowledged his misconduct in this matter.

[109] Third, the Applicant argues that none of the cases the hearing panel relied on supported a finding of a lengthy suspension in this matter. In support of that position the Applicant provided a number of cases.

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[53] SCC, para. 67

[110] First, in *Law Society of BC v. Van Twest*, [1994] LSDD No. 129, a hearing panel imposed a two-week suspension on a lawyer who acted for multiple parties in real estate transactions without obtaining the required consents, including in one transaction where the lawyer had an undisclosed financial interest. This case is distinguishable from our current case for many reasons, most saliently because, as noted at page 4, "no loss occurred to any party as a result of the member's misconduct" and "the member expressed remorse for his misconduct," both of which factors are not present in the current case.

[111] In *Law Society of BC v. O'Neill*, 2013 LSBC 23, a hearing panel imposed a reprimand and a fine in a case where a lawyer took an undisclosed fee from a financial advisor he introduced to his corporate client. We find that this case is also distinguishable from the current matter because, importantly, there was no evidence or suggestion that the lawyer's conduct had any negative impact on his corporate client and the lawyer acknowledged his misconduct.

[112] In *Law Society of BC v. Culos*, 2013 LSBC 19, a hearing panel imposed a fine and ordered the lawyer obtain the services of a practice supervisor to assist with conflict decisions for one year following appointment. *Culos* involved two separate matters. In the first, the lawyer acted for a funeral services company in collecting a debt against an estate where the lawyer had acted for the administrator. In the second, the lawyer acted for two clients in an estate matter and, in following the instructions of one client, he prejudiced the interest of another. He immediately recognized his error and contacted senior practitioners and the Law Society for advice but it was too late. We find that this case is also distinguishable from the current matter because, importantly, there was no evidence or suggestion that the lawyer's conduct was motivated by any personal financial interest in the outcome of the matter and the lawyer acknowledged his misconduct.

[113] In *Law Society of BC v. Dent*, 2001 LSBC 36, [2001] LSDD No. 39, aff'd 2002 LSBC 1, [2002] LSDD No. 15, a hearing panel ordered a one-month suspension. The lawyer in *Dent* acted in a conflict of interest by not informing a lender, who was a friend of his wife, that the mortgage documents he prepared for her as collateral for her loan would not adequately provide her security because they were subordinate to an undisclosed second mortgage and failed to advise her to get independent legal advice. The house was then sold and the proceeds repaid the first and second mortgage, but were insufficient to repay the friend. We find that this case is also not particularly informative for the current matter because, in *Dent*, the panel stated that they would have imposed a longer suspension but did not because the lawyer had assisted in the investigation, admitted to his wrongdoing and independently had instituted a monthly payment schedule to repay the lender. We

also note that the case surveyed a number of similar matters and the outcomes ranged from fines, a one-week suspension plus fine, a one-month suspension, a two-month suspension plus a fine, an eight-month suspension, to an undertaking to withdraw from practice and not reapply for at least two years.

[114] In *Law Society of BC v. Coglon*, 2006 LSBC 14, a hearing panel ordered a one-month suspension where a solicitor assisted a client to make a secret investment in a company contrary to the direct instructions of another corporate client that no insiders be allowed to participate in an investment. Again, there are many factors that distinguish this case including: no financial harm occurred to any of the clients; the lawyer was not motivated directly by the hope of financial gain; the lawyer was already unable to practise due to non-payment of annual membership fees to the Law Society; and, the fact that his application for reinstatement had been pending for over two years because of the disciplinary proceeding. Further, the panel recognized that, in addition to the one-month suspension, it would be several more months before his reinstatement would occur, so the effective length of his suspension was much longer.

[115] The Applicant also cited some decisions of other law societies in support of the proposition that a reprimand would be the appropriate remedy in this matter: *Law Society of Upper Canada v. Igbinosun*, 2013 ONLSHP 0031; *Law Society of Upper Canada v. Ghan*, 2012 ONSLHP 0199; and *Law Society of Alberta v. Schwartz*, 2015 ABLS 4, [2015] LSDD 159. In each of these cases a reprimand was found to be the appropriate penalty.

[116] *Igbinosun* involved a lawyer who acted in a conflict of interest when the lawyer loaned money to a client and acted with respect to a second mortgage without making adequate disclosure of his interest to the client. In that matter, the panel noted that the lawyer was never repaid the money he lent and the mortgage was discharged. We do not find this case particularly informative in the present circumstances.

[117] In *Ghan*, a lawyer placed privileged information on the public record without instructions to do so while acting with a conflict of interest. There is no suggestion that the lawyer was motivated by financial gain or benefited from his actions.

[118] In *Schwartz*, a lawyer was retained to draft a shareholder's agreement for a corporate client with a single shareholder, but for a corporation that another client also had a financial interest in. When a dispute arose between the single shareholder and the other client, the lawyer represented the other client in the dispute notwithstanding the conflict of interest. Again, this matter is distinguishable from the current case because no financial harm was suffered as a

result of the lawyer's actions (other than the cost of a motion to have the lawyer removed as counsel).

[119] For the reasons given above, none of the cases cited by the Applicant are sufficiently comparable to the matter at hand to provide a clear reason to interfere with the decision of the hearing panel on penalty.

[120] Finally, the Applicant argued that the motivation of the Law Society bringing the citation and the hearing panel in imposing a five-month suspension was to punish the Applicant. We agree with the Applicant that the following statement from *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3 correctly states that punishment cannot be the purpose of a disciplinary decision:

> It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[121] However, we do not agree that punishment motivated the hearing panel. The Applicant argues that it must be the case because none of the cases cited by the Law Society in support of the suspension involved a case where the impugned conduct arose from an honest but mistaken belief in the nature of the retainer. The Applicant made this same argument before the hearing panel, and the hearing panel rejected it because they found that "… the Respondent engaged in his conduct as a result of taking a personal financial interest in S Corp., which led to his failure to comply with his fiduciary obligations."[54] The majority of the SCC came to a similar conclusion that the Respondent was motivated not by misunderstanding of his retainer but rather by his personal financial interest: "The unfortunate inference is that Strother did not tell M Corp. because he did not think it was in his personal financial interest to do so."[55] Given the SCC coming to a similar conclusion as to the factor that gave rise to the Applicant's actions, we find that the hearing panel did not come to this conclusion with the intent of punishing the Applicant, but rather found that the Applicant was motivated by his personal financial interests. We do not believe that the hearing panel made a clear and palpable error in coming to that conclusion.

[54] Decision on Disciplinary Action, para. 25
[55] SCC, para. 70

[122] The Applicant also argued that the conduct and outcome of this matter was punitive because the goals of general deterrence and the public interest in the ethical obligations in this matter being fully examined were both satisfied by the lengthy civil litigation that resulted in the SCC decision. That same argument was made before the hearing panel, who addressed it as follows in the discipline decision at paras. 26 and 27:

> … in our view it is also necessary for the Law Society, given its responsibilities under Section 3 of the *Legal Profession Act*, to express its view of the significance of the professional misconduct the Respondent engaged in. Section 3 obligates the Law Society to "uphold and protect the public interest in the administration of justice." In our view that obligation requires the Law Society, and in particular this Panel, to indicate clearly its view of the significance of the professional misconduct of the Respondent. That will not be done if we defer to the results of the civil litigation. As Chief Justice McLachlin said in *Canadian National Railway Co. v. McKercher* LLP, 2013 SCC 39, [2013] 2 SCR 649:
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> > [16] Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 SCR 331. In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role.
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> Instead, in discharging our role, we must impose discipline that the professional misconduct of the Respondent requires. As the panel in *Power* stated in paragraph 46: "When imposing a penalty appropriate to the circumstances, a panel sends an important message to lawyers as well as to the public that such conduct is deserving of that kind of penalty." In imposing appropriate disciplinary action, we are discharging the Law Society's responsibility to the public with respect to the administration of justice.

[123] We agree that the presence of civil litigation in a matter, no matter how lengthy, does not discharge the Law Society from fulfilling its statutory mandate and do not find any indication that the hearing panel was being punitive in doing so.

AWARD OF COSTS

[124] The hearing panel found that, because the Law Society was overall the successful party in the proceedings, it was appropriate to make an order of costs against the Applicant. Under Rule 5-11(3) of the Law Society Rules, the hearing panel is permitted to make an order of costs and is required when doing so to have regard to Schedule 4 to the Rules, which, among other things, states that Scale B applies for matters of more than ordinary difficulty and under that scale, the value of units awarded in the tariff is $150 per unit.

[125] The hearing panel considered the difficulty inherent in the matter and noted that, in addition to three days of hearing at the hearing panel, this matter involved numerous issues, including "two pre-hearing conferences, opening submissions, and three contested applications,"[56] and issues "regarding the allegations contained in the citation itself, evidence in a general sense, jurisdiction, and the proper interpretation of a civil trial judgment, as well as two appeal judgments,"[57] all of which were thoroughly contested.

[126] Further the hearing panel found that, despite certain admissions, the Applicant maintained positions that were not supported by the hearing panel's findings at para. 44:

> The Respondent, throughout this proceeding, conceded that he breached his duty to M Corp. by not advising M Corp. that his earlier advice needed to be revisited at some point. However, the Respondent could not say when that obligation arose. In addition, the Respondent maintained throughout the hearing that he retained no interest in S Corp. between August 11, 1998, and March 31, 1999. As stated at paragraph 39 of our decision on Facts and Determination, we found that the Respondent had a contingent financial interest in S Corp. from January 30, 1998, onward, during a period when he owed M Corp. a duty of undivided loyalty. Despite the Respondent's admission, the subject matter of the Respondent's relationship with M Corp., and the circumstances giving rise to the Respondent's taking an interest in S Corp. are complex. This matter has been of more than ordinary difficulty and complexity. Accordingly, an award of costs at Scale B is appropriate, and we so order.

[127] The Applicant made a number of arguments as to why this order of costs was inappropriate. First, the Applicant submits that the hearing panel found the

[56] Decision on Disciplinary Action, para. 35
[57] Decision on Disciplinary Action, para. 43

Applicant's clean disciplinary record over a 20-year career to be an aggravating factor, as opposed to a mitigating factor. However, we are unable to find any discussion of the Applicant's disciplinary record in the hearing panel's discussion of its award of costs.

[128] Second, the Applicant argued that an award of costs on Scale B was an error. He stated first that the Law Society's position in the hearing was that the matter was straightforward. We do not see how rhetorical positions taken by parties to this matter are relevant to a determination by the hearing panel as to the complexity of the matter before it.

[129] The Applicant also argued that the hearing was not lengthy at three days. The Applicant did not address the five other subsidiary processes that had to be undertaken, namely two pre-hearing conferences and three contested applications.

[130] Third, the Applicant sought credit for certain admissions he made to streamline the case. However, we note that a key factual matter, namely that the Applicant had a financial interest from Jan. 31, 1997 and then at all relevant times thereafter, was denied by the Applicant despite the SCC's finding supporting the hearing panel's ultimate decision.

[131] We find that the hearing panel was correct in concluding that this matter was of more than ordinary difficulty.

[132] The Applicant also argued that each party should bear its own costs or costs should be shared. The hearing panel considered this same argument and determined that costs should follow the event and the Law Society was overall successful in this matter. We do not see anything on the record before us that would cause us to interfere with that decision.

DECISION

[133] We conclude as follows:

(a) the hearing panel was correct in finding that the Applicant's failure:

(i) to provide material disclosure to M Corp. of his financial interest in a potential commercial competitor; and

(ii) to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered,

each constituted professional misconduct;

(b) the hearing panel erred in finding that the Applicant's failure to advise M Corp. of a favourable advance tax ruling constituted professional misconduct;

(c) notwithstanding such error, the hearing panel was correct in imposing a five-month suspension in the circumstances; and

(d) the hearing panel's award of costs at Scale B was appropriate in the circumstances.

COSTS

[134] No submissions on the costs of the s. 47 review process were made at the hearing of this matter. If the parties wish to address this issue by way of written submissions, we invite them to do so within 30 days of the release of this decision.