2017 LSBC 32
Decision issued: September 1, 2017
Citation issued: May 9, 2016

CORRECTED DECISION: PARAGRAPH [65](1) OF THE DECISION WAS AMENDED ON SEPTEMBER 6, 2017

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 DISCIPLINARY ACTION

Hearing date:	July 11, 2017
Written Submissions received:	July 27, 2017
Panel:	Phil Riddell, Chair Gillian M. Dougans, Lawyer
Discipline Counsel:	J. Kenneth McEwan, QC Trevor Bant
Counsel for the Respondent	Paul E. Jaffe

INTRODUCTION

[1] The Respondent was found to have committed professional misconduct in the following manner:

> Between May 2013 and November 2013, you [the Respondent] used your trust account to receive and disburse a total of $25,845,489.87 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;

(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.

[2] The reasons of the Panel dealing with Facts and Determination, 2017 LSBC 15 ("F&D"), set out the basis for the factual background and the manner in which the Respondent committed professional misconduct.

POSITION OF THE LAW SOCIETY AND THE RESPONDENT WITH REGARD TO THE APPROPRIATE DISCIPLINARY ACTION.

[3] The Law Society submits that the appropriate disciplinary action is:

(a) a six-month suspension;

(b) disgorgement of $25,845, representing the fees earned by the Respondent, payable to the Law Society; and

(c) imposition of conditions on the use of a trust account.

[4] The Respondent submits that the appropriate disciplinary action is the imposition of the conditions sought by the Law Society with regard to the operation of the Respondent's trust account and no further sanction. The Respondent further submits that he has suffered from adverse publicity since the Panel's decision on F&D and that his reputation has been destroyed because the media have referred to this as a money laundering case. Money laundering was not proved, but the Respondent is now being viewed in that context by the public.

PRINCIPLES

[5] The purpose of disciplinary action was set out in *Law Society of BC v. Hill*, 2011 LSBC 16, where the panel stated at paragraph 3:

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.

[6] Section 38 of the *Legal Profession Act* sets out the powers of a panel to impose sanctions and states:

> (5) If an adverse determination is made against a respondent other than an articled student, under subsection (4), the panel must do one or more of the following:
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> (a) reprimand the respondent;
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> (b) fine the respondent an amount not exceeding $50 000;
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> (c) impose conditions or limitations on the respondent's practice;
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> (d) suspend the respondent from the practice of law or from practice in one or more fields of law
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> (i) for a specified period of time,
>
> (ii) until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection,
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> (iii) from a specified date until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection, or
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> (iv) for a specific minimum period of time and until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection;
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> (e) disbar the respondent;
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> (f) require the respondent to do one or more of the following:
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> (i) complete a remedial program to the satisfaction of the practice standards committee;
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> (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;
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> (iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the

> respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;
>
> (iv) practise law only as a partner, employee or associate of one or more other lawyers;
>
> (g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.
>
> ...
>
> (7) *In addition to its powers under subsections (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate.*
>
> [emphasis added]

[7] The leading case in dealing with the principles to be upheld in applying sanctions is *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45. The panel in that case set out a list of factors to be considered in imposing sanctions. The list is neither exhaustive, nor are all the factors applicable in each case. The factors in *Ogilvie* are set out in paragraph 10:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

RESPONDENT'S BACKGROUND

[8] The Respondent was called to the Bar in BC in 1969. He is a sole practitioner who has a solicitor's practice. He is 74 years of age. He has no prior discipline record.

[9] The Panel asked counsel for the Respondent if he wished to provide any additional information about the Respondent other than what had come out in the evidence at the F&D stage of the hearing, and counsel declined.

ANALYSIS OF THE *OGILVIE* FACTORS

Nature and Gravity of the Conduct Proved

[10] The Respondent was found to have breached his duty as a gatekeeper of his trust account. Given the fact that a lawyer's trust account is subject to solicitor-client privilege, a lawyer has a positive obligation to ensure that it is not misused. The Respondent failed in his duty to make reasonable inquiries with regard to the source of the excess of $25 million in Canadian funds deposited into his trust account. This is in conjunction with the fact that the Respondent did not provide any substantial legal services.

[11] The Law Society takes the position that the failure on the part of the Respondent in his duty posed a serious risk to the public interest.

[12] The Respondent takes the position that, while the Respondent is the gatekeeper of his trust account, and must be on guard to ensure he is not a dupe, the Respondent did not breach any written rules of the Law Society. Furthermore, the Respondent argues that all he did was fail to make reasonable inquiries.

[13] The Respondent's conduct is serious in that it involved the breach of one the fundamental obligations of a lawyer in the operation of his trust account, and that is to make reasonable inquiries as to the source of the funds being deposited into his trust account. A lawyer's trust account is impressed with solicitor-client privilege, and the failure of the Respondent in his duty to act as a gatekeeper of his trust account creates serious risk to the public interest. The Respondent's breach of his professional obligations is serious.

Age and Experience of the Respondent

[14] The Respondent was called to the bar in 1968. During the hearing of F&D there was evidence that the Respondent had practised in small to medium firm settings, and latterly as a sole practitioner. He was an experienced solicitor, and had an active solicitor's practice at the time of the incidents that led to the citation.

[15] The Respondent argued that schemes such as money laundering were relatively new and had not been a risk during much of his career and so his age and experience would lead him to be less suspicious. The Panel rejects this reasoning. The Respondent's experience at the bar, in particular the fact that he was an experienced solicitor, is an aggravating factor because those years of experience should have given him an appropriate appreciation of the importance of maintaining a trust account with integrity. To put it simply, with his experience at the Bar the Respondent should have known better.

Previous Character

[16] The Respondent has no professional conduct history. This is a mitigating factor.

Impact Upon the Victim

[17] There is no defined victim, as one would generally find in the case of professional misconduct, in that there is not an aggrieved party. In this case the conduct of the Respondent exposed the public to the risk of the misuse of a lawyer's trust account.

[18] The schemes that could give rise to the misuse of a lawyer's trust account may not involve an obvious victim if both the sender and receiver of funds are involved in the scheme. That is why the gatekeeper role is so important, and it is so even in the absence of a complaint from a victim.

Number of Times the Offending Conduct Occurred

[19] There were four transactions between May and November 2013 involving seven deposits to the Respondent's trust account. A total of $25,845.489.87 flowed through the Respondent's trust account in these transactions.

[20] There was no evidence that the Respondent was becoming concerned about the similarity of the transactions and the fact that he was never asked to perform any substantial legal services.

[21] The Respondent submits that he only made one mistake on the first transaction, which was repeated in the next and that, since it is the same mistake with the same parties, then it is not a case of a systematic breach of the rules. We do not accept that argument.

[22] The frequency of the transactions and amount of money involved is an aggravating factor.

Acknowledgement of Misconduct and Steps to Disclose and Redress the Wrong and Other Mitigating Factors

[23] At all times during the F&D hearing and this disciplinary action hearing, the Respondent maintained that he had done nothing wrong and characterized the Law Society's case as unfair, abusive, a violation of the principles of natural justice and procedural fairness as well as a vendetta and a "protracted effort to smear EF."

[24] The Law Society tendered Exhibits 1 and 2, which were two affidavits. The substance of Exhibit 1 was a press release prepared on behalf of the Respondent and distributed after the decision on F&D. Exhibit 2 was a press report that referred to the press release set out in Exhibit 1.

[25] The Respondent tendered Exhibit 3, an affidavit of the Respondent (pages 1 to 3 of Exhibit A of the affidavit were found to be inadmissible). Exhibit C of the affidavit contained 14 press reports, of which three dealt with the Respondent by name.

[26] The Law Society argued that the press release of the Respondent is "worthy of rebuke" and shows that the Respondent fails to understand his gatekeeper function. The Respondent stated that the press report shows that the Respondent was trying to manage the adverse media reporting caused by the Panel's decision on F&D. We accept that the press release issued by the Respondent is not an aggravating factor. In the circumstances of the Respondent, we accept that the press release was an attempt at image management.

[27] We do not accept the position of the Respondent that the press reports set out in Exhibit C of the Respondent's affidavit are representative of the public interest. The legislature has delegated to the Benchers of the Law Society the jurisdiction to decide what amounts to conduct in the public interest.[1]

[28] In the course of submissions made on behalf of the Respondent, several submissions were made that raised a concern that the Respondent did not understand the severity of his conduct:

(a) The lack of a connection between the breach of the Respondent's gatekeeper function and the $25,845 earned as "fees". This displayed a lack of understanding that his professional misconduct made it possible for him to earn the "fee".

(b) The failure to understand the effect of solicitor-client privilege with regard to a lawyer's trust account. The Respondent, through his counsel, took the position with each of the transactions that are the subject of the citation that the banking documents associated with the electronic transfer of funds showed the source of

[1] *Elias v. Law Society of BC*, 26 BCLR (3d) 359, 1996 CanLII 1359 (CA), at para. 10.

the funds and the "client" to whom the funds were to be credited to. There was a failure to understand that, upon funds being deposited, the effect of solicitor-client privilege is that the privilege creates a veil of secrecy over to whom the funds are paid out.

(c) There was continued reference to the fact that the Law Society had not shown the existence of illegal activity. This is concerning in that the Respondent's professional misconduct was his failure to fulfill his gatekeeper function; it was not participation in illegal activity either knowingly or as a dupe.

(d) The Respondent is not required to acknowledge his misconduct. That requirement would lead to a situation in which a respondent might be required to prejudice potential appeals in order to mitigate the disciplinary action imposed. The failure of the Respondent to acknowledge his wrongdoing is not an aggravating factor, it is neutral. If the Respondent had acknowledged his misconduct that would be considered a mitigating factor.

(e) The Respondent has presented no evidence of other mitigating factors, or any information with regard to changes in his practice regarding the way in which he deals with making inquiries regarding the sources of funds deposited to his trust account or what would constitute substantial legal services.

Remediation or Rehabilitation

[29] The Law Society states the prospect of rehabilitation is unlikely given the Respondent's denial of wrongdoing. The Respondent states that the conditions on the Respondent's trust account jointly proposed by the parties deals with remediation and rehabilitation.

[30] The Panel is concerned not by the Respondent's denial of wrongdoing, but with the Respondent's lack of understanding of his obligation to make reasonable inquiries. The Respondent, through his counsel, repeatedly took the position that the Respondent breached no written rule.

[31] There is merit to the position that the imposition of the conditions under which the Respondent may operate his trust account will have some remedial effect.

Impact on the Respondent of Criminal or other Sanctions or Penalties

[32] There are no other sanctions or penalties visited upon the Respondent. The Respondent argued that the media attention, including inaccurate reporting, should be considered, but there was no evidence of any effect on the Respondent's practice or reputation. Inaccuracies in any media reports should be dealt with directly by the Respondent. It is not the Panel's responsibility to monitor the media.

Impact of the Proposed Penalty on the Respondent

[33] As referred to earlier, the Respondent chose not to provide us with any information as to his personal circumstances. Accordingly, we do not know the Respondent's ability to pay the disgorgement of $25,835 proposed by the Law Society, or the economic effect of the six-month suspension sought by the Law Society, or his ability to return to practice upon the end of any suspension.

[34] In considering the impact of a suspension, the fact that a lawyer may find it difficult or impossible to restart his practice after the suspension is irrelevant.

> [I]t can never be an objection to an order of suspension in any appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."[2]

Specific and General Deterrence

[35] The Law Society takes the position that, given the comments of the Respondent after the release of the decision, specific deterrence is required. The panel is of the view that, while the Respondent has expressed a view that he disagrees with the decision, a view that he is entitled to hold, we are satisfied that the Respondent in the future will comply with his obligations with regard to the operation of his trust account. This is particularly so given the conditions that he has consented to with regard to the operation of his trust account.

[36] Given the fact that lawyers have been constitutionally exempted from the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and Regulation (the "Proceeds of Crime Regime") as a result of the *Federation of Law Societies of Canada* decision,[3] the legal profession has the responsibility for policing itself with regard to the use of lawyers' trust accounts. This means that there is a need for lawyers to understand the importance of their role in acting as gatekeepers to their trust accounts and to ensure that they make the necessary inquiries with regard to transactions that reasonably appear to be suspicious prior to their allowing funds to be deposited into their trust accounts. General deterrence requires the profession to understand that the breach of that professional duty will be treated as a serious breach.

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[2] *Law Society of BC v. Sas*, 2017 LSBC 8 at para. 109, quoting *Bolton v. The Law Society*, [1994] 2 All ER 486 (England and Wales CA).
[3] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401.

The Public's Confidence in the Integrity of the Profession

[37] For the reasons set out above dealing with the need for general deterrence, the fact that lawyers are constitutionally exempt from the Proceeds of Crime Regime requires breaches of the gatekeeper function with regard to lawyers' trust accounts be taken seriously to preserve the public confidence in the integrity of the profession.

[38] In order to preserve the public confidence, the Respondent's professional misconduct must be considered a serious breach.

Range of Penalties Imposed in Similar Cases

[39] The Law Society provided a number of cases showing a range of penalty from reprimand to a 12-month suspension. Those cases are:

(a) *Law Society of BC v. Bohun*, 2003 LSBC 8, [2003] LSDD No. 6

Twelve-month suspension for misconduct for permitting his trust account to be used to pool $148,000 from various lenders and recklessly making statements about the repayment of the loans. The lawyer made a conditional admission under Rule 4-22 consenting to a 12-month suspension. "Here the Respondent was a dupe who gained nothing other than the fees he charged for the work he stupidly did."

(b) *Law Society of BC v. Nielsen*, 2009 LSBC 08

Six-month suspension for misconduct for participating in a fraudulent scheme in which mortgage funds were obtained and dispersed under false pretenses, acting in a conflict of interest and failing to comply with various trust accounting rules. The lawyer made a conditional admission under Rule 4-22 consenting to a six-month suspension and an undertaking not to practise real estate law. The Respondent received some benefit from his misconduct in the form of higher than normal fees, which he justified on the short turnaround time on the conveyances; a $3,000 bonus was described as compensation for a transaction that did not proceed.

(c) *Law Society of BC v. Rai*, 2011 LSBC 02

Three-month suspension for failing to make reasonable inquiries about mortgage transactions that turned out to be fraudulent. The lawyer made a conditional admission consenting to a three-month suspension. The panel found this to be the lower end of the appropriate range. "[T]he misconduct was not motivated by

greed or personal gain and did not result in any financial benefit to the Respondent beyond the modest fees billed for the work performed."

(d) *Law Society of BC v. Skogstad*, 2009 LSBC 16

Three-month suspension for permitting his trust account to be used to pool $1 million of investment monies in what turned out to be a Ponzi scheme and failing to advise the investors that he was not protecting their interests. The lawyer made a conditional admission consenting to the three-month suspension. "[W]hat distinguishes this case from other cases is that the Respondent was not a participant in the fraudulent schemes and did not personally profit from the investors' money."

(e) *Law Society of BC v. Elias* (1996), 26 BCLR (3d) 359 (CA)

A reprimand for a lawyer who asked a corporate client if it would be interested in acquiring the cash proceeds of a brothel business in the Philippines. The transaction did not go beyond this, but the Panel found that the lawyer should have made inquiries about the lawfulness to operate such a business and export $10 million in cash before even contacting a client and offering to assist.

(f) *Yungwirth v. Law Society of Upper Canada*, 2004 ONLSAP 1, [2004] LSDD No. 11

Twelve-month suspension for being an unknowing participant in a real estate fraud and for making misrepresentations to and misleading clients; failing to follow instructions and swearing false affidavits. The lawyer admitted professional misconduct.

(g) *Law Society of Upper Canada v. Tucciarone*, 2005 ONLSHP 20, [2005] LSDD No. 55

Six-month suspension for unknowing participation in 16 real estate transactions in which mortgage funds were fraudulently obtained. The Panel was convinced there would be no repetition of the conduct.

(h) *Law Society of Upper Canada v. Senjule*, 2008 ONLSHP 22, [2008] LSDD No. 15

Five-month suspension for carelessness that fell short of misconduct as a result of being a dupe. The lawyer was found to have acted in a conflict of interest, failing to disclose material facts, failing to follow instructions, failing to obtain informed consent, and failing to make reasonable inquiries. It is noted by the panel that Ms.

Senjule did not profit or benefit in any way beyond modest fees with respect to the transactions that were the subject of the hearing. The panel noted the misconduct was entirely out of character, largely explained by inexperience and the lack of a mentor. The panel also noted her tremendous remorse, which was genuine and heartfelt.

(i) *Law Society of Upper Canada v. Peddle*, [2001] LSDD No. 64

Three-month suspension and a fine of $5,000 for misconduct in becoming the tool or dupe of a client while acting as escrow agent for a group of investors. The lawyer pleaded guilty to misconduct and admitted that he ignored red flags and failed to take independent steps to confirm that the investment venture existed and functioned as represented to him and that investor interests were protected. He admitted that he failed to exercise due diligence and allowed himself to become a dupe. He had paid himself a fair legal fee out of the funds and disbursed $180,000 to his girlfriend (now wife) as a return on her investment before learning of the scheme. The lawyer made substantial efforts to obtain the return of the monies invested with the result that $950,500 of the $1.18 million invested was recouped.

(j) *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD 44

One-month suspension for misconduct in becoming a dupe of an unscrupulous client and allowing funds to pass through his trust account without due diligence. The lawyer did not profit from his client's fraud, and the panel found that the payment of fees and debts did not constitute a profit. The lawyer facilitated the laundering of $340,000. One month was considered the low end of the range.

[40] In addition to these, the Respondent relied upon:

(a) *Law Society of BC v. Ben-Oliel*, 2016 LSBC 35

The respondent was found guilty of misconduct for failing to comply with an order to provide complete and substantive responses to enquiries in Law Society letters.

> The breach of an order of a hearing panel requires a penalty that not only specifically deters the Respondent, but also provides a general deterrence to the profession as a whole. We find the Respondent's impugned conduct a grave case of professional misconduct.

A further two-month suspension was added to an existing four-month suspension, and the suspension was to continue after that until the respondent complied with the previous order of the hearing panel.

At paragraph 23 the panel stated:

> The purpose of the discipline process is not to punish or exact retribution; it is to discharge the law Society's statutory obligation as set out in s. 3 of the Legal Profession Act to protect the public interests in the administration of justice: *Hill*.

(b) *Law Society of BC v. Jensen,* 2015 LSBC 10

Although not referred to by counsel, this decision was overturned on a review under s. 47. That decision is indexed at 2016 LSBC 37. Counsel relied upon the decision of the hearing panel.

The respondent was found to have committed professional misconduct for failing to advise two unrepresented parties that he was not protecting their interests in a share transaction. The respondent was an exemplary lawyer who erred; there was no need for specific deterrence. The respondent did not financially gain and was motivated to help his friends. A reprimand and payment of a fine of $2000 plus costs of $30,000.

> The Respondent has consistently believed he made no error and what occurred did not amount to not [sic] professional misconduct. He is entitled to such belief. We came to a different conclusion. Although Mr. Jensen was obdurate and single minded, it was his belief. In these circumstances we do not consider this an aggravating factor. Sometimes there is a need for a hearing. In other words, the case was no [sic] so clear that the lawyer should be sanctioned for defending the citation.

[41] The Law Society relies upon *Bohun*, *Nielsen* and *Tucciarone* to support a suspension of six months. In doing so it says that, while in those three cases there were fraudulent schemes involved, no significance should be given to this factor because in the case of the Respondent there were four highly suspicious transactions of unknown legality. The Respondent's delict was the failure to make reasonable inquiries in circumstances that were reasonably suspicious, and it did not matter whether the underlying transactions were legal or not.

[42] The Respondent takes the position that no sanction should be imposed in addition to the conditions on the operation of his trust account that the Respondent has agreed to.

[43] Of the cases provided *Elias* is the only case where the sanction imposed was not a suspension and was in fact a reprimand. *Elias* is not a case in which the lawyer had put money into his trust account. It is a case in which the lawyer contacted a client to determine if the client would be interested in acquiring an interest in $10 million acquired from a brothel business in the Philippines. The lawyer should have been reasonably suspicious that the funds came from illegal activities. Monies were not transferred, and the lawyer had not profited from the transaction.

DECISION

[44] Section 38(5) of the *Legal Profession Act* sets out the sanctions that may be imposed after an adverse determination at a disciplinary hearing.

[45] We accept the joint position of the Law Society and the Respondent that an order should be made under s. 38(5)(c) to impose the following limitation on the Respondent's practice:

(a) the Respondent must report to the Senior Forensic Accountant of the Trust Regulation Department within five business days after becoming aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada; and

(b) on request by the Law Society, the Respondent must immediately produce and permit the Law Society to copy all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person requesting on behalf of the Law Society for the purpose of reviewing the Respondent's trust transactions.

[46] Given an analysis of the applicable *Ogilvie* factors, we find that the public interest is served by the Respondent being suspended from the practice of law for six months with the suspension to begin no sooner than on the last day of the month following the month in which these reasons are released, or on some earlier date as agreed to by the Law Society and the Respondent.

[47] The professional misconduct of the Respondent constituted a serious breach of his professional obligation. It was a breach in which he ignored the fundamental obligations of a lawyer to act as the gatekeeper of his trust account. The fact that lawyers are constitutionally excluded from the Proceeds of Crime Regime means that the profession must ensure that all of its members comply with their duty to make reasonable inquiries in objectively suspicious circumstances.

DISGORGEMENT OF FEES

[48] The Respondent allowed approximately $25 million Canadian to flow through his trust account when not only did he provide no substantial legal services, but he also failed to make reasonable inquiries as to the source of the funds in objectively suspicious circumstances. He profited from this by charging one tenth of one per cent of the value of all funds that passed through his trust account as a "fee". In the particular circumstances of this case the amount received has been described as a "fee", but it should not be characterized as a fee for legal services, since no substantial legal services were provided. It was a "fee" for the use of the Respondent's trust account.

[49] The Law Society has sought disgorgement of the $25,845 (the "fee" charged less applicable taxes) to the Law Society. There is no specific authority in s. 38(5) of the *Legal Profession Act* that deals with disgorgement. The Law Society says the power to order disgorgement arises as a result of s. 35(7), which states: "In addition to its powers under subsections (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate."

[50] The Respondent argues that there is no causal connection between the misconduct and the fees; that there is no evidence the receipt of the fees was based on a failure to make reasonable inquiries; and no evidence that, had the Respondent "gone the distance" of making reasonable inquiries, he would not have earned those fees.

[51] The Respondent argues that disgorgement is really a fine, which should not be made in addition to a suspension and should not be made where there is no loss to a client that results in the enrichment of a lawyer.

[52] There are no cases in BC in which disgorgement has been ordered in a case of this sort; in fact it would appear that it has never been considered as a sanction before.

[53] There have been cases in which hearing panels have ordered restitution.[4] A panel can order a suspension and a monetary penalty (be it a fine or restitution). "However, imposing both types of penalty in a single case should be limited to instances where doing so can reasonably be seen as necessary to further the principles underlying the discipline process."[5]

[54] In *Abrametz* (currently under appeal) a lawyer was required to pay to the Law Society the amount of profit he made on a real estate transaction for remittance to his client when he acted in a conflict of interest. The hearing committee found that the lawyer was guilty of

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[4] *Law Society of Saskatchewan v. Abrametz,* 2017 SKLSS 4; *Law Society of BC v. Coutlee,* [1997] LSDD 196; *Law Society of BC v. Thomson,* [1998] LSDD 129; *Law Society of Manitoba v. Carroll,* 2008 MBLS 11.
[5] *Nguyen v. Law Society of BC*, 2016 LSBC 21 (review board) at para. 46.

conduct unbecoming for taking advantage of a vulnerable client by purchasing her home at a low price and selling it for a profit of $17,000. The lawyer offered to pay back to his client the sum of $14,000 being the profit less $3,000 tax paid. The hearing committee ordered, at paragraph 141, restitution to the Law Society for remittance to the client in the amount of $14,000. The payment was ordered to be made to the Law Society in order to be sure that the client received it.

[55] In *Abrametz* there was no discussion of disgorgement, and the amount being remitted to the client was not actually lost by the client, so it was not a case of true restitution. The amount did represent the profit the lawyer made from acting in a conflict of interest.

[56] The hearing committee relied on section 55(2)(c) of the *Legal Profession Act, 1990,* SS c L-10.1, as it existed at the time of the conduct in question, which gave it authority to make "any other order that the committee considers appropriate." This section was similar to section 38(7) of our *Legal Profession Act*, which states that a panel may make "any other orders and declarations and impose any conditions it considers appropriate." Six other provinces have an open-ended provision empowering hearing panels to craft orders that are appropriate in the circumstances: Ontario, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island.

[57] It is worth noting that Law Society hearing committees in Saskatchewan can fine a respondent "in any amount that the committee may specify," per section 53(3)(a)(iv) of the *Legal Profession Act, 1990*.

[58] Section 38(7) of the *Legal Profession Act* has been commented upon lately in decisions in British Columbia to encourage the use of this subsection creatively and to further the purpose of disciplinary action – "to protect the public, maintain high professional standards and preserve public confidence in the legal profession."6

[59] In British Columbia, a panel cannot impose a fine of more than $50,000. To simply fine a lawyer in the amount of fees received for the improper use of his trust account creates a situation where a lawyer paid more than $50,000 would be entitled to keep the excess. That would not uphold and protect the public interest in the administration of justice or preserve public confidence in the legal profession. A fine is not the best remedy in these circumstances.

[60] Restitution requires a party to return the money to a victim. That will not be possible when, as here, there is no victim complaining about the lawyer's conduct. Restitution is not the best remedy in these circumstances.

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[6] *Hill* at para. 3

[61] Compensation also requires that a party who has suffered damages be made whole. Here it is the public in general who suffers when lawyers do not discharge their gatekeeper function. Compensation is not an available remedy in these circumstances.

[62] Disgorgement is not about punishment; it is about deterrence. It is about not allowing a lawyer to gain from his or her misconduct. We are satisfied that s. 38(7) of the *Legal Profession Act* allows us to order disgorgement of the funds received by the Respondent as a result of his professional misconduct. The amount to be disgorged should be the gross amount received without reduction for taxes or other expenses.

[63] The $25,845 received by the Respondent as a "fee" arose directly from his professional misconduct. His failure to make the reasonable inquiries in circumstances in which he should have been objectively suspicious and in a case in which the "fee" was earned without the provision of any substantial legal services leads to a conclusion that the Respondent's professional misconduct led to his "fee" being paid. The nature of the transactions the Respondent became involved in did not require his skills as a lawyer or the use of his trust account. The use of his trust account was a convenience for his "clients". The "fee" received by the Respondent was nothing more than a service charge to use his trust account. Counsel for the Law Society described this as the Respondent renting his trust account, which is an apt description.

[64] The Respondent should not be allowed to benefit financially from his misconduct. His client is not owed restitution as a result of the misconduct. This is an appropriate case for the Respondent to be ordered to disgorge the $25,845 received as his "fee" to the Law Society of British Columbia. Since we have not been provided any information regarding the Respondent's personal circumstances, that payment must be made within 60 days of the release of this decision.

ORDER

[65] We order that:

1. The Respondent be suspended from the practice of law for a period of six months to commence November 1, 2017 or on some earlier date as agreed to by the Law Society and the Respondent.

2. Following the Respondent's suspension he will be subject to the following conditions:

    (a) The Respondent must report to the Senior Forensic Accountant of the Trust Regulation Department within five business days after becoming

aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada; and,

(b) On request by the Law Society, the Respondent must immediately produce and permit the Law Society to copy all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person requesting on behalf of the Law Society for the purpose of reviewing the Respondent's trust transactions.

3. The Respondent pay to the Law Society the amount of $25,845, representing the disgorgement of the "fee" paid as a result of his professional misconduct, within 60 days of the release of this decision.

COSTS

[66] The parties have indicated that they wish to make submissions with regard to costs. Unless there is some reason that submissions on costs cannot be in writing, delivery of submissions will be on the following schedule:

(a) submissions of the Law Society on costs 30 days after the release of this decision;

(b) submissions of the Respondent on costs 21 days after the delivery of the Law Society submissions; and

(c) reply of the Law Society within 10 days of the delivery of the Respondent's submissions.

[67] Either party may make application to have an oral hearing on costs.