2018 LSBC 07
Decision issued: February 15, 2018
Oral decision: April 12, 2017
Citation issued: December 20, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 Review concerning

RONALD WAYNE PERRICK

APPLICANT

DECISION OF THE BENCHERS ON REVIEW

Review date:	August 11, 2015 and April 12, 2017
Benchers:	Nancy Merrill, QC, Chair Pinder Cheema, QC Sharon Matthews, QC Elizabeth Rowbotham Tony Wilson, QC
Discipline Counsel:	Alison Kirby
Appearing on his own behalf:	Ronald W. Perrick

[1] This review board was initially constituted with seven Bencher members. However, after the Review commenced but prior to concluding, one member of the review board was unable to continue with the Review for medical reasons. Prior to the review board's reasons for decision being completed, the term of office of another Bencher expired. This Review continued with the remaining five Benchers pursuant to section 47(4.1) of the *Legal Profession Act* as it was when the citation was issued.

INTRODUCTION

[2] The Review of this matter was heard on April 11, 2015 and April 12, 2017. In the intervening time, additional written submissions were requested and received by the parties. Our reasons for decision are set out below and are structured as follows:

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I. THE REVIEW AND REVIEW PROCEEDINGS

A. Background to the Review

[3] Pursuant to s. 47 of the *Legal Profession* Act, Ronald Wayne Perrick applied for a review of the hearing panel's decisions on:

(a) the application made by the Law Society pertaining to the use to be made of the findings of fact made by Allan J. in the British Columbia Supreme Court trial pertaining to the same factual context out of which the citation arose, based on the doctrine of abuse of process;

(b) facts and determination issued January 23, 2014, finding that Mr. Perrick was guilty of professional misconduct;

(c) disciplinary action issued June 12, 2014, imposing a $25,000 fine.

[4] On October 21, 2013 a hearing panel heard the application of the Law Society for an order that the prior judicial decision of Madam Justice Allan dated May 1, 2009, *380876 British Columbia Ltd. v. Ron Perrick Law Corp. and Ronald W. Perrick*, 2009 BCSC 601 (the "Allan Decision") be admitted into evidence as *prima facie* proof of the matters before the hearing panel, with the exception of allegation 5(c) in the citation regarding the alleged failure to record trust transactions within seven days.

[5] The Law Society also sought an order that Mr. Perrick be prohibited from relitigating the matters before Madam Justice Allan based on the legal doctrine of abuse of process.

[6] The allegations in the citation related to Mr. Perrick's conduct while acting for a numbered company (the "Company") regarding the sale of property in Vancouver, and the withdrawal of fees and/or commission paid to the Applicant from his trust account.

[7] Most of the factual circumstances that form the basis of the allegations in the citation were addressed in two British Columbia Supreme Court proceedings between the Company, Mr. Perrick and his Law Corporation: the Allan Decision and *380876 British Columbia Ltd. v. Ron Perrick Law Corporation and Ronald W. Perrick*, 2007 BCSC 507 (the "Rice Decision").

[8] Mr. Perrick agreed that the Allan Decision could be admitted into evidence as *prima facie* proof of the matters before the hearing panel; however he wished to call evidence on the basis that the Allan Decision was no longer valid as he had appealed that decision and the appeal was subsequently settled.

[9] On October 21, 2013 the hearing panel granted the Law Society's application to admit the Allan Decision as *prima facie* proof of the matters before it, except the allegation in paragraph 5(c) of the citation, and prohibited Mr. Perrick from relitigating the matters that had been litigated before Madam Justice Allan. On January 16, 2014 the hearing panel issued written reasons.

[10] On January 23, 2014 the hearing panel rendered its decision on facts and determination (2014 LSBC 03) after a five-day hearing from October 21 to October 25, 2013.

[11] The hearing panel found that Mr. Perrick, while representing the Company, committed professional misconduct by:

(a) Improperly using expired Powers of Attorney (allegation 1 in the citation);

(b) Backdating an assignment of shares (allegation 2 in the citation);

(c) Failing to respond to communications from another lawyer (allegation 3 in the citation);

(d) Failing to take reasonable steps to determine who was authorized to give instructions in a commercial transaction (allegation 4(a) in the citation);

(e) Failing to keep his client reasonably informed with respect to the disbursement of trust funds (allegation 4(b) in the citation);

(f) Failing to inform his client of the basis of his fees (allegation 4(c) in the citation);

(g) Failing to enter into a written contingency fee agreement (allegation 5(b) in the citation);

(h) Withdrawing funds from trust when he knew those funds were in dispute (allegation 5(d) in the citation); and

(i) Withdrawing fees prior to delivering a bill (allegation 5(e) in the citation).

[12] On April 25, 2014, the hearing panel issued its decision on disciplinary action (2014 LSBC 25) and ordered Mr. Perrick to pay a fine in the amount of $25,000 and costs of $24,210.

[13] Mr. Perrick applied for a review of the decision. He seeks a dismissal of the hearing panel's orders regarding abuse of process, facts and determination and disciplinary action and a dismissal of the complaints or, in the alternative, a new hearing admitting evidence that was not part of the record before the hearing panel.

[14] The grounds for Mr. Perrick's Review are as follows:

(a) The hearing panel erred in failing to consider whether the refusal to allow a measure of relitigation where "fairness dictates that the original result should not be binding in a new context";

(b) The hearing panel failed to address the effect of the settlement of his appeal to the Court of Appeal; and

(c) The hearing panel erred in failing to consider whether the adjudicative process would be harmed by a failure to allow a measure of relitigation of the relevant issues and circumstances

[15] The s. 47 Review commenced on August 11, 2015. Mr. Perrick sought to introduce new evidence.

[16] On September 10, 2015, the review board wrote to Mr. Perrick and counsel for the Law Society requesting further submissions on certain issues. In that memorandum, the review board stated:

> We understand that your application for a section 47 review is limited to the abuse of process issue and the Hearing Panel's decision on allegations 3 and 4 of the citation only. Further to our discussion at the end of the day on August 11, 2015 of your section 47 review, we ask that you provide the Review Board with a list with the following details regarding each document and each witness that you wish to have the Review Board consider under section 47(4) of the *Legal Profession Act* that relate to allegations 3 and 4.

[17] In his response on November 13, 2015, Mr. Perrick stated:

> The Respondent's Section 47 Review is not limited to allegations 3 and 4 of the Citation only.

B. Hearing of the Review and Requests for Additional Submissions

[18] Throughout the course of this Review, several written requests by this review board were made of the Applicant and the Law Society.

[19] On September 10, 2015, the Law Society was asked to provide written submissions on:

1. What is the legal status of findings of fact made by a Court in circumstances where the decision of the Court has been appealed and then abandoned as a result of a settlement reached by the parties? In particular, can a Hearing Panel or Review Board rely on the Court's findings of fact for its own purposes?

2. Are there any authorities (including from other common law jurisdictions) that address this question other than the authorities referred to in your written submissions? Please also address the doctrine of collateral attack in your submission on this issue.

3. If the Review Board overturns the decision of the hearing panel's ruling, [sic] dated January 16, 2014, on the application concerning abuse of process:

    (a) What is the status of the Hearing Panel's decisions on Facts and Determination (F&D) and Disciplinary Action (DA) if the Review Board simply overturns the decision on abuse of process and says nothing else?

    (b) Does the original Hearing Panel have any standing to re-hear the evidence and make a new decision on F&D and DA?

    (c) Does the Review Board have the jurisdiction to order a new hearing on F&D and DA?

4. Is it open to the Review Board to permit Mr. Perrick to present new evidence (including witnesses) in person to the Review Board that he was not permitted to present at his hearing with respect to allegations 3 and 4 of the citation?

[20] As set out in paragraph 16 above, the September 10, 2015 memorandum from the review board also confirmed the review board 's understanding that the Review was limited to the abuse of process issue and to the hearing panel's decision on allegations 3 and 4 of the citation only. Mr. Perrick was asked to provide a list and further details of the evidence he intended to rely on, as follows:

1. The name of the document, date and description. Name of witness, title and capacity;

2. Description of evidence that will be provided by the document or witness;

3. Relevance of the evidence (i.e. what you wish to prove with your evidence, with reference to a particular allegation (or part of the allegation));

4. Reference to the particular paragraph (or paragraphs) where the Hearing Panel made a finding of fact which you wish to refute with the evidence; and

5. Confirmation from you that you were precluded from presenting this evidence to the Hearing Panel as a result of the Hearing Panel's decision on the abuse of process application.

[21] In addition, Mr. Perrick was asked to provide written submissions on the same questions submitted to the Law Society and quoted in paragraph 62 above.

[22] Written submissions (including reply) were concluded on December 17, 2015.

[23] Mr. Perrick was given 30 days to respond and the Law Society was given a right to reply within 15 days of Mr. Perrick's response.

[24] The Law Society provided its submissions dated October 6, 2015.

[25] Mr. Perrick requested and was granted an extension to November 13, 2015 to provide his response and submissions. He provided them on November 13, 2015.

[26] The Law Society provided its reply submissions dated November 24, 2015.

[27] Mr. Perrick requested and was granted an extension to December 17, 2015 to provide his reply submissions. He provided such submissions on December 17, 2015.

[28] On April 26, 2016 the review board requested the Law Society and Mr. Perrick provide further written submissions within 30 days, as follows:

1. Given that judicial authorities say that the doctrine of abuse of process derives from the inherent jurisdiction of superior courts, does a hearing panel of the Law Society have the jurisdiction to apply the doctrine of abuse of process? If so, what is the source of the jurisdiction?

2. If a hearing panel does not have the jurisdiction to apply the abuse of process doctrine, is there any other principle of law that authorizes a hearing panel to prevent a Respondent from introducing evidence that the hearing panel considers to be relitigation of an issue previously decided by a court?

3. If a hearing panel does have jurisdiction under 1 or 2, what is the appropriate test to determine whether or not evidence that the Respondent wishes to tender should be excluded?

4. Did the hearing panel prevent the Respondent from rebutting the prima facie proof of the matters decided by Madam Justice Allan by requiring his evidence to be new and compelling?

[29] Written submissions were received by June 10, 2016.

[30] The Law Society provided its submissions on May 24, 2016.

[31] The Applicant requested and was granted an extension to June 10, 2016 to provide his submissions. He did so on June 10, 2016.

[32] On July 25, 2016 the review board wrote to the Law Society and Mr. Perrick, and provided Mr. Perrick with one last opportunity to comply with the requests originally made of him by the review board in its letter of September 10, 2015 to him, as follows:

1. Name of document, date and description. Name of witness, title, and capacity;

2. Description of evidence (i.e., what is to be proven with the evidence, with reference to the particular allegation (or part of the allegation) addressed); and

3. Confirmation from Mr. Perrick that he was precluded from presenting this evidence to the Hearing Panel as a result of the Hearing Panel's decision on the Abuse of Process application

[33] Written submissions were concluded on September 20, 2016.

[34] Mr. Perrick provided his further response on August 22, 2016 and the Law Society provided its reply on September 6, 2016.

[35] A further, partial response to the Law Society's reply submissions was provided by Mr. Perrick on September 20, 2016.

The review board reconvened the review on April 12, 2017 to hear final submissions from the parties.

II. THE CITATION

A. Background to the Citation

[36] The matters which are the subject of the citation relate to Mr. Perrick's representation of the Company in the sale of real property in Vancouver, British Columbia in 2006 and the payment for fees and/or commission from monies to his Ron Perrick Law Corporation (RPLC) trust account.

[37] JW and MW (the "parents") had four children, RW, DK, RM and AW.

[38] The parents purchased property at the foot of Seymour Street in Vancouver, BC (the "Property").

[39] In January 1990, the Company was incorporated for the purposes of an estate freeze. The shareholders of the Company were the parents, each of whom owned 50 per cent of the voting shares, and their four children. Title to the Property was transferred from the parents to the Company.

[40] Sometime in 2002, the Company and the parents agreed to sell the Property. In April 2003, C Corp. offered to purchase the Property for $2.6 million. After this offer was made, Mr. Perrick was retained by the Company to represent it on the sale of the Property.

[41] There was no written fee agreement pertaining to Mr. Perrick's representation of the Company in the sale of the Property.

[42] Both of the parents died before the Property sold: JW on December 4, 2004; and MW on October 25, 2005.

[43] The Property was ultimately sold to C Corp. for approximately $5.75 million, pursuant to an offer to purchase and purchase and sale agreement dated December 15, 2005. The closing date was February 9, 2006.

[44] Shortly thereafter, disputes arose between Mr. Perrick and the parents' children as to his fees. These disputes became the subject of British Columbia Supreme Court litigation.

[45] The facts that underlie the British Columbia Supreme Court litigation were also the subject of a complaint to the Law Society. After an investigation, the Law Society issued a citation which contains five categories of allegations, some of which have multiple counts, as follows:

1. improper use of an expired power of attorney;

2. backdating assignment of share to a date prior to the death of the parents of a client;

3. failure to respond to communications from another lawyer;

4. three allegations of failure to provide quality of service; and

5. five allegations of breach of Rules.

[46] The judicial proceedings pertaining to the same subject matter as the allegations in the citation were:

(a) a Rule 18A Application before Mr. Justice Rice between the Company, Mr. Perrick and RPLC, decided January 23 2007;

(b) a 22-day trial before Madam Justice Allan between the Company, Mr. Perrick and RPLC in which reasons for judgment were issued May 1, 2009 in favour of the Company.

[47] In the Rice Decision, the Court determined that Mr. Perrick had removed funds in the amount of $926,916 that he claimed as fees from his RPLC trust account without rendering a statement of account pursuant to the Law Society Rules. The Court ordered judgment against Mr. Perrick and RPLC in that amount plus interest.

[48] In the Allan Decision, the Court found that Mr. Perrick's misconduct in the course of his retainer disentitled him to any fee in relation to real estate and legal services rendered. Mr. Perrick appealed the Allan Decision. The parties to the appeal reached a settlement, and the appeal was abandoned due to that settlement.

[49] The conduct that Madam Justice Allan considered overlaps with the conduct that is the subject of the citation heard by the hearing panel. The citation allegations and the findings of fact made by Madam Justice Allan that relate to the citation are set out below.

B. Findings of Fact in the Allan Decision

(i) Citation allegations 1 and 2: Improper use of expired powers of attorney and backdating of assignment

[50] The citation alleges that, after the death of the parents, Mr. Perrick prepared an assignment of their voting shares in the Company. The assignment was backdated to a date prior to their deaths. In the assignment, the (deceased) parents purportedly assigned the shares to their son, RW. It was signed by their children, RM and DK, pursuant to powers of attorney. Mr. Perrick witnessed their signatures.

[51] RM and DK had powers of attorney prior to their parents' deaths, but the powers of attorney expired on their respective deaths and therefore were expired at the time the assignment was prepared and signed.

[52] Madam Justice Allan found that Mr. Perrick had received advice from the Company's corporate solicitor that the executrices of the estate (also RM and DK) could appoint RW an officer and director of the Company whereby he could direct the voting shares to be transferred to himself. Madam Justice Allan found that, instead of heeding this advice, Mr. Perrick prepared the backdated assignment and had it executed by RM and DK under their expired powers of attorney. Madam Justice Allan found that he witnessed their signatures.

[53] Madam Justice Allan also found that, when AW complained to Mr. Perrick that his brother had been improperly given authority he did not have by use of his sisters' expired powers of attorney, Mr. Perrick replied that the assignment had been prepared at the request of the sisters. Madam Justice Allan found that Mr. Perrick did not advise AW that it had been Mr. Perrick's idea to use the sisters' powers of attorney.

(ii) Citation allegation 3: Failure to respond to communications from another lawyer

[54] The Company and three of the four children retained Robert Ward, QC, to obtain details from Mr. Perrick relating to distribution of the balance of the sale proceeds and to have Mr. Perrick account for his fees. The Law Society alleged that Mr. Perrick did not respond to Mr. Ward for over two months and, once he did, he did not do so completely.

[55] Before the Court, Mr. Perrick took the position that the Company did not have the authority to retain Mr. Ward. Madam Justice Allan found that RW, who had become the President of the Company due to the steps taken by Mr. Perrick, had

approved the steps that Mr. Ward took on behalf of the Company. She held that Mr. Perrick took the "untenable position" that RW could not retain counsel and that AW, one of the other children, was the proper instructing authority for the Company. AW was not involved in retaining Mr. Ward to inquire into Mr. Perrick's account. Madam Justice Allan observed that Mr. Perrick was careful to note that his instructions were received from RW through AW in one particular transaction.

[56] Madam Justice Allan found that Mr. Perrick had said that he would respond to Mr. Ward but he did not do so in a timely way. She found that Mr. Perrick did not say, at that time, that he viewed Mr. Ward as being improperly retained.

[57] Madam Justice Allan found that Mr. Perrick delivered an account of fees on June 16, 2006, having first removed monies from his RPLC trust account for his fees on February 9, 2006, having been aware of questions and concerns from three of the children since March 2006 and having received the request from Mr. Ward regarding Mr. Perrick's fees in late March 2006.

(iii) Citation allegation 4: Failure to provide quality of service

[58] This allegation was divided into allegations as follows.

(a) Allegation 4(a): Failure to take reasonable steps to determine who was authorized to give instructions for the Company

[59] The allegations were that Mr. Perrick was receiving his instructions from AW except for the period of time after which the backdated assignment was signed (February 2006), when he began taking instructions from RW in accordance with the backdated assignment. After the closing, Mr. Perrick again commenced taking instructions from AW.

[60] Mr. Perrick asserted that, by having the voting shares transferred to RW for the purposes of allowing the sale to complete, RW's authority to speak for the Company was restricted to that transaction only. Mr. Perrick maintained that he could continue to receive instructions from AW.

[61] In addition, when Mr. Ward communicated with Mr. Perrick for the purpose of obtaining an accounting of the monies received and details of Mr. Perrick's fee account, Mr. Perrick ignored those inquiries and corresponded directly with the siblings.

[62] As set out in paragraph 37 above, Madam Justice Allan found that Mr. Perrick's position that RW was not authorized to retain Mr. Ward for the Company was untenable. She reviewed Mr. Perrick's evidence that RW was only designated the sole officer and director of the Company for the purpose of signing the closing documents and that he, Mr. Perrick, was properly instructed by AW, was not consistent with his note to file on one occasion that he received instructions from AW through RW.

(b) Allegation 4(b): Failure to keep client reasonably informed of handling of disbursement of trust funds

[63] The Law Society alleges that, after receiving trust funds on February 9, 2006, Mr. Perrick did not keep the Company informed as to the handling and disbursement of the trusts funds and in particular did not respond to a letter dated February 17, 2006 from DK or a letter dated February 26, 2006 from RM.

[64] Madam Justice Allan made the following findings about Mr. Perrick's payments of fees to himself out of his RPLC trust account and the information he provided to the Company and the shareholders about such payments:

(a) On February 9, 2006, the sale of the Property completed, and on that day Mr. Perrick received the sale proceeds into his RPLC trust account;

(b) On February 9, 2006, Mr. Perrick distributed monies from his RPLC trust account to the shareholders;

(c) On February 9, 2006, Mr. Perrick withdrew the sum of $350,000 from his RPLC trust account for fees;

(d) On February 10, 2006, Mr. Perrick withdrew the sum of $49,000 in relation to taxes on those fees;

(e) Mr. Perrick posted a non-particularized account to his ledger that initially described the fees as a commission but later amended the entry to describe as a fee. The base amount and taxes differed but the total was $926,916 under both approaches;

(f) On February 17, 2006, DK asked Mr. Perrick to provide the Company with an estimate of how the balance of the proceeds from the sale of the Property would be disbursed. Mr. Perrick failed to respond;

(g) On February 26, 2006, RM sent a fax to Mr. Perrick asking him about the plan and timing for disposition of the balance of the funds. She advised him that they would like to know about his fee, they were feeling uncomfortable with this "unknown" and would like clarification in writing as soon as possible. Mr. Perrick did not reply to this letter;

(h) On February 27, 2006, Mr. Perrick removed an additional sum of $342,000 from his RPLC trust account for his fees;

(i) On March 1, 2006 DK had a telephone conversation with Mr. Perrick. DK's notes record a discussion about his fee in which he told her the dollar figure was about $800,000;

(j) On March 2, 2006, Mr. Perrick sent a letter to the Company and the shareholders containing a number of documents, including a one page handwritten schedule of the sale proceeds that included commission and GST totaling $926,616. In the proceedings before Mr. Justice Rice, Mr. Perrick swore an affidavit saying that the March 2, 2006 letter provided the Company and shareholders with precise calculations of his commission/fee and the proposed distribution of the remainder of the sale proceeds. Madam Justice Allan found that this letter did not contain a precise calculation and that the assertion by Mr. Perrick that this was his account was untenable. Her Ladyship found the schedule did not have Mr. Perrick's signature, it did not name the payee, it did not have a breakdown of disbursements; and it gave no indication that funds had been taken from his RPLC trust account in partial payment of that fee/commission;

(k) On March 3, 2006, Mr. Perrick met with RW and DK to discuss the capital dividend election in relation to the sale. The election for the capital dividend included the amount of $926,616 as commission expense. Madam Justice Allan found that, despite Mr. Perrick's assertion that, by signing the capital dividend election, RW approved his fee of $926,616, it was nonsense to suggest that RW's signature on the election document represented approval of his fees. Madam Justice Allan accepted RW's evidence that he was shocked at the amount of the fee and considered it to be a proposal, which he hoped would be lowered;

(l) On March 7, 2006, Mr. Perrick wrote to the Company advising that he was willing to meet with shareholders to discuss his account;

(m) On March 29, 2006, the shareholders other than AW instructed Mr. Ward to obtain a fee account and a distribution of the funds held in trust;

(n) On April 18, 2006, Mr. Perrick removed the final $185,000 from his RPLC trust account for his fees. At that time, he was well aware that there was a dispute over his fees;

(o) In April 2006, Mr. Perrick said he would respond to Mr. Ward, but he did not do so in a timely way;

(p) In June 2006, Mr. Ward continued to inquire as to whether the balance of the plaintiff's money was still in trust, whether there was any fee agreement, and how Mr. Perrick's account was quantified;

(q) Mr. Perrick did not render a statement of account until June 15, 2006. That account was backdated to February 9, 2006; and

(r) On September 22, 2006, Mr. Perrick issued a supplementary account for services rendered between February and April 2006.

(c) Allegation 4(c): Failure to advise client of the basis of fees

[65] As noted above, Madam Justice Allan found that there was no concluded fee agreement. Madam Justice Allan said that she did not believe Mr. Perrick's evidence that he told all of the siblings at one time or the other that courts have found 17 or 17-and-one-half per cent fees appropriate on straightforward real estate matters and the amount goes up based on the risk and the result.

[66] Madam Justice Allan did not believe Mr. Perrick's evidence that, at a meeting on March 15, 2005 he told the whole family that he would be expecting a fee of between 20 and 30 per cent of the difference between the $2.6 million offer from C Corp. and any final sale. She did not accept Mr. Perrick's evidence in the form of notes that he verbally confirmed his fee agreement with the siblings on a number of occasions. She preferred the evidence of RM, DK and RW that Mr. Perrick had never told them he was going to charge 20 to 30 per cent of the increased value of the Property.

(iv) Citation allegation 5: Breach of Law Society Rules

(a) Allegation 5(a): Failure to account to client contrary to Rule 3-48

[67] The hearing panel dismissed this allegation on the basis that it was duplicative of the 4(b) allegation on which it had found professional misconduct.

(b) Allegation 5(b): Failure to enter into a written contingent fee agreement

[68] Madam Justice Allan found, and Mr. Perrick admitted, there was no written fee agreement, either contingent or otherwise.

(c) Allegation 5(c): Failure to record trust transaction within seven days

[69] This was not the subject of any findings of fact by Madam Justice Allan. Mr. Perrick's evidence was that he was aware of the rule requiring recording trust transactions within seven days.

[70] Mr. Perrick's explanation was that he had a different bookkeeper working at the relevant times, and she may or may not have been aware of the requirements to record the transactions within seven days of the transaction.

[71] The hearing panel held this to be a rule breach but not professional misconduct.

(d) Allegation 5(d): Withdrawal of funds from trust when in dispute

[72] Madam Justice Allan found that, by April 7, 2006, Mr. Perrick was well aware that the $185,000 remaining in trust was the subject of a fee dispute. She found that, on April 18, 2006, he removed that amount from his RPLC trust account for his fees.

(e) Allegation 5(e): Withdrawal of fees prior to the delivery of a bill

[73] Madam Justice Allan's findings regarding withdrawal of fees are set out above. In summary, she found that no account or bill was delivered until June 15, 2006 but withdrawal of funds for fees commenced on February 9, 2006 and took place on four occasions up to and including April 18, 2006.

[74] Madam Justice Allan quoted from the decision of Mr. Justice Rice in arriving at her findings that Mr. Perrick removed trust funds improperly:

> [117] ... Mr. Perrick removed the funds without permission before rendering a statement of account according to the Rules of the Law Society. Mr. Perrick knew that he was not authorized to take out funds. He knew or ought to have known that taking them was contrary to the Rules and constituted a breach of trust. Further, he concealed his actions. Despite many numerous and urgent requests between February and October 2006, Mr. Perrick never revealed that he had taken the money. To this day he has not revealed what he has done with the money. By virtue of those wrongful acts, his breaches of the Law Society Rules and his breaches of duty as trustee of the funds, the plaintiff has been unlawfully deprived of $926,916. The defendants should not be allowed to retain that sum which was placed in trust for the plaintiff. Pursuant to s. 84 of the *Legal Professions Act* [sic] and at law, Mr. Perrick is personally liable for a breach of trust by the Perrick Corporation.

C. The Abuse of Process Application before the Hearing Panel

[75] The findings made by Madam Justice Allan were the subject of an application brought by the Law Society at the outset of the hearing of the citation by the hearing panel for orders:

> (a) that findings of fact and law made by Madam Justice Allan could be introduced into evidence as *prima facie* evidence of facts underlying the Law Society's case; and
>
> (b) that Mr. Perrick not be entitled to relitigate the issues argued before Madam Justice Allan on the basis that it would be an abuse of process to permit him to do so.

[76] On October 4, 2013, 16 days before the hearing before the hearing panel was scheduled to commence, counsel for the Law Society notified Mr. Perrick that an application for the above orders would be made.

[77] Mr. Perrick asserted that he was a "deer in the headlights" so far as the abuse of process application was concerned, that he did not know what to do or what he was entitled to do after the ruling was made. Based on the submissions before us and our review of the transcript of the hearing before the hearing panel, we accept that he had not given advance thought or prepared a plan as to how he would proceed if the hearing panel ruled in favour of the Law Society's application. Nor did he

request an adjournment (other than for the balance of the day on which the ruling was made).

[78] Based on this record, and the submissions he made before us, Mr. Perrick does not appear to have adapted to this ruling. But he was not precluded from calling evidence. He was permitted to call fresh and compelling evidence that related to Madam Justice Allan's findings, and he was permitted without limitation to call evidence that did not contradict Madam Justice Allan's findings. He did call evidence that we understand to have been in the latter category.

III. THE ISSUES AND POSITIONS OF THE PARTIES ON THE REVIEW

A. The Issues

[79] The issues are:

(a) Does the Law Society Tribunal have the jurisdiction to apply the abuse of process doctrine?

(b) If the abuse of process doctrine can be applied, was it correctly applied by the hearing panel?

(c) Should Mr. Perrick be allowed to adduce new evidence at this Review?

(d) If the hearing panel correctly applied the abuse of process doctrine, does the Notice of Review raise any other issues to be decided by this review board?

B. The Position of Mr. Perrick on Review

[80] Mr. Perrick's position is that his appeal of Madam Justice Allan's decision meant that the decision did not become final and the settlement of the appeal did not render it a final decision. Accordingly, the abuse of process doctrine could not be applied.

[81] Mr. Perrick also challenges the hearing panel's application of the abuse of process doctrine on the basis that the hearing panel did not follow the law, which requires consideration of fairness in deciding whether to apply the doctrine where the conditions to apply it exist. Mr. Perrick asserts that fairness is served by the Law Society putting in its case in the usual way and Mr. Perrick responding to it. Mr. Perrick asserts that he was taken by surprise by the abuse of process application

and, in that sense, it was not fair because he could not regroup and did not understand what evidence and witnesses he was entitled to call.

[82] Mr. Perrick asserts that he did a very a good job for these clients. Although he does not relate that assertion in a cohesive way to the allegations in the citation, he argues that he was wronged by the litigation (presumably the judicial findings which disentitled him to a fee), his counsel did not put the correct evidence before the court, and he was told by his counsel that, if he settled the appeal, the findings of fact of Madam Justice Allan would disappear.

[83] Mr. Perrick says he is entitled to introduce evidence not heard by the hearing panel which he says it ought to have heard. As explained in more detail below, it was not entirely clear whether this application was part of his challenge to abuse of process or a separate application. His submissions and therefore his position on the reasons the review board ought to receive the new evidence overlapped considerably with his position on abuse of process.

[84] Finally, and based on the arguments made above, Mr. Perrick also sought to challenge the facts and determination and penalty decisions on issues other than set out in the notice of review. He asserted that he understood the notice of review could be supplemented through submissions.

C. The Position of the Law Society on Review

[85] The Law Society takes the position that the decision of Madam Justice Allan was final for the purposes of applying the abuse of process doctrine and the abuse of process doctrine was properly applied.

[86] On application to receive new evidence, the Law Society's position is that the various documents and evidence sought to be adduced are not admissible at this stage for one or more of the following alternative reasons: the evidence is not relevant to the issues on review; the evidence was available at the hearing before the hearing panel but not led by Mr. Perrick; and/or the evidence is neither fresh or nor compelling.

[87] The Law Society's position is that the notice of review is limited to issues that relate to the decision to apply the abuse of process doctrine and that no other issues that challenge the facts and determination or the penalty decisions have been properly raised by Mr. Perrick.

IV. STANDARD OF REVIEW

[88] Section 47(5) of the *Legal Profession Act* provides that a review board may either confirm the decision of the hearing panel or substitute a decision the hearing panel could have made under the *Act*.

[89] In two recent companion decisions, the British Columbia Court of Appeal considered the issue of what standard of review should be applied by a review board on a review of a hearing panel decision under s. 47. The Court of Appeal held that the standard of review is the correctness standard as described in *Harding v. Law Society of BC*, 2017 BCCA 171 at paragraph 28 and 37, and *Vlug v. Law Society of BC*, 2017 BCCA 172.

[90] The review board therefore must determine whether the decision of the hearing panel was correct. If the review board finds the decision of the hearing panel to be incorrect, it can substitute its own decision: *Law Society of BC v. Goldberg*, 2007 LSBC 55; *Law Society of BC v. Hordal*, 2004 LSBC 36.

[91] The hearing panel is to be afforded deference in its decision to the extent that the panel heard *viva voce* evidence and thus was in a better position to assess the evidence, save any clear and palpable error: *Hordal*, at paragraph 11.

V. LEGAL PRINCIPLES AND ANALYSIS

A. The Doctrine of Abuse of Process

[92] A judgment in a civil or criminal case is admissible in evidence as proof of its findings and conclusions on similar or related issues. The party against whom the judgment is submitted as evidence may lead evidence to contradict it, or lessen its weight, unless precluded from doing so by the doctrines of *res judicata*, abuse of process or collateral attack: *British Columbia (AG) v. Malik*, 2011 SCC 18, [2011] 1 SCR 657 at paragraph 7.

[93] In this case, the question is whether application of the doctrine of abuse of process properly precluded Mr. Perrick from leading evidence to contradict or lessen the findings made by Madam Justice Allan.

[94] The doctrines of abuse of process and *res judicata* (which includes issue estoppel, cause of action estoppel and collateral attack) arise from the broader policy objective of avoiding multiplicity of proceedings and relitigation of matters that are the subject of a final and binding order: *Malik* at paragraph 37 and *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 SCR 77 at paragraphs 23, 33, and 38.

[95] As concisely and provocatively stated by Binnie J. for the court in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001], 2 SCR 460 at paragraphs 18-19, while addressing issue estoppel:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be relitigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

[96] The primary focus of these doctrines is avoiding harm to the integrity of the judicial function of the courts. Integrity of the judicial function is endangered when different findings of fact or legal conclusions are reached on the same matters and issues. Multiplicity of proceedings are to be avoided for reasons of judicial economy, avoiding the embarrassment of inconsistent findings of fact or conclusions of law based on identical facts, avoiding collateral attack on judicial orders, finality and the integrity of the administration of justice: *Danyluk* at paragraphs 18-21 and *Toronto (City)* at paragraphs 37, 43 and 51.

[97] This case concerns the application of the doctrine of abuse of process, which exists to address the same concerns about avoiding multiplicity of proceedings, but does not require the same parties (or their privies) to the dispute, unlike issue estoppel, which does require mutuality of parties: *Toronto (City)* at paragraphs 29, 38. In this case, the Law Society was not a party to the proceedings before Madam Justice Allan.

[98] Abuse of process was addressed by the Supreme Court of Canada in *Toronto (City)*. There, the court explained that the doctrine is used in a variety of

circumstances. It seeks to avoid oppressive or vexatious proceedings that violate the fundamental principles of justice. Its use to avoid multiplicity of proceedings was explained at paragraph 37:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 OR (3d) 481 (CA) at para. 55, per Goudge JA, dissenting (approved [2002] 3 SCR 307, 2002 SCC 63)). Goudge JA expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 WLR 347 at p. 358, [1990] 2 All ER 990 (CA).
> >
> > *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined*.
> >
> > [emphasis added by SCC]

[99] Because abuse of process does not require mutuality or privity of parties, it is appropriate in circumstances where there are no concerns that prompt the requirement for mutuality, such as the "wait and see" or "free rider" party that could have joined in the original litigation, but instead allows someone else to carry the burden and then comes along to reap the benefits: *Toronto (City)* at paragraphs 29-30.

[100] Application of the abuse of process doctrine is not automatic. Avoiding relitigation must be balanced against fairness and any other circumstances the case presents that serve to establish that evidence on matters that are already the subject of findings of fact or law ought to be allowed. Before applying the doctrine, the court or tribunal must stand back and ask whether to do so would create an injustice: *Danyluk* at paragraph 80 and *Toronto (City)* at paragraph 53. See also *British*

Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 BCLR (3d) 1 (CA) at paragraph 32.

[101] In *Toronto (City)*, the court said at paragraph 52 that permitting relitigation would serve the integrity of the judicial system where:

(a) the first proceeding is tainted by fraud or dishonesty;

(b) fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

(c) fairness dictates that the original result should not be binding in the new context.

[102] In summary, the doctrine of abuse of process comes into play when a court or tribunal has previously considered, in full or in part, the evidence and issues to be determined in a new proceeding and its decision is final. The findings of the previous court are admissible as *prima facie* evidence, which may be rebutted by the party against whom they are led. However, the ability to lead evidence to rebut them may also be circumscribed where the integrity of judicial decision-making balanced against fairness to the party so circumscribed mandates the limitation: *Toronto (City)* at paragraphs 43 and 45.

(i) Does the Law Society Tribunal have Jurisdiction to Apply Abuse of Process Principles?

[103] Before turning to whether the doctrine ought to have been applied in this matter, we consider a preliminary issue of whether the Law Society Tribunal has the jurisdiction to apply the doctrine.

[104] We raised this issue with the parties given the observation of the Supreme Court of Canada in *Toronto (City)* that the abuse of process doctrine arises from the inherent powers of superior courts to control their own processes. It is well understood that administrative tribunals do not have inherent powers or inherent jurisdiction in the sense that such powers in jurisdiction exist in the superior courts established by the *Constitution Act, 1867,* section 96.

[105] An administrative tribunal has two sources of jurisdiction:

(a) those powers expressly granted by statute; and

(b) those powers that exist by necessary implication. As stated by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta*

(Energy & Utilities Board), 2006 SCC 4, [2004] 1 SCR 140 at paragraph 51:

> … the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature …

[106] Pursuant to the doctrine of necessary implication, an administrative body has those powers that can be inferred from the wording, structure and purpose of the Act as being reasonably or practically necessary for the body to effectively or efficiently perform its statutorily mandated functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1756*; R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 at paragraphs 70-71; *ATCO*.

[107] Implied powers are generally those that can be said to be the kinds of powers administrative tribunals need to control their processes: *Lee v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2013 BCSC 513 at paragraph 68.

[108] In *Bell Canada* at p. 1756, the court cautioned against both "unduly broadening the powers of such regulatory authorities through judicial law-making" and "sterilizing these powers through overly technical interpretations of enabling statutes."

[109] With regard to whether the legislation governing Law Society tribunals confers the powers to apply the abuse of process doctrine, we have reference to ss. 36(f) and 41 of the *Legal Profession Act*, SBC 1998, c. 9, and Rule 5-6 of the Law Society Rules 2015.

[110] Section 36(f) of the *Legal Profession Act* provides that benchers may make rules authorizing the ordering of a hearing into the conduct or competence of a lawyer by issuing a citation. Section 41 of the *Legal Profession Act* provides that the benchers may make rules providing for the practice and procedure before panels.

[111] Under Rule 5-6 the panel may "determine the practice and procedure to be followed at a hearing."

[112] The question is whether the Rule 5-6 discretion to determine the practice and procedure to be followed at a hearing includes the authority to apply the abuse of process doctrine to balance the principle of avoiding relitigation with fairness. We find that the jurisdiction does exist.

[113] The language of s. 41 of the *Legal Profession Act*, pursuant to which Rule 5-6 was made, is broad, as is the language of Rule 5-6. Accordingly, while the *Legal Profession Act* does not expressly provide a hearing panel with the jurisdiction to apply the doctrine of abuse of process to prevent relitigation of matters previously considered by another court or tribunal, these provisions do confer a hearing panel with powers to control its own processes to facilitate a just and timely resolution of the matters before it.

[114] We are of the view that this language, in conjunction with the necessary implication doctrine, encompasses the jurisdiction to apply the doctrine of abuse of process. As noted above, abuse of process is a very flexible doctrine that is not automatic in application. Even if the conditions to make it apt to apply exist (prior and final judicial findings of fact or law on the same facts or issues), the tribunal considering its application must still consider whether it will enhance the administration of justice and be fair to apply it. Administrative tribunals often apply a less rigid standard of evidence and procedures than courts but do so in a way that is driven by fairness. In our view the doctrine of abuse of process, with fairness as the governor on its application, is ideally suited to an administrative tribunal such as the Law Society Tribunal.

[115] We are reinforced in this conclusion by decisions of the courts pertaining to the use of abuse of process doctrine by administrative tribunals and by the use of the doctrine by administrative tribunals, including law society discipline tribunals, without questioning the jurisdiction to do so.

[116] The Supreme Court of Canada, in *Toronto (City)* at paragraph 44, included both courts and tribunals in its reference to the integrity of the adjudicative process sought to be protected by the abuse of process doctrine. Indeed, that case was about the failure to apply the abuse of process doctrine in an administrative proceeding (a labour arbitration). The Supreme Court of Canada held that the arbitrator had permitted an abuse of process by not relying on evidence of a conviction and relitigating the issue.

[117] Similarly, the British Columbia Court of Appeal in *Bajwa v. British Columbia Veterinary Medical Association*, 2011 BCCA 265, upheld the decision of the British Columbia Veterinary Medical Association to refuse to allow Dr. Bajwa, at his disciplinary hearing, to relitigate allegations of institutional bias he had previously raised before another administrative tribunal, the British Columbia Human Rights Tribunal. The Court held at paragraph 36:

> The central concerns that underpin the doctrine of abuse of process exist here, namely a duplication and waste of resources and the possibility of inconsistent findings by different adjudicative bodies passing upon similar facts and issues. In the recent case of *British Columbia (Attorney General) v. Malik*, Binnie J. noted at para. 40, "[i]n a number of decisions our Court had emphasized a public interest in the avoidance of "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings" (*Danyluk v. Ainsworth Technologies Inc.*, at para. 18)".

[118] In several law society proceedings (both in BC and in other provinces), the doctrine of the abuse of process has been discussed and in some cases applied to prevent relitigation without any questions as to whether it is within the jurisdiction of the tribunal to do so. See: *Law Society of BC v. Strother*, 2012 LSBC 01; *Law Society of Alberta v. Terrigno*, 2013 ABLS 14; *The Law Society of Manitoba v. Chen*, 2006 MBLS 13; *Baker, re*, 2014 CanLII 10687 (NL LS); *Law Society of Upper Canada v. Robson*, 2015 ONLSTA 4; *Law Society of Upper Canada v. Coady*, 2009 ONLSHP 51; and *Law Society of Saskatchewan v. Duncan-Bonneau*, 2014 SKLSS 11.

[119] We conclude that the hearing panel had the jurisdiction to apply the abuse of process doctrine to prevent relitigation of facts found and issues determined by Madam Justice Allan.

(ii) Application of the Abuse of Process Doctrine

[120] Mr. Perrick's grounds of appeal challenge the application of the doctrine on three bases: failing to consider whether fairness dictates that the original result should not be binding in a new context; failing to address the effect of the settlement of his appeal of Madam Justice Allan's order; and failing to consider whether the adjudicative process would be harmed by a measure of relitigation of the relevant issues and circumstances.

[121] On the first issue in his notice of review, Mr. Perrick submits that, although the hearing panel set out the three considerations laid down by the Supreme Court of Canada in *Toronto (City)* as to when relitigation should be allowed, it only considered one of them, namely where fresh, new evidence previously unavailable, conclusively impeaches the original result. The two said not to have been considered are where the original proceeding was tainted by fraud or dishonesty and where fairness dictates that the original result should not be binding in the new

context. Mr. Perrick's notice of review and his submissions before us were about the fairness element.

[122] Dealing first with fraud and dishonesty, the hearing panel's decision did not contain a focused review of whether the trial before Madam Justice Allan was tainted with fraud and dishonesty. However, neither did any of the submissions made before the hearing panel raise such a spectre, notwithstanding that, during submissions, the hearing panel pointed out to Mr. Perrick the three bases on which relitigation might be permitted, including fraud and dishonesty, and suggested he focus his submissions appropriately. Mr. Perrick addressed the finality point but did not address fraud or dishonesty.

[123] Nor did the submissions before us address or suggest that fraud and dishonesty tainted the trial. Mr. Perrick's only submission that could be said to touch on this point, made in some detail before the hearing panel and less detail but to the same effect before us, is that the trial was marred by improper preparation and use of a joint book of documents. He says that the book was prepared in such a way that the documents were not properly described or put in proper context. Witnesses were not taken to documents they should have been taken to. Mr. Perrick blames his counsel for this and asserts he had no control over it. His view is that, if witnesses had been taken to the proper documents and proper submissions had been made on the documents, the outcome would have been different.

[124] Such a submission does not rise to the level of a trial tainted by fraud or dishonesty. We do not find that the hearing panel failed to exercise its discretion properly in this regard.

[125] Mr. Perrick spent the bulk of his time before us making submissions on the issue of fairness.

[126] Mr. Perrick asserted that he had no control over the litigation before Madam Justice Allan, in particular the development of the evidence before her. He criticized his trial counsel for not having used the evidence he gave them and for agreeing to and/or preparing a joint book of documents that allowed the plaintiffs' documents to be "homogenized" with his documents. He told us that he had a dispute with his counsel over his representation. There was no evidence before us or before the hearing panel that would substantiate such allegations or assist in linking them to a lack of fairness in the abuse of process order. A review of the decision of Madam Justice Allan demonstrates that his position at the trial (as put forth by his counsel) on many of the evidentiary disputes at trial were the same positions that Mr. Perrick took before us. In our view, Mr. Perrick's complaints about his trial counsel do not

support the conclusion that allowing relitigation was necessary in order to preserve fairness.

[127] On a broader basis, Mr. Perrick's submission was that fairness demanded that the Law Society put in its case the normal way, and he would respond to it. He did not have any nuanced position on what facts or issues found by Madam Justice Allan could be or could not be fairly adopted or why. He simply wanted the usual procedure to apply. That, in his submission, is the fair procedure.

[128] We tried to understand his position and asked him what evidence he would have led had he been permitted to lead evidence to rebut the findings of fact made by Madam Justice Allan. We asked for particulars as to what evidence would be called for what purpose, and how it was relevant to the allegations in the citation.

[129] Mr. Perrick's responses were not of assistance in determining what evidence he was precluded from leading that would support his assertion of unfairness. For example, in his first response to such a request he said:

> The abuse of process Order should be set aside and The Law Society should be required to proceed in the old and usual way. They have a lot of material to work with and once they present their case against the Respondent in that way he will be in a position to use the evidence he has already provided to them and determine what witnesses he will require, if any, without re-litigating the court case. The hearing panel in its decision on the abuse of process, inter alia, decided against fairness so as to avoid re-litigation which precluded the Respondent from calling evidence and knowing what they might allow. The hearing panel should have permitted the Respondent to present his case so they could review his actions and conduct in the context of his dealings with all of the parties involved in the real estate transaction.

[130] He then argued/asserted that the investigation and issuance of the citation were tainted because then Law Society second vice-president (later president) Herman Van Ommen's law firm and client were involved in the sale of the Property and because Mr. Van Ommen's wife was a partner in a Vancouver law firm with whom Mr. Perrick had protracted litigation. We are of the view that those matters have no bearing on the matters in the citation or the grounds of review. Mr. Van Ommen's client's interests have nothing to do with the allegations in the citation, which all relate to Mr. Perrick's dealings with his own clients. The dispute with Mr. Van Ommen's wife's law firm, as we understand it, followed the reasons of Madam Justice Allan. Those reasons provide ample basis for the citation to be issued. Mr.

Perrick, on the other hand, provided no basis for his assertion that the citation would not have been issued had Mr. Van Ommen and his wife not had these tangential connections to these matters.

[131] Mr. Perrick's second response goes no further on the issue of which witnesses he would have called to rebut findings of Madam Justice Allan. He made a number of submissions on evidence he sought to adduce as fresh evidence, and he made submissions on evidence he said should have been before Mr. Justice Rice. His only submission responsive to our request that he identify evidence and witnesses that would rebut the Allan findings is as follows:

> The Respondent also submits that he should be able to call witnesses that he believes will answer any outstanding questions or issues the Panel has with respect to the Citation. The fact that he was precluded from calling witnesses and didn't understand what evidence he could call at the F&D Hearing should be sufficient to qualify as special circumstances with respect to any new evidence. In any event, the Respondent's position is that that the Decision on the Abuse of Process was incorrect and should be dismissed.

[132] In Mr. Perrick's third response, he submitted that, at the hearing before the hearing panel, he was precluded from introducing any evidence from the 40 volume book of joint documents before Madam Justice Allan, even though some of them were not referred to at trial. He does not specify which of those documents he would have put into evidence before the hearing panel or which of the findings in the Allan Decision would have been rebutted. He provides a list of 13 witnesses he may have called, including his counsel at the trial before Madam Justice Allan, who would provide evidence on preparing the book of documents. He was unable to provide a "reference to the particular allegation (or part of the allegation)" to be addressed by such evidence. For each witness he simply said their purpose was "to rebut" but he did not say which finding they would have been called to rebut.

[133] Mr. Perrick's submissions on unfairness seem to stem at least in part from the fact that he was not prepared for the abuse of process application, for the order that was made, or to reorganize his defence based on such an order.

[134] Mr. Perrick believes he was wronged by the outcome of the litigation. In particular, he asserts that he was disentitled to a fee despite the fact that he did a significant amount of very good work and the children each received in excess of one million dollars due to his efforts. He argues his counsel did not put the correct

evidence before the court and he was told that, if he settled the appeal, the findings of fact of Madam Justice Allan would disappear.

[135] In our view these submissions do not support the assertion that the abuse of process order was unfair. They demonstrate that he rejects the findings made by Madam Justice Allan but not based on reasons that would render it unfair to adopt them in this proceeding. Related to this is that he has admitted most of the facts the Law Society seeks to have admitted and counsel for the Law Society's reliance on Madam Justice Allan's findings are limited. Particularly troubling was Mr. Perrick's refusal to address which witnesses and evidence he seeks to adduce to rebut particular facts as outlined above.

[136] It is our view that the hearing panel did not fail to consider fairness in deciding the issues and the abuse of process order did not result in any lack of fairness to Mr. Perrick in the circumstances.

[137] Next, Mr. Perrick submits that the hearing panel failed to consider that the order of Madam Justice Allan did not become final because he appealed it and the appeal was not heard but rather settled. In this regard he relies on cases such as *Toronto (City)* that stand for the proposition that "a decision is final and binding on the parties only when all available reviews have been exhausted or abandoned" (at paragraph 46).

[138] Mr. Perrick asserts that the settlement of the appeal eradicated Madam Justice Allan's findings of fact. He says that he settled it for that reason, on the advice of counsel. His counsel on the appeal was different counsel from at trial. There was no evidence before us on the advice he says he was given that settling the appeal would make the trial judge's findings of fact disappear, but Mr. Perrick says he would have led that evidence if we had permitted him to. He says that the use of the word "abandoned" on the form filed with the court to formalize the conclusion of the appeal is not significant.

[139] The Law Society's position is that the settlement of the appeal resulted in it being abandoned, and an abandoned appeal is the equivalent of the often quoted statement that a decision is final once "all avenues of appeal have been exhausted": see, for example *Wilson v. The Queen*, [1983] 2 SCR 594 at 599. The Law Society points to the form filed with the court to bring a close to the appeal. The mandatory language of that form provides that the appeal has been abandoned.

[140] We agree that the language of the court form is not determinative of this issue. It is required by the form. In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd*. (1988), 22 BCLR (2d) 89, 1988 CanLII 2941 (SC), the court declined to

decide whether a party could relitigate where the first decision was appealed and the appeal was settled but with an order stating the appeal was allowed. The court declared that the words of the order allowing the appeal did not affect the legal status of the underlying decision any more than if the words of the order had been that the appeal would not proceed because it had settled.

[141] Accordingly, the question is the status of Madam Justice Allan's findings given an appeal that was not heard but rather settled.

[142] In *Saskatoon Credit Union,* Chief Justice McEachern (then of the BCSC), ruled that the defendant in the first case was precluded from making new arguments on matters that had been decided against him in trial, notwithstanding the appeal taken and settled. He applied this result in a subsequent case, *Carla M. Courtenay Law Corporation v. Lalani*, 2001 BCCA 82, 86 BCLR (3d) 51, where the parties had entered a consent order purporting to set aside the order of the trial court. The Court of Appeal held that the parties to an action could not nullify a court order by consent order because non-parties may be inappropriately affected.

[143] The Manitoba Court of Appeal, in *Solomon v. Smith,* 1987 CanLII 117, dealt with the status of an Alberta trial judgment from which an appeal had been taken and abandoned as settled. The majority refused to allow relitigation of the issues decided by the Alberta court.

[144] In addition, the Law Society refers to the British Columbia Court of Appeal legislation and rules that do not permit a single justice to make an order disposing of an appeal: see for example, *Dorus v. Teck Corporation et al*, 2005 BCCA 600.

[145] We add that the abuse of process doctrine is concerned with individual *findings* of fact and law and not the *orders* of Madam Justice Allan. In this case, it was not her orders that were sought to be applied since the legal questions at the trial were different from the questions the hearing panel was addressing, namely whether Mr. Perrick had breached Law Society rules and professionally misconducted himself. Even where an appeal from a trial judge's order is allowed, some of the findings of fact and law may still be intact. The settlement of an appeal short of a hearing by a full panel provides a resolution that is acceptable to the parties, which may affect the enforceability of the trial judge's order as between them, but it does not nullify or negate the trial judge's findings.

[146] We conclude that, while an appeal is outstanding, the trial judge's findings are not final. But the settlement of an appeal does not equate to an order overturning the findings. Only a full panel of the Court of Appeal can do that. The settlement of the appeal ends the suspension of the trial judge's findings.

[147] Accordingly, we agree with the hearing panel that the judgment of Madam Justice Allan was final when the matter came before the hearing panel.

[148] Mr. Perrick's final issue on review is that the panel failed to consider whether the adjudicative process would be harmed by a failure to allow a measure of relitigation. More particularly, Mr. Perrick says the hearing panel erred in not permitting him to call additional evidence because of a conflict in findings between Mr. Justice Rice and Madam Justice Allan.

[149] We do not accept this submission. The hearing panel, at paragraphs 22-25 addressed such issues. It held that the issues at the trial before Madam Justice Allan and the findings she made formed the evidentiary basis for most of the allegations in the citation. Most of the witnesses Mr. Perrick proposed to call testified before Madam Justice Allan. The hearing panel adopted the comments of a hearing panel in *Law Society of Upper Canada v. Coady*, 2009 ONLSHP 51, which held that findings of fact made by a superior court judge on the same issue after full and exhaustive consideration of the evidence before the court was compelling. In the absence of new or compelling evidence that was not before the trial judge, the trial judge should not make different findings. Making different findings would result in a collateral attack against those findings and result in an abuse of process.

[150] In our view, especially given Mr. Perrick's response to our requests as described above, in this case, to allow relitigation would be harmful to the integrity of the judicial system. The hearing panel exercised its discretion appropriately.

[151] Furthermore, we could see no conflict between the findings of Justice Rice and Justice Allan.

B. Application to Lead Evidence not before the Hearing Panel

[152] Mr. Perrick sought to introduce new evidence.

[153] To a large extent, Mr. Perrick's submissions on the new evidence overlapped with his arguments about abuse of process. It may be that they overlapped completely. But there also seemed to be a suggestion that he was making the type of fresh evidence motion on appellate review that engages the well-known *Palmer* criteria, discussed below. We have dealt with the abuse of process issues above and held that no evidence was improperly excluded under that ruling. In this section, we deal with the more typical new evidence motion and the *Palmer* criteria.

[154] Section 47(4) of the *Legal Profession Act* and Rule 5-23 (2) of the Law Society Rules allow that a Review Board may hear evidence that is not part of the record in "special circumstances".

[155] The Supreme Court of Canada set out the criteria for admission of new evidence in *Palmer v. The Queen*, [1980] 1 SCR 759:

(a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

(b) The evidence must be relevant in the sense it bears upon a decisive or potentially decisive issue in the trial;

(c) The evidence must be credible in the sense that it is reasonably capable of belief; and

(d) It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[156] The *Palmer* criteria have been adopted by review panels in *Law Society of BC v. Kierans*, 2001 LSBC 6, [2001] LSDD No. 22, *Law Society of BC v. Vlug*, 2015 LSBC 59 and, most recently, in *Law Society of BC v. Sas*, 2017 LSBC 08, in deciding applications made under s. 47(4) of the *Legal Profession Act* and under Rule 5-23(2) of the Law Society Rules.

[157] In *Kierans*, the review board considered the tests for admissibility in both criminal and civil contexts and also held that if the proffered evidence fails to meet any of the four *Palmer* criteria, it cannot be admitted.

[158] The *Kierans* analysis was applied by the review board in arriving at its decision in *Law Society of BC v. Goldberg*, 2007 LSBC 55.

(i) Evidence Sought to be Adduced

[159] The evidence that Mr. Perrick seeks to introduce as "new evidence" is predominantly from sources that he submits he was prevented from calling by the panel at the Facts and Determination hearing. At the written request of the review board , Mr. Perrick made a written submission dated August 22 2016, and attached one of the two Schedules provided to him by the review board . The Schedules provided by the Chair of the review board were in the form of templates to assist Mr. Perrick in setting out the evidence he wished to introduce as new and compelling evidence.

[160] Mr. Perrick listed 13 items as persons or documents in Schedule 1 to his August 22, 2016 written submissions. Schedule 1 is attached to this decision as an Addendum and its heading reads as follows: "Evidence that you (the Respondent) wish to present to rebut the *prima facie* proof of the matters in the reasons for Madam Justice Allan."

[161] Mr. Perrick submits that Items 1 through 4 are self-explanatory and their purpose is to rebut. These are listed as two Court of Appeal Factums, the Appellant's Court of Appeal Transcript Extract Book and fourthly, "Documents referred to in Items 1 and 2 hereof (Extracts to be provided)."

[162] Items listed 5 through 13 are the names of nine individuals. Beside the name of each of the persons is a short description of evidence and the purpose of evidence set out in Schedule 1. The purpose stated for all individuals is "to rebut".

[163] Mr. Perrick supplemented the list with oral remarks relating to some of the individuals on the list. He referred to Item 8 as new evidence to be provided by Herman Van Ommen, QC about his role in the issuance of the citation. Other individuals on the list were the Directors of the Company, Secretary of the Company, two employees of the Law Society, two previous counsel and one co-counsel for Mr. Perrick.

[164] On August 11, 2015, Mr. Perrick sought to have certain documents admitted at the Review, which were referred to by shorthand as "documents 8, 9, and 10" as they were attachments 8, 9 and 10 to a letter dated October 23, 2007 to the attention of Howie Caldwell, who was an investigator for the Law Society.

[165] On August 11, 2015 Mr. Perrick described documents 8, 9 and 10 in the following manner:

(a) Document 8, an affidavit from himself sworn October 11, 2012;

(b) Document 9, a transcript of RW's cross-examination on affidavits dated January 12, 2007;

(c) Document 10, "just an index from the joint book with the lists of exhibits"[1].

Mr. Perrick does not consistently describe what he means by the term "joint book". On April 12, 2015, the second day of the Review, Mr. Perrick described document

[1] Official transcript of proceedings of August 11, 2015, page 7, lines 9 and 10.

10 as "the index to that transcript"[2] and as "the index to the exhibits that were produced in exhibit 9."[3] Both parties are consistent in describing document 10 as an index.

[166] The Law Society objected to the admission of the items referred to as documents 8, 9 and 10 on the basis that they are not relevant and that Mr. Perrick could not identify their purpose in this Review. In addition, the documents were all available to Mr. Perrick at the hearing. The Law Society addressed each item as follows:

(a) Document 8 was Mr. Perrick's own affidavit, and he was available to testify before the hearing panel;

(b) Document 9 was a transcript of the evidence given by RW on cross-examination at the trial. RW was present at the citation hearing and available to be called as a witness. It was also Mr. Perrick who failed to include document 9 in the material he presented to be included in the Notice to Admit in these proceedings, and Mr. Perrick has not stated that it is relevant to these proceedings;

(c) Document 10 is simply an index and does not meet the test for new and compelling evidence.

[167] The Law Society objected to the admission of the documents listed as items 1 through 4 and submitted that the factums and transcripts listed in Schedule 1 are not new and compelling evidence that relates to the allegations in the citation. The Law Society described the nature of factums as argument and records, not new and relevant evidence in this context.

[168] The Law Society's position with respect to each proposed witness and document listed in Schedule 1 is specific as follows:

(a) Item 5: RW – The Law Society objects to this witness on the basis that Mr. Perrick was not precluded from calling RW as a witness before the hearing panel; rather he did not seek to call RW. Furthermore, in paragraph 40 of its written response dated September 6 2017, the Law Society submits that RW had testified before Madam Justice Allan on the very issue of whether he had authorized payment of fees subject to taxation. The evidence of RW was rejected at trial as not credible. In addition, the Law Society submits that Mr. Perrick gives no explanation

[2] Official transcript of proceedings of April 12, 2017, page 54, lines 24 and 25.
[3] Official transcript of proceedings of April 12, 2017, page 55, lines 10 and 11.

as to why he did not call RW at the citation hearing, no indication as to whether RW's expected evidence for the review board would differ from what he gave at the trial, nor why this review board could now accept it;

(b) Item 6 – Robert Ward, QC. The Law Society argues that Mr. Perrick was not precluded from calling Mr. Ward as a witness before the hearing panel. The record will show that Mr. Ward was summoned by Mr. Perrick to testify but Mr. Perrick elected not to call him to testify;

(c) Item 7 – Howie Caldwell. The Law Society submits that Mr. Caldwell was a staff lawyer with the Law Society's Professional Regulation Department who investigated the complaint and was available to testify on the fourth day of the hearing but Mr. Perrick elected not to call him. The Law Society says it is unclear what evidence he wishes to elicit from Mr. Caldwell that is relevant to the panel's decisions;

(d) Item 8 – Herman Van Ommen, QC. The Law Society submits that the validity of the citation or Mr. Van Ommen's part in its issuance was not raised by Mr. Perrick before the hearing panel at the Facts and Determination hearing nor in the notice of review. The Law Society suggests that Mr. Perrick was not precluded from calling Mr. Van Ommen by the hearing panel since the issue of bias in the issuance of the citation was not the subject of any findings by Madam Justice Allan. The Law Society states that Mr. Perrick did not list Herman Van Ommen, QC as a possible witness at the hearings before the hearing panel. The Law Society questions the relevance of the evidence Mr. Van Ommen could give, although Mr. Perrick was not precluded by the panel from calling him. The Law Society objects to calling Mr. Van Ommen as it is doubtful that a reasonable person would consider that the evidence would be relevant;

(e) Items 9 through 13 – Although Mr. Perrick listed previous counsel, the Company secretary and a Law Society Trust Audit Department Manager, he did not specifically address any need for them to give evidence nor how they would qualify under the *Palmer* test. The Law Society objected to those potential witnesses and documents on the basis of relevance.

[169] In its written response to Mr. Perrick's August 22 submissions, the Law Society submits that Mr. Perrick did not provide a Schedule 2 to the review board as had

been requested, and therefore had failed to provide sufficient details of the evidence to contradict or lessen the weight of the findings of Madam Justice Allan. In particular, the Law Society asserts that by not completing Schedule 2, Mr. Perrick:

(a) did not provide the name, date and description of the documents he wished to tender nor a summary of the evidence he hoped to elicit from his witnesses; and

(b) did not provide a description of what was to be proven with the evidence with reference to the particular allegation in the citation to which that evidence was addressed; and

The Law Society submits that, as a result of these failures, Mr. Perrick has not shown that he has any "new or compelling evidence" relevant to the issues on review that should be considered by the review board .

[170] The Law Society goes on to submit that, in fact, Mr. Perrick was not precluded from presenting documentary evidence or calling witnesses by the hearing panel except insofar as it was evidence subject to the abuse of process order.

[171] With respect to Schedule 1, the Law Society's position is that none of the witnesses pass the criteria set out in *Palmer* and *Kierans*, and there are no special circumstances that would invite new evidence under section 47(4) of the *Legal Profession Act*.

(ii) Analysis

[172] In conducting an analysis of potential new evidence, it must be viewed in light of the allegations in the citation in order to determine relevance, due diligence, credibility and, if believed, whether the new evidence could have affected the result**.**

[173] After reviewing Schedule 1 and the other proposed new evidence and hearing submissions, both oral and written from the parties, we have concluded that:

(a) the factums and extracts of transcripts do not meet the second *Palmer* criteria, namely relevance to the allegations;

(b) RW was available to be called to give evidence before the hearing panel, but Mr. Perrick did not call him. Therefore he was not precluded. It may have been a factor for Mr. Perrick that Madam Justice Allan found RW not be a credible witness in the prior judicial proceeding, which

would have been a factor for the hearing panel in making a decision whether or not to admit his evidence. However, Mr. Perrick did not attempt to call RW and did not explain to this review board what relevance his evidence might have. For both these reasons this witness does not meet the test in *Kierans* and *Palmer* for admission of new evidence;

(c) Robert Ward, QC, was also available to be called at the hearing, and therefore fails the first *Palmer* criteria;

(d) Howie Caldwell was available to be called at the hearing and was not called, and it is difficult to see how any evidence from him could have affected the result; (first and third *Palmer* criteria);

(e) Herman Van Ommen, QC, was available to be called at the hearing, but the allegation of bias is based on facts that, even if proven to be true, are so tangential to the allegations that they would not make out bias in issuing the citation, especially given the findings of Madam Justice Allan that are so damning to Mr. Perrick.

[174] The attachments to a letter dated October 23 2007 referred to as "documents 8, 9 and 10" were available to Mr. Perrick at the hearing but were not included in the package he submitted for the Notice to Admit. There is evidence from the Law Society that these documents, although not relevant, were included elsewhere in the material submitted to the hearing panel; however that was not confirmed by both parties. We find that:

(a) Document 8 is not admissible as it is Mr. Perrick's own affidavit, and he was available at the hearing to testify to the matters in the affidavit;

(b) Document 9 is not admissible as it is a transcript of the cross-examination of RW, a witness who was available to be called at the panel hearing; and

(c) Document 10 is an index of no evidentiary value.

[175] The evidence that Mr. Perrick seeks to admit fails to meet the criteria set out in *Palmer* and adopted by *Kierans* and is therefore not admissible as new evidence. Neither are the circumstances special in any way that would alter the decision not to admit the witnesses and documents sought by Mr. Perrick.

C. Going beyond the Issues Identified in the Notice of Review

[176] Mr. Perrick's notice of review seeks to overturn the following decisions:

(a) the decision on Abuse of Process dated January 16, 2014;

(b) the decision on Facts and Determination dated January 23, 2014; and

(c) the decision on Disciplinary Action on June 12, 2014.

[177] The notice of review identifies and expands on the following issues, all of which pertain to the abuse of process decision:

> Whether the Respondent should have been prohibited from calling evidence to rebut the *prima facie* proof of the matters before the Hearing Panel as a result of some specific paragraphs of the Decision of Madam Justice Allan other than "new or compelling evidence, not previously available", which the Hearing Panel determined included all documents in the Joint Book of Documents put in evidence before her (some 7,819 pages) regardless if they were dealt with at the trial or not by counsel for the Respondent.
>
> (a) The Hearing Panel erred in failing to consider whether the refusal to allow a measure of re-litigation where "fairness dictates that the original result should not be binding in a new context". ...
>
> (b) Additionally, the settlement raises an issue as to the merger of the trial judgment into the settlement agreement in the Court of Appeal. ...
>
> (c) Alternatively, and additionally, the Panel erred in failing to consider whether in the circumstances of the present case, the adjudicative process would be harmed by a failure to allow a measure of relitigation of the relevant issues and circumstances. ...

[178] On its face, the notice of review seeks to overturn all decisions of the hearing panel on the basis of issues pertaining to the abuse of process decision. There is nothing wrong with that form of notice of review. Indeed, if Mr. Perrick succeeded in persuading us to overturn the decision on abuse of process, there would have been more evidence led, and it follows that the decisions on facts and determination and disciplinary action would have been reviewed to some extent or completely.

[179] Mr. Perrick also sought to persuade us to overturn the hearing panel's decision on facts and determination and disciplinary action, on other issues not set out in the

notice of review. His written and oral submissions strayed considerably from issues that related to the abuse of process decision and from the allegations in the citation.

[180] During oral submissions, Mr. Perrick was asked to relate his submissions to the issues on review as set out in the notice of review. Mr. Perrick acknowledged that those issues were all related to the abuse of process but said he understood the issues were something that could be supplemented or particularized through written submissions. He said that he had that understanding based on a pre-hearing conference.

[181] The rule pertaining to the contents of a notice of review is Rule 5-21 of the Law Society Rules, 2015. It provides as follows:

> **Notice of review**
>
> **5-21** A notice of review must contain the following in summary form:
>
> (a) a clear indication of the decision to be reviewed by the review board;
>
> (b) the nature of the order sought;
>
> (c) the issues to be considered on the review.

[182] Mr. Perrick's notice of review complied with rule 5-21. It is a basic tenet that initiating pleadings such as a notice of civil claim or a notice of review are intended to provide notice of the matters in issue and define the parameters of the proceeding. It is hard to understand how anything said at a pre-hearing conference could have led Mr. Perrick to believe that he could raise issues not raised in his notice of review.

[183] In addition to the basic premise of the purpose of a notice of review, the Law Society's written and oral submissions pointed out that Mr. Perrick's submissions addressed issues not raised in the notice of review and asserted that he should be limited to the issues raised in his notice of review.

[184] Finally, during oral submissions we suggested that Mr. Perrick take the lunch break to gather his thoughts and prepare a submission on whether the review board should entertain submissions on issues other than those raised in the notice of review. Mr. Perrick declined that invitation, saying that he would have nothing further to say other than he was under the impression he could supplement or particularize his notice of review. He did not seek leave to amend the notice of review or bring any evidence that the issue of supplementing the notice of review had been addressed at a pre-hearing conference.

[185] We are of the view that the Review should be decided based on the issues raised in the notice of review and not entertain submissions on issues not raised in the notice of review.

[186] Having determined that our confirmation of the ruling of the hearing panel addresses all of the issues raised in the notice of review, and having determined that Mr. Perrick's application to adduce fresh evidence, even if brought separately from his arguments on abuse of process, must fail, there are no other issues to consider pertaining to the decisions of the hearing panel on facts and determination and disciplinary action.

VI. CONCLUSION

[187] We conclude that the hearing panel correctly applied the abuse of process doctrine and made no error in its decision dated January 23, 2014 providing reasons on that application. Having upheld that decision, there are no other errors alleged pertaining to the decision on Facts and Determination dated January 23, 2014 and the decision on Disciplinary Action on June 12, 2014. Accordingly, we also confirm those decisions of the hearing panel.

[188] Costs will follow the event. If the parties cannot agree as to costs of the Review, they will have 30 days from the date of this decision in which to make any submissions on costs.

ADDENDUM

SCHEDULE 1

Evidence that you (the Respondent) wish to present to rebut the prima facie proof of the matters in the reasons of Madam Justice Allan:

Item # for Reference	Type of Evidence	Description of Evidence	Purpose of Evidence
1	Appellants' Court of Appeal Factum filed June 30th, 2010 by the Respondent In Person	Self-Explanatory	"to rebut"
2	Appellants' Court of Appeal Supplemental Factum filed February 25th, 2011 by Joseph Arvay, QC	Self-explanatory	"to rebut"
3	Appellants' Court of Appeal Transcript Extract Book filed October 25th, 2010 by the Respondent In Person	Self-explanatory	"to rebut"
4	Documents referred to in Items #1 and 2 hereof (Extracts to be provided)	Self-explanatory	"to rebut"
5	RW, authorized representative of the Plaintiff Company	Authorized payment of fees subject to taxation	"to rebut"
6	Robert Ward, Complainant to LSBC	Authority to represent the Plaintiff Company and communications with Respondent	"to rebut"
7	Howard [sic] Caldwell, LSBC	His role in the issuance of the Citation	"to rebut"
8	Herman Van Ommen, Chair LSBC Discipline Committee Counsel for CP Ltd. and OG Co.	His role in the issuance of the Citation	"to rebut"

Item # for Reference	Type of Evidence	Description of Evidence	Purpose of Evidence
9	Felicia Ciolfitto, LSBC Audit Department Manager	Trust Accounting issues	"to rebut"
10	Brian Baynham, Counsel for Respondent at trial	His role in preparing the Books of Documents and the Respondent's April 10th, 2007 Affidavit	"to rebut"
11	Salman Bhura, Co-Counsel for the Respondent at trial	His role in preparing the Books of Documents and the Respondent's April 10th, 2007 Affidavit	"to rebut"
12	Joseph Arvay, QC, Counsel for the Respondent in the Appeal and Counsel for AP in the HE Limited claim against AP for fees	Settlement of Judgment of Madam Justice Allen [sic] with Robert Ward	"to rebut"
13	DK, Secretary of the Plaintiff Company	Efforts the Company made to collect from CP Ltd and OG Co. on the concluded agreement with them and the lawsuit they commenced after the settlement as well as the dissolution of the Company	"to rebut"