Citation: Doolan v Law Society of Manitoba, 2016 MBCA 57

Date: 20160531
Docket: AI15-30-08330

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

ROBERT FRANK DOOLAN	)	***D. S. Miles***
	)	*for the Appellant*
Appellant	)	
	)	***R. H. Kravetsky***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
	)	***January 8, 2016***
THE LAW SOCIETY OF MANITOBA	)	
	)	*Judgment delivered:*
Respondent	)	***May 31, 2016***

HAMILTON JA

[1] The appellant appeals the findings of professional misconduct for breaching his duty to act with integrity arising from his practice of law and his subsequent disbarment.

[2] A panel of the discipline committee (the Panel) of the Law Society of Manitoba (the Law Society) found the appellant guilty of numerous instances of misappropriation and attempts to mislead the Law Society by falsifying banking records.

[3] The findings of misappropriation concern the manner in which the appellant dealt with refunds (totalling $9,096.44) that he received from the Winnipeg Land Titles Office (the LTO) for registrations he made on behalf

of various clients in his extensive real estate practice. The findings that he attempted to mislead the Law Society arise in the context of how the appellant responded during the Law Society's investigation.

[4] The appellant pled guilty to other instances of attempting to mislead the Law Society during the same investigation.

[5] While the appellant advances several grounds of appeal, the key issue concerns the Panel's analytical approach to the allegations of misappropriation.

[6] For the reasons that follow, I am of the view that the Panel's findings of professional misconduct, and its reasons for those findings, were reasonable, as was the Panel's decision to disbar the appellant. Accordingly, I would dismiss the appellant's appeal.

Background

[7] The appellant received his call to the bar in 1977. He practised law, on his own, in a high-volume real estate conveyancing practice. He employed one legal assistant and a part-time bookkeeper.

[8] The LTO publishes a schedule of fees and land transfer tax payable to enable users of the LTO to know the specific payments due for different types of registrations. Documents presented for registration at the LTO must be accompanied by a registration details application (RDA), the required fee and, where applicable, the required land transfer tax.

[9] When registering documents in the LTO on behalf of his clients, the appellant paid for the fees and taxes by cheque, either drawn on his trust

account using the client's trust funds, or drawn on his general account. In the latter case, the amount paid was charged as a disbursement and billed to the client.

[10] When the appellant overpaid the required fees and taxes, or a document he filed was rejected, the LTO issued a cheque payable to the appellant to refund the overpayment.

[11] In 2008, the Law Society conducted a spot audit of the appellant's law practice. At that time, the auditor noted that he "failed to maintain supporting documentary evidence of disbursements". The auditor instructed him by letter to stop discarding the RDAs and to place them on the appropriate file. The appellant confirmed to the Law Society that he would do so.

[12] In July 2009, the LTO noticed that about 90 of the appellant's recent 500 RDA forms resulted in refund cheques. Also, in that month, the appellant presented an RDA accompanied by eight endorsed refund cheques, unrelated to the transaction, to pay the required fees and/or taxes. The LTO contacted the Law Society about its observations.

[13] In February 2010, the Law Society conducted another audit of the appellant's records. It referred its concerns to the discipline department for further investigation, which included enquiries of the LTO and the appellant.

[14] The appellant's responses included that he "was not keeping the RDA's because it took [him] 20 minutes a day to put them in files", that the refunds were just errors that occurred because he was "always rushed" and that the refunds often went into his general account marked LTO "because

[he] wasn't keeping track of who they belonged to."

[15] The appellant attended before the Law Society's complaints investigation committee (CIC) on April 13, 2010, after which the CIC authorized charges of professional misconduct against the appellant. The appellant provided an undertaking that he would practise subject to specific conditions.

[16] Through his counsel at that time, the appellant responded to more inquiries. He confirmed that he negotiated numerous client refund cheques for cash at the teller, that he also deposited clients' refund cheques into his personal bank account, that "11 refund cheques . . . resulted from deliberate overpayments made by [him] in the spring of 2010 to cover up his earlier conduct," that he arranged for deliberate overpayments to cover the misappropriation and that he "[altered] the bank books in an effort to hide cashing the [LTO] cheques."

[17] The CIC issued a citation dated September 16, 2010, containing 14 allegations of misappropriation of refund cheques and 6 counts of attempting to mislead the Law Society during the course of its investigation.

[18] A further citation issued on May 3, 2012, for 73 more allegations of misappropriation and 2 more counts of attempting to mislead the Law Society (on 17 occasions). An amended citation issued on July 4, 2013, which was substantively the same as the May 3, 2012 citation.

The Hearing

[19] The appellant appeared on his own behalf at the hearing into his

conduct. He pled guilty to attempting to mislead the Law Society during its investigation (counts 8-13 in the September 16, 2010 citation and count 2 in the July 4, 2013 amended citation) "by making misleading statements and by making deliberate overpayments to the [LTO] when registering documents to conceal that he had misappropriated clients' monies."

[20] He pled not guilty to the allegations of misappropriation and of attempting to mislead the Law Society during its investigation on 12 occasions by falsifying banking documents by altering bank deposit slips for deposits that he had previously made (count 3 of the amended citation).

[21] The Law Society tendered, by way of affidavit evidence, extensive documentary evidence, including cancelled cheques and other banking records, client records and LTO records. The appellant cross-examined the chief financial officer of the Law Society on her affidavit.

[22] The appellant testified and called three other witnesses, one of whom was client 27, who testified that, "his usual instructions would have been to retain the [refund] cheque, and to apply same for future registrations".

[23] The appellant also testified that he had the consent from client 23 to retain a $1,180 overpayment. He did not call client 23 as a witness, as he did not want to subpoena his client. He declined the Panel's offer to subpoena the client.

[24] The appellant asserted that his admissions before the CIC were not true, but were told on the recommendation of his then counsel to avoid suspension, as he had "no choice".

[25] He testified that:

- he did not use the proceeds from the refund cheques for his own benefit; he kept the cash proceeds in an envelope in his briefcase; he would apply the funds for the benefit of clients whom he claimed owed him money for unbilled disbursements; and he kept track by using a brown envelope and sticker notes.

- "If my regular clients asked me to search a property or search a bunch of properties, I didn't give them a bill for $10, $20, $30. It was too time consuming. They wouldn't pay me anyway." Rather, he said that he treated the refund cheques as "float" money.

- he acknowledged that his actions were not in compliance with the rules related to financial and trust records.

- for several months after the 2008 audit, he and/or his paralegal kept the RDAs as directed by the Law Society, but stopped because it took too much time.

- after receiving the first complaint and learning he might be disbarred, he "decided to lie to The Law Society and started to alter his bank records."

- he did not have the intention to steal.

- he did not need the money and his biggest mistake was attempting to conceal what he had done from the Law Society, which he did out of fear and panic.

[26] His position was that: 1) because he did not have the intention to steal and he did not benefit personally, he could not be found guilty of misappropriation; and 2) when he provided the banking records to the Law Society, it already knew that they were false and, therefore, he could not be found guilty of attempting to mislead the Law Society.

The Panel's Decisions

Re Professional Misconduct

[27] The Panel found the appellant guilty of all counts of misappropriation, except with respect to client 27, and guilty of all counts of attempting to mislead the Law Society during its investigation by falsifying banking records.

[28] The Panel noted the appellant's many acknowledgments and admissions, including that he "acknowledged that he had deliberately lied to the [CIC] in order to avoid an interim suspension, so that he could continue to practice and earn an income." It preferred the evidence of the Law Society to that of the appellant whenever there was a conflict.

[29] The Panel explained that misappropriation must be proven on a balance of probabilities, and that it does not require an element of personal gain or benefit or the intention to steal. It distinguished the charges of misappropriation from criminal charges of theft.

[30] Nonetheless, the Panel made findings of personal benefit and intent:

> [I]t is our determination that [the appellant] did knowingly intend to both misappropriate client monies and to obtain a personal benefit when he deposited [LTO] refund cheques owing to his clients into his own personal bank account, and when he negotiated such cheques for their cash value, and also when he deposited such refund cheques into his general account and then utilized such monies for his own benefit.

[31] The Panel stated that the fact that most of the refund cheques involved small amounts was "irrelevant" to a finding of guilt and ultimately concluded, that:

> [The appellant] appeared to believe that he had a sense of entitlement to these refund cheques, to compensate himself for the out of pocket expenses which he was incurring on behalf of clients.
>
> These charges, and the resulting convictions, are the result of the manner in which [the appellant] chose to organize and administer his office. They could have been avoided if he was prepared to hire and train additional staff in order to enable him to comply with the standards expected of professionals entrusted with trust monies. We accept that he had a large and busy practice. However, the appellant knew the rules in regard to the administration of trust monies, and what was expected of him. However, for reasons of convenience and expediency, he chose not to follow and comply with such rules and expectations.

[32] In finding the appellant guilty of the count of misappropriation concerning client 23, the Panel noted that there was no corroboration for the appellant's evidence that client 23 consented to the appellant retaining the refund.

[33] The Panel rejected the appellant's position that he was not guilty of attempting to mislead the Law Society by falsifying banking records because the Law Society knew the deposit slips were altered when the appellant

delivered them to the Law Society. In its summary of the appellant's evidence about his attempts to mislead the Law Society, the Panel indicated that, "it is significant to note that [the appellant] also said that he was not one hundred percent sure that he would not do this again if he was in a similar situation."

Re Disbarment

[34] The Panel stated that, "The basic principle pursuant to which lawyers . . . are entitled to continue in the practice of law is the requirement of integrity" and that all of the facts demonstrate "a clear lack of integrity." The Panel concluded that the only appropriate consequence for the appellant's "clear lack of integrity" was disbarment. In addition, it ordered that he pay $38,108.23 in costs.

[35] The Panel referred to a number of well-known texts and cases, including *Law Society of British Columbia v Ogilvie*, [1999] LSBC 17 (QL), and Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, (Toronto: Carswell, 2015) (loose-leaf—release 3). From *Ogilvie*, the Panel listed the factors that are generally considered in disciplinary dispositions and considered the overarching purpose of the governing legislation to protect the public and maintain the reputation of the profession.

[36] Several times in its reasons, the Panel commented on the appellant's heavy workload, how he organized his office and his breach of accounting rules. For example:

> At some point, individuals must accept responsibility for their

> own actions. These were conscious decisions made by [the appellant], to accept and undertake this volume of work, and to make do, and not retain sufficient support staff to enable not only the required work, but also the required recordkeeping, to be done in an appropriate manner, as required by the Rules of Professional Conduct, and the *Legal Professions Act* [CCSM c L107].
>
> Although [the appellant] was not charged with any such breach of the accounting rules, this was clearly part of the problem.

[37] The Panel quoted from the MacKenzie text (at p 26-46):

> Neither the fact that a lawyer has a heavy workload nor the fact that a lawyer relied on employees should be compelling mitigating factors, because both are within the lawyer's control.

[38] In its reasons, the Panel:

- described the "serious matters" of attempting to mislead the Law Society as "lying";
- concluded that, "There can therefore be no doubt that this was a well thought out and premeditated and deliberate attempt to mislead the governing body . . . during the course of its investigation";
- considered the appellant's statement during the hearing into his misconduct "that he was not sure that he would not do the same thing again, if he found himself in similar circumstances."
- noted a number of decisions where disbarment occurred for misappropriation, and others where it had not and concluded

that the appellant did not demonstrate "any exceptional circumstances" to explain his actions; and

- placed little weight on the reference letters submitted by the appellant, noting that "it was acknowledged that only one of the lawyers . . . was aware of either the Citations issued against this member, or the findings of this Panel."

[39] The Panel was of the view that the appellant continued to display a "lack of understanding and/or appreciation of the seriousness of his actions" and concluded that a suspension accompanied by an order to practice under supervision "would not be sufficient to reflect the seriousness of the offences in this case, and to deter other members from similar actions, and to preserve public confidence in the legal profession and its ability and willingness to govern itself."

The Position of the Appellant

Re Findings of Misconduct

[40] The appellant asserts that the Panel applied the wrong definition of misappropriation by equating a breach of Law Society accounting rules with misappropriation. He argues that misappropriation requires a deliberate taking with dishonest intent, which was not proven here to the required standard of proof of the balance of probabilities by clear, cogent and unequivocal evidence.

[41] He relies on the definition of misappropriation found in *Law Society of Upper Canada v Lisa Edna Reiten*, 2007 ONLSAP 7 (CanLII),

"'Misappropriation' refers to a deliberate (*i.e.*, knowing) taking with a dishonest intention, usually theft, or fraud or some other serious wrong" (at para 47). He says that this definition has been consistently applied throughout Canada and in all Manitoba misappropriation cases.

[42] Furthermore, he asserts that the Panel did not address his belief that he had a colour of right to the refund cheques and that there was no evidence of personal gain, particularly given the LTO fees that he paid on behalf of his clients but never billed them. He also says that, at the time of the 2008 audit, the Law Society did not object to how he was handling his general account.

[43] He also asserts that the Panel erred in convicting him of attempting to mislead the Law Society by falsifying banking records because he had already admitted to the Law Society that he had done so when he provided the altered deposit slips to the Law Society. Therefore, he argues that he did not have the required wrongful intent.

[44] As well, he specifically appeals the finding of guilt for misappropriating $1,180 from client 23. He refers to his testimony that he had the consent from the client to retain the overpayment, and argues that the Panel erred when it concluded that corroboration was required to defeat the misappropriation charge. He also asserts that the Panel erred in not requiring the Law Society to contact client 23 because he did not want to subpoena his client.

Re Disbarment

[45] The appellant argues that the Panel erred in law by proceeding on

the basis "that in cases involving fraud or theft disbarment is almost always required to be imposed in order to maintain the Public trust in the absence of any exceptional circumstances." He says that the law is set out in *Guttman v Law Society of Manitoba*, 2010 MBCA 66, 255 ManR (2d) 151, which adopted the following proposition set out in the MacKenzie text, "If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practice will almost certainly be determined" (at para 75).

[46] Here, he says that there was no substantial sum of money.

[47] He also argues that the Panel failed to give proper weight to the support letters, and erred when it determined that the authors of the letters were not aware of the charges and findings of misconduct by the Panel when the evidence was that all but one of the authors were never provided with the Panel's decision or the citations. This does not mean, he says, that they did not know about the charges and findings.

[48] In addition, he says that the Panel should not have considered his statement that he was not sure that he would not do the same thing again if he found himself in similar circumstances. He says that this was speculation because no one can be certain what they will do in the future.

[49] He submits that the disbarment is unreasonable and disproportionate for breaches of trust accounting rules done for convenience and expediency.

[50] He says that a reasonable disposition would be a one-year suspension for all the offences, given that:

- he practised law for about 37 years with a clean record;
- the Law Society never received a complaint from any of his clients, including the incidents that are the subject of this appeal;
- he had an exemplary record of integrity and honesty throughout the Law Society membership and the public at large;
- from April 20, 2010 to July 10, 2013, he had practised under supervision and was following the accounting rules without incident;
- the custodian of his files after his suspension submitted a reference letter on his behalf.

The Law Society's Position

Re Findings of Misconduct

[51] The Law Society submits that it was reasonable for the Panel to conclude that the appellant was guilty of professional misconduct by reason of breach of his duty to act with integrity, and that in the circumstances, the appropriate disposition was disbarment. Therefore, it says that there is no basis for this Court to intervene.

[52] Relying on the the Supreme Court of Canada's decision in *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, it asserts that there is no longer a spectrum of standards of proof applicable in civil cases, and that the only applicable standard is balance of probabilities, which was applied by the

Panel. In particular, there is no standard of "clear, convincing and cogent" proof (at para 39). The Law Society also refers to *Moll v College of Alberta Psychologists*, 2011 ABCA 110, 510 AR 48; *Fitzpatrick v College of Physical Therapists (Alta)*, 2012 ABCA 207, 533 AR 245; and *TD v Director of Child and Family Services*, 2015 MBCA 74, 323 ManR (2d) 29.

[53] The Law Society submits that the Panel applied the correct definition of misappropriation and that *Reiten* has never been cited in Manitoba and is not regularly cited in Ontario. It relies on *Law Society of Upper Canada v Richard Kazimierz Chojnacki*, 2010 ONLSHP 74 (CanLII); and *Law Society of Upper Canada v Lawrence John Burns*, 2011 ONLSHP 101 (CanLII).

[54] In *Chojnacki*, the hearing panel endorsed the definition of misappropriation from *Nebraska State Bar Association v Veith*, 470 NW (2d) 549 (Neb 1991) (at para 6):

> Misappropriation is any unauthorized use . . . of clients' funds entrusted to [a lawyer], including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom .... (An attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation.) Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful even in the absence of deliberate wrongdoing.

[55] Similarly in *Burns*, the hearing panel concluded that "misappropriation is any unauthorized use of clients' funds entrusted to a lawyer, including not only stealing, but also unauthorized use or benefit for the lawyer's own purpose or any other unauthorized purpose" (at para 7).

[56] As for client 23, the Law Society argues that the Panel did not indicate that corroboration was required, as argued by the appellant. Rather, it says the remark must be considered in the context of the recited evidence and the appellant's impugned credibility. In any event, the Law Society points out that the appellant declined, after a specific question, to have the Panel issue a subpoena to the client.

[57] Finally, the Law Society says that the appellant admitted to altering bank deposit slips to cover up his actions with respect to the refund cheques. The fact that he later provided the altered deposit slips to the Law Society is not the relevant point in time to assess his misconduct. The charge is that he altered the deposit slips with the intention of misleading the Law Society.

Re Disbarment

[58] The Law Society submits that the disbarment is a reasonable consequence because the appellant breached his duty of integrity, which is the first rule of professional conduct, and he did so dozens of times by misappropriating his clients' money and lying about it.

[59] It points out that the Panel considered the amounts involved, noted that lawyers had been disbarred for lesser sums and was aware that not all misappropriations result in disbarment.

[60] The Law Society says that the Panel considered all the appropriate factors and principles, including the letters of reference, the appellant's career, the facts of the misconduct, and his "lack of understanding and/or appreciation of the seriousness of his actions."

Standard of Review

[61] The Panel's findings of misconduct and its decision to disbar the appellant are to be reviewed on the standard of reasonableness. See *Smith v Law Society of Manitoba*, 2011 MBCA 81 at para 10, 270 ManR (2d) 156, leave to appeal to SCC ref'd, [2011] SCCA No 540 (QL); and *Doré v Barreau du Québec*, 2012 SCC 12 at paras 44-45, [2012] 1 SCR 395.

[62] As explained by Binnie J, for the majority in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, the standard of review calls for deference (at para 59):

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* [2008 SCC 9, [2008] 1 SCR 190], at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[63] The standard of reasonableness basically involves asking, "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" See *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 47, [2003] 1 SCR 247.

[64] Therefore, for the key issue with respect to how the Panel approached its analysis of the allegations of misappropriation, the standard of review is reasonableness and not correctness, as argued by the appellant.

Decision

Re Findings of Misappropriation

[65] Misappropriation is not defined in *The Legal Profession Act*, CCSM c L107 (the *Act*), The Law Society of Manitoba Rules, online: <www.lawsociety.mb.ca/lawyer-regulation/law-society-rules/documents/english-version/EngRules.pdf> or The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011, online: <www lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct/documents/english-version/code_of_conduct.pdf>. The *Act* mentions misappropriation only in connection with the reimbursement fund. In that context, the term "misappropriation" is always paired with the phrase "wrongfully converted". For instance, section 46(2) states:

> The purpose of the reimbursement fund is to compensate claimants who have sustained pecuniary losses because of a member's or law corporation's misappropriation or wrongful conversion of the claimants' money or property.

[66] Similar references are in the Law Society Rules. See r 3-34 and r 3-73.1. As well, r 5-102(2)(c), which deals with applications for reinstatement by lawyers who have been disbarred, requires that applicants submit statutory declarations showing "that restitution of any property and payment of all money that was misappropriated or converted by the applicant has been made, or the reason why restitution or payment has not been made".

[67] The current *Code of Professional Conduct* requires that lawyers report "the misappropriation or misapplication of trust monies" to the Law

Society (at ch 7.1-3(a)). The previous *Code of Professional Conduct*, 1992, included the following commentary (at ch 1(3)(a), (e)):

> Illustrations of conduct that may infringe the Rule (and often other provisions of this Code) include:
>
> (e) misappropriating or dealing dishonestly with the client's monies;
>
> (f) receiving monies from or on behalf of a client expressly for a specific purpose and failing, without the client's consent, to pay them over for that purpose.

[68] A review of lawyer discipline cases dealing with what constitutes "misappropriation" highlights two different approaches.

[69] Several cases indicate that misappropriation must involve dishonest intention, as argued by the appellant. See *Reiten*; *Law Society of British Columbia v Burton*, [2001] LSBC 1 (QL); and *Law Society of Alberta v Lutz*, 2015 ABLS 12 (CanLII).

[70] In *Reiten*, the Law Society appeal panel wrote (at paras 47-49):

> "Misappropriation" refers to a deliberate (*i.e.*, knowing) taking with a dishonest intention, usually theft, or fraud or some other serious wrong. Such allegations are among the most serious that can be brought. The usual consequences – disbarment, or permission to resign, subject to unusual circumstances such as a small amount, the absence of loss, medical or psychological evidence – are commensurate with that specific intent. They do not form a rule, but rather reflect the experience of the Bench year after year, case after case.
>
> A person who is reckless or willfully blind in the operation of a trust account has committed an act or omission of professional misconduct that requires no such specific intent. Each state of mind, the equivalent of knowledge, is sufficient to justify a

> finding of professional misconduct, but the appropriate penalty will reflect all the circumstances. There will be cases where disbarment or permission to resign is appropriate, and others where suspensions, fines or remedial measures will properly protect the public. The Hearing Panel will consider the previous history of the licensee, the harm caused, and any considerations of ungovernability.
>
> There can also be a merely negligent operation of a trust account, based on a failure to take proper care. Negligence, unless rebutted by evidence of due diligence, is also an appropriate state of mind to characterize professional misconduct.

[71] *Reiten* was cited with approval in *Law Society of Upper Canada v Leslie Andrew Vandor*, 2012 ONLSHP 66 (CanLII); and *Law Society of Upper Canada v Norma Jean Walton*, 2013 ONLSHP 110 (CanLII).

[72] In *Burton*, the hearing panel wrote (at paras 35, 37):

> [W]hile there may be some overlap there is a substantive distinction in most instances between the negligent handling of trust funds and a misappropriation of funds that amounts to professional misconduct. Clearly, the intention and the fashion in which those funds are held or dealt with are pertinent considerations in the determination of whether the member has acted improperly.
>
> [M]isappropriation requires an intent to wrongfully deprive a person of monies, rightfully theirs.

[73] In contrast, many other cases highlight a growing trend to approach misappropriation on the basis that any unauthorized use of client trust funds by a lawyer amounts to misappropriation, regardless of the lawyer's subjective intentions. See *Law Society of British Columbia v Andres-Auger*, [1994] LSDD No 127 (QL); *Law Society of Upper Canada v Mikitchook*, [1998] LSDD No 29 (QL); *Law Society of Upper Canada v*

Kamin, [1998] LSDD No 166 (QL); and *Law Society of Upper Canada v Simon Van Duffelen*, 2005 ONLSHP 34 (CanLII); *Harder (Re)*, 2005 LSBC 48 (CanLII); *Ali (Re)*, 2007 LSBC 18 (CanLII); *Law Society of Alberta v Dennis McGechie*, 2007 LSA 21 (CanLII); *Chojnacki*; *Burns*; and *Gellert (Re)*, 2013 LSBC 22 (CanLII).

[74] In *Andres-Auger*, the panel concluded that:

> There must be some mental element amounting to wrong doing. This need not be the equivalent of criminal conduct such as dishonesty or fraud. Incompetence or some degree of carelessness may be all that is necessary. It will in every case depend upon the circumstances.

[75] In that case, the hearing panel found that:

> The member's pattern of disregard and inattention to her handling of client trust monies, and her prolonged and often repeated negligence in maintaining accounting records, involve[d] a sufficient mental element of wrong-doing to constitute misappropriation.

[76] In *Mikitchook*, the issue was whether the trust money that was transferred improperly to the member amounted to misappropriation or something less, such as misapplication of trust funds or failure to keep proper books and records. The majority of the discipline committee found that misappropriation was the proper characterization (at para 29):

> Monies . . . were put to the Member's personal use. The Member's actions were deliberate and purposeful and he did transfer the money out, notwithstanding his uncertainty of entitlement to it. At the least, he was wilfully blind. He received a financial advantage on the fifteen occasions that the fees and disbursements were paid from trust.

[77] The majority in *Mikitchook*, and the hearing panels in *Kamin* and *Van Duffelen*, cited with approval the definition of misappropriation from *Veith*.

[78] In *Kamin*, the discipline committee held that, "'misappropriation' is any unauthorized use by a lawyer of client trust funds, even if that use is only temporary" (at para 55). Thus, the only issue to be addressed was whether the lawyer's use of the client's trust funds was authorized. Finding that it was not, the committee recommended that the lawyer be disbarred. In *Van Duffelen*, the hearing panel opined that taking trust funds without the client's authorization amounted to misappropriation.

[79] In *Harder*, after citing *Andres-Auger*, as well as American jurisprudence akin to *Veith*, the hearing panel stated that (at para 56):

> The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.

[80] The hearing panel in *Ali* concluded that the amount of money taken without authorization is irrelevant.

[81] In *McGechie*, the committee addressed reckless behaviour (at para 15):

> [I]f the Member withdrew funds from trust in a reckless manner, then the Member cannot shelter behind an "honest belief" defence to misappropriation. The Committee agrees that the Member is not entitled to assert a defence to misappropriation where the alleged honest belief is founded on reckless and

careless behaviour.

[82] In *Chojnacki*, the hearing panel specifically addressed the apparent conflict between *Mikitchook* and *Reiten*, and noted that *Mikitchook* was not cited to the appeal panel in *Reiten*. The panel held that the definition of "misappropriation" in *Reiten* was "too restrictive and that misappropriation may be found if there is an unauthorized temporary use of the client's money" (at para 11).

[83] The panel in *Burns* followed *Mikitchook*, and also noted the divergence in approach in some cases (at para 7):

> There is an issue in some of the cases about the degree of *mens rea* that is required to establish misappropriation or misapplication; specifically, whether it must be deliberate, the result of wilful blindness, reckless or negligent. Given that the practice of law is a privilege in which it is each lawyer's obligation to accurately and properly account for trust funds received and applied, and given that the reputation of the legal profession and trust in its self-governance depends on the protection of clients' funds, regardless of the motivations of their lawyers, we are inclined to the view expressed in *Law Society of Upper Canada v. Mikitchook*, [1998] L.S.D.D. No. 29, that misappropriation is any unauthorized use of clients' funds entrusted to a lawyer, including not only stealing, but also unauthorized use or benefit for the lawyer's own purpose or any other unauthorized purpose.

[84] In *Gellert*, the hearing panel wrote about the broad nature of misappropriation (at paras 71-73):

> Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing. As this

> definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law.
>
> In determining whether a lawyer has misappropriated trust funds, it matters not whether the lawyer received any personal benefit from taking the funds. Nor does it matter that the lawyer intended to or did return the funds in short order, that he or she was acting in response to severe personal financial pressures, or that the amount of money taken was relatively small.
>
> The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. An unauthorized use of trust funds harms or risks harming the client, undermines the client's confidence in counsel, and has a seriously deleterious impact on the legal profession's reputation in the eyes of the public. Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out.

[85] Here, the Panel was aware that there were two lines of authorities in lawyer discipline cases as to what constitutes misappropriation. Its analytical approach was consistent with the line of authorities that I described above as the growing trend in misappropriation cases. These cases demonstrate that the Panel's approach, and its subsequent analysis of the evidence leading to its findings of misappropriation by the appellant, meet the standard of reasonableness and are entitled to deference.

Other Grounds of Appeal Re the Findings of Misconduct

[86] The appellant's other grounds of appeal are not persuasive and need only brief comment.

[87] The Panel assessed the evidence on the basis of the standard of

proof on a balance of probabilities. I agree with the Law Society that there was no other standard of proof for the Panel to apply. See *FH*.

[88] After the 2008 audit, the Law Society directed the appellant to file the RDAs on the appropriate client files. This negates his argument that the Law Society did not object, at that time, to how he handled his general account.

[89] The Panel did not simply equate breaching the accounting rules with misappropriation. Its reasons must be read as a whole and in context, part of which was the Panel's observations that the appellant was not complying with the applicable accounting rules.

[90] The appellant was found guilty of attempting to mislead the Law Society, not misleading it. The relevant time to assess the appellant's actions and intent was when he altered the bank deposit slips, not when they were sent to the Law Society, as argued by the appellant.

[91] The conviction with respect to client 23 is unassailable, given the reasonableness of the Panel's approach to the charges of misappropriation. In any event, the Panel did not state that corroboration was required, as the appellant argued. Rather, it stated that there was no corroboration. In the context of its negative credibility findings against the appellant, that is a reasonable observation. Furthermore, the appellant declined the Panel's offer to subpoena the client.

Re Disbarment

[92] The Panel considered all of the relevant factors, including the fact

that the amount of money involved was not substantial compared to many other cases. However, it also considered the extensive efforts of the appellant to attempt to mislead the Law Society in its investigation. In this regard, it was open to the Panel to consider the appellant's statement that he was not sure if he would not do the same thing again. The Panel was entitled to consider the fact that the authors of the letters of support were not provided with copies of the Panel's decision with respect to professional misconduct or the citations and to give little weight to the letters.

[93] The decision to disbar the appellant was a consequence that was open to the Panel. It fell within the range of possible, acceptable outcomes, and was clearly defensible in respect of the facts and law. As such, it is entitled to deference.

Conclusion

[94] Both of the Panel's decisions meet the standard of reasonableness. The reasons provide detailed explanations for their conclusions. In other words, the reasons demonstrate the necessary justification, transparency and intelligibility. Furthermore, the findings of professional misconduct and the disposition of disbarment fall well within the range of possible acceptable outcomes in light of the facts and the law.

[95] Accordingly, I would dismiss the appeal with respect to the Panel's findings of professional misconduct and the resulting disbarment.

[96] I would order costs in favour of the Law Society.

JA

I agree: 

JA

I agree: 

JA