

THE LAW SOCIETY OF MANITOBA

ADMISSIONS AND EDUCATION COMMITTEE (TRUST SAFETY APPEALS SUB-COMMITTEE)

IN THE MATTER OF:

MEMBER A

Appellant

AND IN THE MATTER OF:

A DECISION OF THE AUDITOR-INSPECTOR  
as delegate of the Chief Executive officer  
Dated October 25, 2021

PANEL:

Vivian Rachlis, Chairperson  
Anthony Kavanagh, Bencher and Practising Member  
Neil Cohen, Public Representative

HEARING DATE:

December 23, 2021

APPEARANCES:

Rocky Kravetsky, for the Law Society of Manitoba  
Member A, Self-Represented

*Appeal pursuant to Law Society Rule 5-42.3(1)*

*Appeal based on written submissions pursuant to The Trust Safety Program Guideline and The Trust Safety Program Appeal Guideline*

## REASONS FOR DECISION

### **I. INTRODUCTION AND REGULATORY FRAMEWORK:**

1. By Notice of Appeal dated December 1, 2021, member of the Law Society Member A appeals a decision of the Law Society's Chief Executive Officer, by her delegate, dated October 25, 2021, revoking Member A's status of Trust Account Supervisor ("TAS").
2. This appeal is brought before the panel under the *Rules of the Law Society of Manitoba* (Part 5, Division 4 – Financial Accountability). The panel was duly constituted under Rule 5-42.2(1) and (2) and the associated *Trust Safety Program Guidelines* (the "TSP Program Guideline") and the *Trust Safety Program Appeal Guidelines* (the "TSP Appeal Guideline").
3. Pursuant to the TSP Appeal Guideline, the appeal proceeded via the submission of a Record and written submissions (collectively the "appeal materials"). The Record consisted of accounting records, e-mails, letters, and memorandums. The parties submitted written submissions and authorities.
4. Each of the panel members thoroughly reviewed all of the appeal materials, then met on December 23, 2021 to discuss the evidence and written submissions.
5. The Law Society's Trust Safety Program ("TSP") reflected in the Financial Accountability Rules, first introduced in 2019, applies to members of the Law Society designated by their law firms (which includes sole practitioners) as operating trust accounts. The Rules reflect the specific responsibilities of a Trust Account Supervisor ("TAS").
6. Whether or not Member A complied with their responsibilities as a TAS, and whether they should be permitted to continue to serve as a TAS, is the focus of this appeal.

### **II. FACTUAL BACKGROUND:**

7. The facts reflected in the appeal materials are relatively straightforward and are mainly uncontentious.
8. Member A is a member of the Law Society of Manitoba (LSM). Member A is a sole practitioner primarily handling criminal law matters. Their office is located in downtown Winnipeg however due to the COVID-19 pandemic (the "Pandemic"), and related personal reasons, they have mainly practised from their residence for most of 2020 to date, with infrequent attendances to their office.

9. Member A's accounting procedures consist of the PC Law software housed on a desktop computer at their office, combined with physical records such as bank statements, receipt books and an Excel spreadsheet.
10. The appeal materials before the panel reveal that going back to at least 2017, Member A has had difficulties managing their accounting processes. In historical communications with the Law Society's Audit Department (the "Audit Department") they explained that some of these difficulties arose from unreliable bookkeepers and their lack of familiarity with PC Law. Member A has reiterated these challenges in their appeal letter (initiating this process before the panel) dated December 1, 2021.
11. The Audit Department's Sandra Alleyne worked with Member A in 2017 and 2018, including reviewing the financial records supporting their required 2017 self-report. Ms Alleyne's communications noted issues that needed to be addressed to put Member A in compliance with the Law Society's Rules governing the maintenance of financial records, including trust account records.
12. The appeal materials reveal that the Audit Department continued to take a remedial approach to Member A's challenges up to and including June 2020. The challenges through this period primarily revolved around Member A's difficulties with completing the monthly reconciliations required under Rule 5-43(2) within 30 days as required by the Rule.
13. On October 26<sup>th</sup> 2018, Member A completed an undertaking whereby they agreed to submit their reconciliations monthly (the "2018 Undertaking").
14. By letter dated October 10, 2018, the Law Society's Director of Audit Kathy Levacque notified Member A of the approval of the Law Society's Trust Safety Program ("TSP"), scheduled to come into effect in April 2019. In the same communication, Ms Levacque advised Member A that based on their previous and ongoing issues complying with the Law Society's reporting requirements they may not be approved to be a TAS when the new program came into effect.
15. In due course another lawyer known to Member A agreed to be Member A's TAS and on October 28, 2019, lawyer AB was approved under Rule 5-42.2(2) to be Member A's TAS.
16. On May 28, 2020 the Law Society received notification that lawyer AB would no longer be able to serve as Member A's TAS given an upcoming leave.
17. On June 30, 2020, the Audit Department provided Member A the opportunity to be a TAS; however, the approval letter was very clear that such approval was "tenuous"

and reiterated that it was “imperative” that they adhere to the Law Society’s trust accounting rules.

18. The Audit Department subsequently conducted a spot audit of Member A’s trust records; finding that between June 2020 and June 2021, in contravention of Rule 5-43(2), only 2 of 13 reconciliations were completed on time. The result as set out in Ms. Alleyne’s October 25, 2021 letter was that the Law Society revoked Member A’s status as a TAS. Member A appeals against that decision.
19. In his submission on appeal dated December 1, 2021, Member A provided further information regarding their practice and how their practice has been impacted by the Pandemic. They seek a degree of leniency due to these factors, requesting that the panel either set aside the decision under appeal, or alternatively that the panel stipulate conditions of their continuing as a TAS, such as hiring a bookkeeper or a further undertaking such as the 2018 Undertaking.
20. The Law Society’s counsel filed with the panel a memorandum from Ms Alleyne dated December 2, 2021 responding to Member A’s perspective and request.
21. There were no issues as to whether any additional evidence provided by the parties was properly before the panel.

### **III. JURISDICTION, PROCESS AND RULES:**

22. The amendments to Part 5, Division 4 of the Rules, creating the TSP, came into effect on April 1, 2019. The TSP requires approval by the Law Society of a TAS designate for every firm maintaining a trust account (which in this context includes a sole practitioner such as Member A). The TSP Program Guideline requires the completion of an educational test prior to approval as a TAS.
23. The Law Society’s mandate for protection of the public in the delivery of legal services is inherent in Part 5 of the Rules (of which Division 4 “Financial Accountability” and the TSP requirements are a part) and the Law Society’s entire regulatory scheme.<sup>1</sup>
24. The Rules relating to financial accountability contain various elements all of which are designed to ensure lawyers maintain trust accounts and associated records in a

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<sup>1</sup> See also *The Legal Profession Act*, <https://web2.gov.mb.ca/laws/statutes/ccsm/i107e.php>

**Purpose**

3(1)

The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

manner that can be easily examined by the Audit Department. Record keeping and reporting are critical elements that allow the Audit Department to do its work.

25. One element of the Law Society's financial accountability requirements, monthly reconciliation of the books of original records (pooled trust and individual client trust accounts) with the bank accounts is designed to ensure that discrepancies can be quickly noted. These processes prevent mistakes, catch errors and ensure accountability for money that belongs to clients. The TAS plays a critical role within the TSP. The TAS is responsible to supervise the process of monthly reconciliations as a necessary part of the accountability to the Law Society in its public protection role.
26. The panel notes that there is no suggestion of impropriety or wrongdoing through *improper use* of client monies in Member A's case.

#### **IV. STANDARD OF REVIEW:**

27. We carefully reviewed the submissions on this point. We concur with counsel for the Law Society that (as described in the next section) the appeal cannot succeed on even the most rigid standard or review.

#### **V. ANALYSIS:**

28. The materials demonstrate that before the TSP came into being, and after lawyer AB's service as Member A's TAS, the Audit Department had provided ongoing assistance, education, persuasion, as well as "second chances" by way of the 2018 Undertaking, all in furtherance of supporting Member A's compliance with their trust account and reporting responsibilities.
29. We note the following particularly relevant aspects of this history:
  - Member A had difficulties in meeting their trust account obligations dating as far back as 2017.
  - Since that time Member A has been repeatedly reminded that they bore the responsibility to maintain their accounts, not their bookkeeper nor the Law Society.
  - Member A was given several opportunities to comply, leading to the requirement for the 2018 Undertaking.
  - The 2018 Undertaking required them to file copies of their monthly reconciliations with the Law Society.

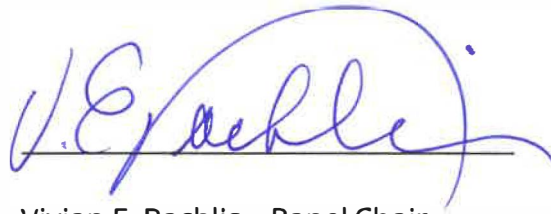
- The 2018 Undertaking created no additional duties for Member A; they were merely to complete their reconciliations as already required by the Rules.
  - The 2018 Undertaking allowed Member A the opportunity to “learn the habit” of doing the reconciliations as required and to prove this to the Audit Department; this was both remedial and had the purpose of protecting the public interest.
  - Member A had a further opportunity to cement their understanding of their trust account responsibilities when they completed the TAS course in late 2019.
  - From October 2019 to May 2020, lawyer AB, not Member A, was the TAS; lawyer AB gave Member A some education on how to better maintain records and trained them on PC Law.
  - Member A fell behind in their reconciliation and reporting obligations almost immediately after being approved as a TAS in June 2020. During the one year period from June 2020 to June 2021, only 2 of 13 reconciliations were completed on time; this was the year immediately following the departure of lawyer AB as the previous TAS.
  - Upon their approval as a TAS Member A was given notice that their approval was “tenuous” and they were warned that any further difficulties could jeopardize their future TAS status.
30. The panel finds itself puzzled that a lawyer with this degree of previous contact with the Audit Department would not comply with the basic requirements associated with submitting monthly reconciliations.
31. The panel gave consideration to Member A’s request for leniency based on the impact of the Pandemic and their associated personal circumstances. The panel is not without sympathy for the challenges described by Member A. Some of the events they described occurred during a period of particular fragility for many members of the legal profession whose practices have been literally upended by court closures, staffing challenges and reduced access to office facilities. On the facts of this case however and in relation to Member A’s lack of attention to their TAS responsibilities, the panel is unable to give sole attribution to the impact of the Pandemic.
32. We noted the following in that regard:
- Based on the realities of Member A’s practice and the reduced volume of cash transactions, the materials required for reconciliation would not require a lot of time to complete.

- Most transactions were for fees and were relatively straightforward.
  - Despite the Pandemic, Member A would still have had the opportunity to pop into their office as necessary to attend to their TAS duties; further this did not require meeting with any other staff, clients or other individuals (at the risk of transmission).
  - Reconciliations could be completed alone and at any time including evenings and the weekend; moreover the required tasks only needed to be done on a monthly basis.
  - Other banking and financial transactions were apparently attended to during the Pandemic.
  - The Pandemic's waves have peaked and troughed; the lack of attention to reconciliations were not restricted to a month here or there, but rather were a pattern of ongoing neglect over an elongated period of time.
33. The panel does not accept, as presented by Member A, that adding a bookkeeper would rectify the matter. They have said this before, in fact the Record reveals that Member A has at various times attempted to divest themselves of responsibility for matters that are central to their own obligations by saying that either their own bookkeeping staff or the Audit Department should have done more. For example, even with the assistance of a bookkeeper, a TAS maintains the responsibility to sign off and supervise. A repeat of the 2018 Undertaking would ensure continued monitoring by the Audit Department, something that cause a further drain on Law Society resources, defeat the purpose of the Financial Accountability Rules and the Trust Safety Guideline, and weaken the protection of the public. Member A has exhausted their chances for a remedial or educational approach.
34. In balancing the public interest and the interests of Member A, the panel considered the harm to Member A and noted the following:
- The removal of their TAS status would not impair their ability to practice nor prevent them from maintaining a trust account should a different TAS be approved.
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- Nothing prevents Member A from reapplying to be a TAS in the future.
35. The maintenance of timely trust reconciliations is neither trite nor voluntary. The responsibilities associated with being a TAS form a part of an overall scheme for the protection of the public, which this panel takes very seriously.

**VI. CONCLUSION AND DISPOSITION**

- 36. In the result the panel accepts the decision of the Law Society’s CEO (by her delegate the Auditor-Inspector) to revoke Member A’s approval as a Trust Account Supervisor. We hereby dismiss the appeal.
- 37. The panel wishes to thank Member A and counsel for the Law Society for their evident cooperation in the preparation and presentation of the Record, additional evidence, and submissions, all of which were of great assistance to the panel.

January 25, 2022



Vivian E. Rachlis – Panel Chair



Anthony J Kavanagh – Bencher and Practising Member



Neil Cohen – Public Representative