2023 LSBC 06
Review File No.: HE20210062
Decision Issued: March 1, 2023
Citation Issued: September 4, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

REVIEW DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

HONG GUO

RESPONDENT

DECISION OF THE REVIEW BOARD

Review dates:	June 29 and 30, 2022
Written submissions:	December 23, 2022 January 20, 2023
Review Board:	Thomas L. Spraggs, Chair Paul Barnett, Public representative Kim Carter, Bencher Maia Tsurumi, Lawyer William R. Younie, KC, Lawyer
Discipline Counsel:	William B. Smart, KC
Counsel for the Respondent:	Craig Jones, KC
Written reasons of the Review Board by:	Maia Tsurumi

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INTRODUCTION

[1] This is a Review involving Hong Guo (the "Respondent") under section 47 of the *Legal Profession Act*, SBC 1998 c. 9 (the "*Act*").

[2] On September 4, 2018, the Law Society of British Columbia issued the Citation against the Respondent.

[3] In *Law Society of BC v. Guo*, 2020 LSBC 52 (the "F&D Decision"), the hearing panel found the Respondent committed professional misconduct by:

(a) failing to comply with trust accounting rules, contrary to Rules 3-63, 3-64(3)(b), 3-64(4), 3-64(7), 3-73 and 3-74;

(b) failing to properly supervise the Respondent's bookkeeper and/or improperly delegating trust accounting responsibilities, including giving a non-lawyer pre-signed blank trust cheques, contrary to Rule 3-64 and the *Code of Professional Conduct for BC* (the "*BC Code*"), rule 6.1-3;

(c) misappropriating trust funds resulting in trust shortages of $638,689.43, $5,250 and $5,483.81, contrary to Rule 3-63 and/or Rule 3-64(3);

(d) breaching an undertaking (the "Undertaking") to the Law Society; and

(e) breaching a Bencher order (the "August Order") made under Rule 3-10.

[4] Subsequently, in *Law Society of BC v. Guo*, 2021 LSBC 43 (the "DA Decision"), the hearing panel found there were exceptional circumstances that made disbarment an unreasonable penalty and suspended the Respondent for one year. The hearing panel also reduced the Bill of Costs from $70,094 to $46,979.44, finding some claimed costs excessive or unwarranted.

[5] The Law Society seeks to set aside the DA Decision. It argues the hearing panel erred because it did not disbar the Respondent and because it reduced the Bill of Costs.

[6] Neither party sought a review of the F&D Decision.

[7] The section 47 hearing occurred virtually on June 29 and 30, 2022.

[8] On December 18, 2022, we requested additional submissions from the parties as follows: if the review board were to consider disciplinary action other than disbarment, what are the parties' positions on the issue of a practice supervision agreement forming part of any penalty? In response, we received submissions from the Respondent on December 23, 2022 and from the Law Society on January 20, 2023.

[9] For the reasons below, we uphold the hearing panel's decision to impose a one-year suspension on the Respondent and its decision on costs. However, we find the hearing panel erred in not requiring the Respondent to enter, and comply with, a practice supervision agreement before returning to practice after her suspension. We find the public interest requires this additional disciplinary measure.

ISSUES

[10] The primary issue we must decide is whether the hearing panel erred in ordering a 12-month suspension and not disbarring the Respondent.

[11] The Law Society says the hearing panel erred in:

(a) its analysis about whether there were exceptional circumstances justifying a penalty less than disbarment;

(b) its assessment of the seriousness of the totality of the misconduct;

(c) failing to adequately take into consideration the need for denunciation and specific and general deterrence;

(d) imposing a sanction that does not adequately protect the public and maintain public confidence in the legal profession; and

(e) reducing the Law Society's Bill of Costs.

[12] The Respondent denies the hearing panel made these errors and points to the outcome in *Law Society of BC v. Guo*, 2022 LSBC 03 ("*Guo No. 2*") as inconsistent with the conclusion that disbarment is the only reasonable penalty. She further says, in deciding whether to substitute a penalty of disbarment for the 12-month suspension, we must consider *Charter* values, specifically that her disbarment would disproportionately and adversely impact access to justice for members of the Mandarin-speaking community.

[13] The Respondent submits the appropriate penalty is a fine of $50,000, which is the maximum allowed under section 38(5) of the *Act*. Such a fine would be by far the largest financial penalty ever imposed upon a lawyer in a Law Society discipline case. The Respondent also agrees to pay the Law Society's costs throughout these proceedings, to a maximum of $70,000. She asks for six months to pay these amounts.

[14] The Respondent also raises a procedural question about the record (the "Record"). Although she did not make a formal application for the Law Society to provide the full Record, she argues we cannot increase her penalty without it.

[15] Finally, the parties disagree on the standard of review.

BACKGROUND

[16] Here, we summarize the findings of fact and reasoning and conclusions of the hearing panel in the F&D Decision and the DA Decision.

Part 1: Facts and determination – findings and conclusion of the hearing panel

[17] The Citation covered five broad allegations of misconduct:

(a) failure to comply with trust accounting rules;

(b) failure to supervise employees;

(c) misappropriation of trust funds;

(d) breach of the Undertaking; and

(e) breach of the August Order.

[18] The hearing panel's findings about professional misconduct are not disputed.

[19] Between approximately January 2014 and October 2016, the Respondent failed to maintain accounting records in compliance with the Law Society Rules. Specifically:

(a) between January 2014 and March 2016, she did not prepare monthly trust reconciliations of her pooled trust accounts within 30 days of the reconciliation, or at all, in a significant number of instances, contrary to Rule 3-73;

(b) she withdrew trust funds from her trust account when there were insufficient funds held to the credit of the client, contrary to Rule 3-64(3)(b);

(c) between July 10, 2015 and March 31, 2016, she failed to report to the Executive Director that her trust account was overdrawn by more than $2,500, contrary to Rules 3-63 and 3-74;

(d) between April 4 and 11, 2016, she withdrew or authorized the withdrawal of a total of $1,870,123.08 in trust funds from her trust account by way of debit memo, contrary to Rules 3-64(4) and (7);

(e) between approximately February and March 2016, she gave a non-lawyer one or more of 112 pre-signed blank trust cheques for her trust account, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*;

(f) between March 11 and 30, 2016, she permitted a non-lawyer to issue one or more of 90 trust cheques drawn on her trust account totalling $44,731,730.65 without proper supervision, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*;

(g) on or about March 11, 2016, she gave a non-lawyer one or more of five pre-signed blank trust cheques, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*;

(h) between March 15 and 30, 2016, she permitted a non-lawyer to issue one or more of five trust cheques drawn on her trust account totalling $8,426,333.41 without proper supervision, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*;

(i) in or about March 2016, she gave a non-lawyer one or more of three pre-signed blank trust cheques, contrary to Rule 3-64 and rule 6.1-3 of the *BC Code*; and

(j) from January 2016, she failed to maintain sufficient funds on deposit in her trust accounts to meet her obligations with respect to funds held in trust for her clients, contrary to Rule 3-63.

[20] Between approximately January and March 2016, the Respondent also failed to properly supervise her bookkeeper or improperly delegated her trust accounting responsibilities to him, or both, which facilitated misappropriation of a total of $7,506,818 from the Respondent's trust account, contrary to Rule 3-64 or Rule 6.1-3 of the *BC Code*, or both. (Although the Respondent's bookkeeper and another

employee attempted to steal over $7.5 million, the final cheque was caught by the bank when it was cashed. Accordingly, the actual theft amount was $6,619,256.)

[21] The hearing panel found the Respondent's professional misconduct resulted in the theft of client trust funds by her bookkeeper.

[22] The hearing panel also found the sheer magnitude of the Respondent's practice was such that proper supervision of her employees and the work product was simply not possible.

[23] The following is a summary of critical facts about what happened after the Respondent discovered the theft:

(a) in late March 2016, the Respondent learned her trust accounts were missing millions of dollars;

(b) on or about April 1, 2016, the Respondent disclosed the trust shortage to the Law Society;

(c) one of the Respondent's first responses to discovering the theft was to deposit about $2.6 million of her money into her trust account to address some of the more pressing closing transactions, including $1.69 million by about April 11, 2016;

(d) by April 11, 2016, most of the $1.69 million was used to close real estate transactions, but as these make up funds were less than the amount required to cover the funds stolen, the Respondent misappropriated other clients' trust funds to cover transactions completing at this time;

(e) the Respondent manipulated her trust account records to allow her to use other clients' trust funds to complete the following real estate transactions:

(i) trust misappropriation #1 – used $638,689.43 to complete a real estate transaction for TZ when TZ did not have this amount in trust;

(ii) trust misappropriation #2 – used $5,250.00 to pay a real estate commission; and

(iii) trust misappropriation #3 – used $5,483.81 to close another transaction;

(f) there is no rule of the Law Society requiring the Respondent to deposit "make up" funds *pro rata* among all clients impacted by the theft, and the hearing panel made no adverse finding because she did not do so;

(g) on April 13, 2016, the Law Society ordered an investigation into the theft and the Respondent agreed to cooperate fully with this investigation;

(h) on April 19, 2016, the Respondent provided the Undertaking to the Law Society, which required her to:

  (i) immediately cease depositing client trust funds into the Bank 2 Trust Account;

  (ii) open a new trust account for all new client matters; and

  (iii) as of May 6, 2016, only operate trust accounts with a Law Society designated signatory;

(i) on August 17, 2016, the Law Society issued the August Order, which required the Respondent to:

  (i) only use new trust accounts for new client matters and have a second signatory;

  (ii) retain a forensic accountant and have them identify certain classes of clients and associated information;

  (iii) complete a client listing for the Bank 2 Trust Account of those affected by the trust shortage as at September 30, 2016, with their names and contact information;

  (iv) consent to the appointment of a custodian of the Bank 2 Trust Account and any files or client matters related to the trust shortage; and

  (v) make no payment to or on behalf of Bank 2 Trust Account clients, except through the custodian;

(j) by early 2018, all trust shortages were eliminated by the approximately $2.6 million of the Respondent's money and about $4.0 million of insurance money, which the insurer had delayed paying out;

(k) the Respondent frequently asked the Law Society for help with her situation. While the Law Society provided some information, it told her

it would be in a conflict of interest if it helped her because the Law Society was prosecuting her;

(l) the Law Society advised the Respondent to retain counsel, which she did;

(m) there was no expectation that the Law Society would provide financial or other assistance to relieve the Respondent's crisis;

(n) it was unnecessary to find the Respondent stole trust funds because borrowing trust funds to complete a transaction for another is misappropriation;

(o) the Respondent breached the Undertaking by:

(i) not opening a new trust account until July 25, 2016, more than three months after the Undertaking was given. The Respondent apologized for this breach, stating she was preoccupied with the theft and pressures created by trying to manage her practice after the theft;

(ii) not depositing trust funds for new client matters into the new trust account from May 16 to September 12, 2016, when she started using her new trust account; and

(iii) not having a second signatory on her trust cheques after May 6, 2016. The Respondent apologized for this breach but did not explain it except to say she was overwhelmed and unfocused;

(p) the Respondent breached the August Order by depositing money into the Bank 1 Trust Account after August 18, 2016. The hearing panel rejected the Respondent's submissions that many of the deposits were not for new clients and/or were for files opened before that date; and

(q) the Respondent's breach of the Undertaking and the August Order was worthy of condemnation. It was significant the breach was to her regulator, and her blatant disregard of the regulator's requirement must be responded to in the clearest possible terms as unacceptable.

[24] In summary, the misconduct occurring after the Respondent discovered the theft was as follows: she manipulated and borrowed trust funds from clients, without their knowledge or authorization, to replace funds missing from other clients' trust

accounts required to complete pending real estate transactions, and she breached the Undertaking and the August Order.

[25] The Respondent deposited about $2.6 million of her own money to ameliorate some of the consequences of the theft and pledged her assets to make her clients whole.

Part 2: Disciplinary action - sanction phase of the hearing

[26] The key issues before the hearing panel in the DA Decision were whether disbarment was the appropriate sanction and, if not, what penalty was merited. The hearing panel noted the presumptive sanction for intentionally misappropriating client funds was disbarment unless there was evidence of exceptional circumstances.

[27] The hearing panel found the following factors from *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45, relevant to the DA Decision*:*

(a) the nature, gravity and consequences of the misconduct;

(b) the respondent's character and professional conduct record;

(c) the respondent's acknowledgment of the misconduct and remedial action; and

(d) public confidence in the legal profession, including the integrity of its disciplinary process.

[28] Regarding the nature, gravity and consequences of the conduct viewed globally, the conduct under decision was: (1) three trust misappropriations; (2) failure to comply with the Undertaking; (3) failure to comply with the August Order; (4) failure to properly supervise staff; and (5) other accounting breaches. The hearing panel found this professional misconduct called for severe sanction. The latter two categories were serious and foundational to the theft. Also, the breaches of the Undertaking and August Order were extraordinary, given all undertakings must be observed, and the Respondent provided no real explanation or excuse. However, the hearing panel found the misappropriations only occurred after the Respondent discovered the theft and were largely motivated by the Respondent's desire to minimize the imminent collapse of pending transactions and prevent her clients from defaulting on these transactions.

[29] Further, over time, the Respondent replaced most, if not all, of the stolen funds, and all the trust shortages were ultimately covered. The insurer caused the

approximately 18-month delay in the Respondent making all her clients financially whole.

[30] The hearing panel noted there were letters of support and media reports in evidence about the Respondent's good reputation, and it accepted these as some indication of community support, although the hearing panel gave this evidence little weight. The Respondent had a record of Practice Standards issues and conduct reviews, a breach of the Undertaking and August Order and breaches of Law Society orders.

[31] The hearing panel accepted the Respondent was very stressed and financially impacted by the theft but found this did not excuse her misconduct. Viewed globally, her stress did not outweigh the financial impact and stress on her clients and third parties: lawsuits by realtors seeking commissions and others alleging damages from delayed or missing payments; and costs, stress, delay payments on pending transactions and inconveniences to several parties. The hearing panel accepted the Respondent's late apology for breaching the Undertaking and August Order but noted she still maintained she was the victim and minimized her role in creating the circumstances leading to the theft.

[32] The Respondent now has no access to a trust account and practises under the supervision of a lawyer.

[33] Turning to the question of public confidence, the hearing panel said the Respondent committed an array of professional misconduct and misappropriation. All the *Ogilvie* factors should be applied through the "prism" of public protection, meaning disbarment is usually the only way to maintain confidence in the legal profession: *Law Society of BC v. Gellert*, 2014 LSBC 05 ("*Gellert 2014*") at paras. 44 and 46.

[34] The hearing panel considered authorities holding seriousness of misconduct is the prime determination of penalty, misappropriation is the most serious misconduct, and absent rare and extraordinary mitigating factors, disbarment is the appropriate disciplinary action for the intentional misappropriation of client trust funds: *Law Society of BC v. Hammond*, 2004 LSBC 32 ("*Hammond No. 1*"); *Law Society of BC v. Harder*, 2006 LSBC 48 at para. 9 ("*Harder 2006*"); *Law Society of BC v. McGuire*, 2006 LSBC 20 at paras. 29 and 30, aff'd 2007 BCCA 442; *Gellert 2014* at paras. 44 and 46; *Law Society of BC v. Lebedovich*, 2018 LSBC 17 at para. 24; *Law Society of BC v. Tak*, 2014 LSBC 57; *Law Society of BC v. Briner*, 2015 LSBC 53 at para. 42; *Law Society of BC v. Lowe*, 2019 LSBC 37.

Decision on disbarment

[35] The hearing panel accepted the presumptive sanction of disbarment, at first glance, and applied it to the Respondent. However, the panel found there were exceptional circumstances that explained and mitigated the Respondent's misconduct. Three circumstances, viewed collectively, amounted to exceptional circumstances:

> [60] In this case, the Respondent manipulated her clients' trust funds to cover shortfalls in other clients' trust funds that occurred due to the massive theft committed by her bookkeeper. We do not agree with the Respondent's submissions that she did not benefit financially (see *Briner*; *Lowe*) from her manipulation of her clients' trust funds. In our view, the Respondent clearly gained a direct advantage when she used her clients' trust funds to cover shortfalls in other clients' trust accounts that would otherwise adversely impact pending real estate transactions. In other words, the proceeds of the misappropriation were utilized to complete commercial transactions that would, but for the misappropriations, have collapsed as a result of the theft from the Respondent's trust account. The Respondent made a deliberate decision to close the transactions in the only way possible by misappropriating funds from one client to facilitate a closing for another.
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> …
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> [62] Specifically, we find that there are three circumstances that collectively amount to exceptional circumstances that mitigate against disbarment. First, the Respondent provided family funds of about $2.6 million to help eliminate the trust shortage caused by the theft, namely $1.69 million between April 5 to 13, 2016, about $219,000 by August 9, 2019, $370,000 in January 2017 and $300,000 in or about March, 2018.
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> [63] Second, the Respondent was attempting to deal with a massive theft of about $7.5 million by a trusted employee. While we determined that the Respondent created the circumstances that led to the theft, we also find that the Respondent was essentially caught between a rock and a hard place. Whether she took any steps or not, many of her clients' pending transactions were adversely impacted by the massive theft. The clients who had pending transactions would bear the brunt of the theft so the Respondent deliberately manipulated her clients' trust funds to close pending transactions. We accept the Respondent's evidence that she believed that by manipulating her trust funds in the manner she did, she could minimize the global impact of the massive theft on her clients.

> [64] Finally, we understand that, with some exceptions (i.e., parties who brought lawsuits claiming damages for delayed or missing payments), most, if not all, affected clients were eventually made whole through funds paid from family funds and the defalcation insurance.

[36] Given its decision not to disbar the Respondent, the hearing panel found it unnecessary to consider the Respondent's *Charter* values argument.

Decision on suspension

[37] Noting the Law Society only made submissions about disbarment, the hearing panel reviewed both parties' authorities, especially those involving misappropriation. The panel concluded there were no reported cases like the proceeding before it. While the most analogous situation was found in *Law Society of Upper Canada v. Ortega*, 2013 ONLSHP 91, where a lawyer was "duped" and suspended for six months as a result, the Respondent's conduct was more serious than that of the respondent in *Ortega*.

[38] The hearing panel concluded the Respondent intentionally misappropriated trust monies but she did so to mitigate the immediate impact of the theft by her bookkeeper, which largely fell on her clients. It also concluded, if her clients' pending transactions had collapsed, the consequences would have been greater for those clients than for other clients or herself at that time.

[39] The hearing panel imposed a one-year suspension. A suspension was required because the Respondent created the circumstances leading to the theft, which was serious misconduct.

[40] However, because the Respondent contributed money to make her clients whole, took steps to restore the stolen trust funds and to prevent pending client transactions from failing, a lengthy suspension was not warranted. Also, the Respondent currently practises under supervision and does not operate a trust account, so there is limited risk of reoccurrence. Importantly, the hearing panel concluded the public interest favours a lawyer taking steps to minimize the overall adverse impacts on clients' trust funds whenever possible, so public interest concerns were not as prominent in assessing penalty. The Respondent's actions were not contrary to the public interest.

Decision on costs

[41] The hearing panel reduced the Bill of Costs from $70,094 to $46,979.44, by reducing the claim for tariff units from 572 to 394 and disallowing some disbursements.

[42] The Respondent largely disputed having to pay for: an application to exclude a member of the public who was disruptive to the hearing; the Rule 3-10 hearings; and related disbursements. Also, the Respondent said some other items fell within the average range of difficulty.

[43] The hearing panel agreed with the Respondent, except for a $350 translator fee.

Decision on abuse of process

[44] The Respondent objected to material in the Law Society's reply submissions about several pending or outstanding citations and conduct reviews involving the Respondent. The panel excluded this material from the hearing, finding it was highly irregular and its prejudice would outweigh its probative value.

PROCEDURAL ISSUE

The Record

[45] The Record before us includes the Notice of Review, the Citation, the F&D Decision, the DA Decision and transcripts, exhibits and written submissions from the DA Decision hearing.

[46] As noted above, the Respondent did not make an application for the Law Society to provide the record of the F&D Decision hearing and she did not take any steps to file a supplemental review record.

[47] However, the Respondent says we cannot order disbarment unless we have reviewed the same evidence the hearing panel had when it made its decision on Disciplinary Action. She says, at the DA Decision hearing, the Law Society and the Respondent made submissions based on evidence in the F&D Decision hearing and so the evidence from these proceedings is relevant to penalty. The Respondent says for us to substitute disbarment for her 12-month suspension, we would need evidence about:

(a) there being no Lawyers Insurance Fund coverage and no help from the Law Society; and

(b) delay by Lloyd's Underwriters in paying out the claim.

[48] The Law Society says both parties rely on the facts determined in the F&D Decision and these findings are not under review. Thus, it would be a waste of Law Society resources and would increase the cost of reviews to require the entire record in such circumstances.

[49] Based on the Respondent's submissions, we find the Respondent is satisfied with the Record before us. We have not ordered disbarment. In any event, the only evidence the Respondent submits we do not have was reviewed by the hearing panel below and the hearing panel found there was: (1) no Lawyers Insurance Fund coverage; (2) no help given to the Respondent from the Law Society about how to handle pending transactions; and (3) delay by the insurer in paying out the claim. Submissions citing this evidence are in the Record we have, and the hearing panel's factual findings are entitled to deference (see next section on standard of review).

New evidence

[50] In response to our December 18, 2022 request for additional submissions about penalty, both the Law Society and the Respondent attempted to submit new evidence. We find most of this evidence inadmissible.

[51] Under section 47(4) of the *Act*, only if a review board finds special circumstances can it hear evidence that is not part of the record. The admission of new, or fresh, evidence to a review board was considered in *Law Society of BC v. Kierans*, 2001 LSBC 06. The test for the admission of new evidence is as follows:

(a) the evidence was not discoverable by reasonable diligence before the end of hearing;

(b) the evidence is wholly credible; and

(c) the evidence will be practically conclusive of an issue before the tribunal: *Kierans* at paras. 13 to 15.

[52] The Respondent provided an affidavit filed during a Rule 3-10 proceeding brought against the Respondent by the Law Society in 2020. This affidavit is inadmissible. It was discoverable by reasonable diligence before the end of the DA Decision hearing.

[53] The Law Society submitted a lengthy affidavit with many exhibits ("LS Affidavit"). We find almost all this material does not meet the *Kierans* test for new evidence and is inadmissible.

[54] The first eight citations attached to the LS Affidavit range from December 12, 2018 to November 10, 2020 (LS Affidavit, Exhibits E-L). These were discoverable by reasonable diligence before the end of the DA hearing. Further, these citations and the ninth citation (LS Affidavit, Exhibit M) do not meet the third criterion for admitting new evidence. As the Law Society acknowledges, citations are not proof of misconduct and so the citations are not evidence practically conclusive of an issue before us.

[55] The Law Society tendered an expanded professional conduct record ("Expanded PCR"). The portion containing the PCR before the hearing panel is not new evidence as it is in the record (LS Affidavit, Exhibit A, Tabs 1-14).

[56] The portion of the Expanded PCR that was not before the hearing panel (LS Affidavit, Exhibit A, Tabs 20-22, Exhibits B-D) is new evidence, but inadmissible. As a review board, our job is to review the DA Decision. We do this based on the record, including the PCR, before the hearing panel. We do not decide *de novo* about penalty. Thus, the portion of the Expanded PCR not before the hearing panel is not practically conclusive of the issue before us, which is whether the DA hearing panel was correct about penalty on the record before it (see Standard of Review section below). It would be unfair to respondents to allow the Law Society on review to expand the professional conduct record beyond the professional conduct record before the hearing panel on disciplinary action, because then delay caused by the time required to conduct a review could cause prejudice to respondents. Also, LS Affidavit, Exhibit A, Tabs 20-21 were discoverable by reasonable diligence before the end of the DA hearing.

[57] The hearing panel decisions (LS Affidavit, Exhibit A, Tabs 17-18) and Court of Appeal decision (LS Affidavit, Exhibit A, Tab 19), resulting from the November 1, 2019 citation (LS Affidavit, Exhibit G) are not evidence. As case law, we may consider them and the parties made submissions to us about these decisions. Exhibit A, Tab 18, is the decision *Guo No. 2*, which is discussed further below.

[58] The hearing panel decisions from the September 4, 2018 citation (LS Affidavit, Exhibit A, Tab 15) and December 6, 2018 citation (LS Affidavit, Tab 16) are not evidence. They are Tribunal decisions that we may consider.

[59] For the same reason we find the portion of the Expanded PCR not before the hearing panel, we find inadmissible the Order of Justice Weatherill regarding contempt of two orders for document production (LS Affidavit, Exhibits S-V); Complaint File No. 20221074 investigation about compliance with the practice supervision agreement and related correspondence (LS Affidavit, Exhibits N, O, Z, AA-RR); Complaint File No. 202220888 investigation (LS Affidavit, Exhibits P-

Q); and Complaint File No. CO20220915 investigation (LS Affidavit, Exhibit R). This material is not practically conclusive of the issue before us.

[60] The following material relating to the Respondent's current practice supervision agreement is also inadmissible because it was discoverable by reasonable diligence before the end of the DA hearing: LS Affidavits, Exhibits W and AA-KK.

STANDARD OF REVIEW

[61] Before we can decide the substantive issues, we must determine the appropriate standard of review.

[62] The Law Society says a review of a discipline panel decision is on the qualified correctness standard developed in *Law Society of BC v. Hordal*, 2004 LSBC 36 ("*Hordal review*"); *Law Society of BC v. Berge*, 2007 LSBC 07; *Harding v. Law Society of British Columbia*, 2017 BCCA 171; and *Vlug v. Law Society of British Columbia*, 2017 BCCA 172.

[63] However, the Respondent says when penalty and not misconduct is reviewed, there is a further element of deference in reviewing a hearing panel decision. The review board must determine whether the disciplinary action imposed falls within the reasonable range of penalties applied in similar situations. If it does, it is "correct", even if the review board would have chosen a different spot on the range: *Strother v. Law Society of British Columbia*, 2017 LSBC 23 at para. 99, aff'd on this point 2018 BCCA 481 at para. 111; *Law Society of BC v. Singh*, 2022 LSBC 13 at para. 30.

[64] In response to this, the Law Society argues the range of sanctions is but one of the many *Ogilvie* factors and there is no range regarding disbarment. The individual is either disbarred or not. Thus, the idea of a reasonable range of penalties only applies when the penalty is less than disbarment.

[65] We agree the qualified correctness standard (or the "*Hordal/Berge* standard") means we must review the DA Decision on a standard of correctness while deferring to findings of fact made by the hearing panel: *Harding* at para. 6.

[66] The *Hordal/Berge* standard means we must determine whether the hearing panel applied the correct legal principles and applied those principles correctly. As discussed in the next section on our decision on the correct penalty in this case, whether the 12-month suspension falls within a reasonable range of penalties is one of the *Ogilvie* factors we must consider and apply: *Hordal review* at para. 18; *Singh* at para. 30. In our view, the range of reasonable penalties includes disbarment.

ANALYSIS AND LEGAL REASONING

[67] As discussed above, the Law Society seeks a review of the hearing panel's decision on penalty and costs. We first address penalty.

Penalty

[68] Decisions on sanction are an "individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings": *Law Society of BC v. Faminoff*, 2017 LSBC 04 at para. 84.

[69] The analysis for determining appropriate sanctions for professional misconduct involves the application of one or more of the following factors set out in *Ogilvie*:

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

(b) the age and experience of the respondent;

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

(d) the impact upon the victim;

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

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

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

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

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

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

(k) the need for specific and general deterrence;

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

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

[70] The usual approach to determining the appropriate disciplinary sanction is to apply only those *Ogilvie* factors relevant to the circumstances of the case: *Ogilvie*; *Law Society of BC v. Dent*, 2016 LSBC 05 at paras. 19 to 23. In this case, we find the following *Ogilvie* factors relevant:

(a) the nature, gravity and consequences of the conduct, including:

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

(ii) whether there were exceptional circumstances;

(iii) whether the Respondent gained an advantage by her misconduct; and

(iv) the impact on the alleged victims;

(b) the previous character and professional conduct record of the Respondent, including her age and experience;

(c) acknowledgement of the misconduct and remedial action and the presence or absence of other mitigating circumstances;

(d) the need for specific and general deterrence, which also relates to the possibility of remediating or rehabilitating the Respondent; and

(e) public confidence in the legal profession, including public confidence in the disciplinary process.

[71] We also consider the range of penalties imposed in other cases. Similar types of misconduct should attract similar disciplinary sanctions to give confidence in the disciplinary process. However, in this case, these cases only provide general guidelines because this case is unprecedented in terms of the scope of the misconduct, impact of the misconduct and the situation in which the professional misconduct occurred.

[72] Finally, we apply a global approach to sanction because there are multiple allegations of misconduct: *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 77; *Law Society of BC v. Tak*, 2014 LSBC 57 at paras. 27 to 29 (see also e.g. *Law Society of BC v. Gellert*, 2005 LSBC 15). The global approach requires an assessment of the seriousness of the totality of the offences and a penalty suitable for all incidents viewed globally. It does not result in our adding together the appropriate penalty for each instance of misconduct.

Application of the *Ogilvie* factors to all the misconduct

[73] Here, we apply the relevant *Ogilvie* factors to all the Respondent's misconduct and, with appropriate deference to the hearing panel's findings of fact, determine whether it arrived at the correct penalty. For the reasons below, we find the one-year suspension was correct, but the panel erred in not requiring the Respondent to also enter, and comply with, a practice supervision agreement with the Law Society once she has served her suspension and returned to practice.

Nature and gravity of the conduct

[74] The misconduct in issue in this case was not just the misappropriations, but also negligence in trust accounting and the Respondent's breaches of the Undertaking and the August Order.

[75] The hearing panel found the Respondent's failure to properly supervise her staff and other accounting breaches particularly deserved sanction because this led to the theft from her clients. There were three misappropriations. The Respondent also breached her undertaking to the Law Society by failing to open a new trust account for more than 100 days, repeatedly depositing money to her tainted trust account and failing to have trust cheques countersigned. As the hearing panel noted, all undertakings must be observed, especially ones given to one's regulator.

[76] In summary, as the hearing panel found, the nature and gravity of the misconduct calls for severe sanction. Each of these types of misconduct alone is a serious offence. Further, as discussed further below in relation to our conclusion on penalty for all the conduct, misappropriation carries a presumptive penalty of disbarment.

Previous character and professional conduct record

[77] The Respondent submitted letters of reference and media reports to show her good character and community contributions. The hearing panel accepted these provided some indication of community support for the Respondent but held the evidence did not have much weight. On review, the Respondent did not take issue with this finding. As a contested finding of fact, the hearing panel's conclusion is entitled to deference, and we find it was reasonable.

[78] The details of the Respondent's PCR were uncontested, except in the case of *Guo No. 2* (see below). The Respondent has had two referrals to the Practice Standards department (2013 and 2016), two conduct reviews (2015 and 2016), an undertaking arising from the investigation into the misconduct dealt with by the hearing panel,

three orders made by Benchers under Rule 3-10 and an administrative suspension under Rule 3-10.

Impact of *Guo No. 2*

[79] The Respondent points to the outcome in *Guo No. 2* as inconsistent with the hearing panel's conclusion that disbarment is the only reasonable penalty. She says, because the Law Society did not appeal that decision, its submissions on review are at odds with *Guo No. 2*.

[80] We disagree. As our review of the DA Decision was not completed, the Law Society and the hearing panel in *Guo No. 2* had to assume the 12-month suspension in the DA Decision was an appropriate penalty. The *Guo No. 2* panel could not re-try the DA Decision, and equivalent conduct was not in issue.

[81] The Law Society had no obligation to appeal *Guo No. 2*. Further, to make its case for disbarment, it had no need to appeal. If we reject the DA Decision, there is no need to appeal *Guo No.* 2. If we affirm the DA Decision, an appeal seeking disbarment in *Guo No. 2* would be moot.

Acknowledgement of the misconduct and remedial action and the presence or absence of other mitigating circumstances

Acknowledgement

[82] At the Disciplinary Action hearing, the Respondent apologized for her breaches of the Undertaking and August Order.

[83] The hearing panel accepted the Respondent's late admission of responsibility for her misconduct. However, it noted, for the most part, the Respondent continued to maintain she was the victim of her bookkeeper's theft and continued to minimize her role in creating the environment that led to the theft by providing numerous pre-signed blank trust cheques to her bookkeeper while on vacation.

[84] We find the Respondent's attitude was similar on this review: she downplayed the pre-theft misconduct and focused on the theft as the underlying problem for her misappropriations and breaches of the Undertaking and the August Order.

Remedial action

[85] The Respondent took steps to ensure her clients recovered their trust monies. She had insurance that eventually paid out some of the amounts, and she used her own funds to make up the shortfall.

[86] We agree with the Law Society that the Respondent's use of her own money to reimburse her clients is not a factor to consider in relation to whether there were exceptional circumstances justifying a sanction less than disbarment (see further below), but it can be a mitigating circumstance when assessing the appropriate disciplinary action, and it is one here as she voluntarily contributed significant personal funds to make her clients whole.

[87] Under a Bencher order made in 2017, the Respondent currently practises under a practice supervision agreement and cannot operate a trust account (*Guo No. 2* at para. 85). She told the hearing panel she had taken complete remedial action to correct all the misconduct and she had been rehabilitated.

Other mitigating circumstances and the *Charter* values argument

[88] The Respondent asserts in deciding whether to substitute a penalty of disbarment for the 12-month suspension, we must consider *Charter* values, specifically that her disbarment would disproportionately and adversely impact access to justice for members of the Mandarin-speaking community.

[89] The Respondent admits a *Charter* values argument was rejected in *Guo No. 2* but says the *Charter* argument in the DA Decision hearing was different from that in *Guo No. 2*. It was not based on the over-prosecution of people of colour by the Law Society; it was premised on the idea that in deciding sanction, the panel should consider the Respondent's role in serving an underserviced visible minority community of Mandarin-speaking residents. The Respondent submits if we reengage in the *Ogilvie* analysis, we must consider *Charter* values as a mitigating factor.

[90] The Law Society submits disbarment of the Respondent would have little, if any, impact on the Mandarin-speaking community's ability to access lawyers and the Respondent has provided no evidence to the contrary. Also, it says the Respondent conflates *Charter* rights with *Charter* values and the Respondent's *Charter* rights with third party *Charter* rights. The Law Society also says it is contrary to its duty under section 3 of the *Act* to not disbar lawyers who have committed very serious misconduct, even if there is a demonstrated need by a racialized community and despite the Law Society's goal to increase ethnic diversity in the legal profession.

[91] We conclude *Charter* values have no application in this case. Although the impact of discipline of a racialized lawyer on a marginalized group of the public may be a mitigating factor in certain circumstances, those circumstances do not arise here.

[92] The Respondent relies on section 3(a) of the *Act* as the source of the *Charter* values she submits apply. Section 3(a) says the Law Society must preserve and protect the rights and freedoms of all persons. The Respondent also relies on section 3(a) for the content of the *Charter* values. She says hearing panels must consider the rights and freedoms of all persons when imposing disciplinary action.

[93] Certainly, administrative decision-makers are required to consider values enshrined by the *Charter* if there is a *Charter* right or freedom in play. In such circumstances, decision-makers must engage in proportionate balancing, giving effect, as fully as possible, to the *Charter* protections at stake in the context of their statutory mandate: *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 35, 57 and 58; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at para. 39.

[94] However, *Charter* values are only relevant to administrative decision-making when the decision engages the *Charter* by limiting *Charter* protections: *Law Society of BC v. Trinity Western University*, 2018 SCC 32 at para. 58. A decision-maker's responsibility to proportionately balance *Charter* values with their statutory mandate does not mean they must consider impacts on third parties. In *Doré*, *Loyola* and *TWU*, the *Charter* right or freedom of the person subject to the decision-making was affected. For example, in *Doré*, the value of expressive freedom of the individual challenging the decision-making had to be balanced with the Barreau du Québec's statutory mandate to ensure lawyers behave with objectivity, moderation and dignity.

[95] We see no basis on which we can extend the holdings of *Doré*, *Loyola* and *TWU* to encompass consideration of potential *Charter* implications for non-parties.

[96] In this case, no *Charter* right or value of the Respondent is in issue. The Respondent makes no claim her *Charter* rights are affected or the penalty decision must proportionately balance a *Charter* value as it applies to her. Instead, we are asked to proportionally balance the section 15, and possibly section 7, rights of an amorphous segment of the public.

[97] Further, if a *Charter* value is different from a *Charter* right, no party to this review has explained how this might be so or explained why this would mean we must consider *Charter* section 15 or 7 implications for third parties merely because the argument is framed as a *Charter* values argument and not as a reliance on *Charter* rights.

[98] Thus, we dismiss the Respondent's *Charter* values argument.

[99] However, we find the Respondent's *Charter* values argument is in fact a submission that Law Society hearing panels should consider access to lawyers by a marginalized group as a mitigating factor when sanctioning a racialized lawyer: *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81.

[100] The factors the Nova Scotia Court of Appeal in *Howe* at para. 179 found relevant to consider when sanctioning a racialized lawyer are as follows:

> (a) a decision-maker can give mitigating effect to systemic discrimination when it impacts the misconduct and influences the lawyer's actions if there is a causal connection between systemic or individual racism and the lawyer's actions giving rise to findings of misconduct;
>
> (b) when sanctioning a racialized lawyer, it is appropriate to consider the community's need to have access to lawyers from their community in the justice system; and
>
> (c) the overarching considerations are the requirements for a self-governing profession to govern itself in the public interest, and to maintain public confidence in the integrity and trustworthiness of members of the legal profession:

[101] The considerations under (c) are already part of the *Ogilvie* analysis. We accept one or more of the other factors may be considered, depending on the facts, when determining penalty for a racialized lawyer. If relevant on the facts, these factors should be considered under the "presence or absence of other mitigating circumstances," which, as per *Ogilvie*, are considered along with any acknowledgment about the misconduct and steps to disclose and redress the wrong.

[102] In *Law Society of BC v. Yen*, 2021 LSBC 30 (see paras. 44 to 54), the respondent made the same *Charter* values argument the Respondent makes here. The *Yen* panel said *Charter* values are different from *Charter* rights and, therefore, unlike us, the panel rejected the Law Society's argument that the respondent had no standing to raise a *Charter* rights argument.

[103] While we differ with the *Yen* panel about whether the Respondent's *Charter* values argument is feasible, ultimately our approach is the same. We both accept, based on *Howe*, that in some cases there may be mitigating factors specific to discipline of a racialized lawyer and these must be balanced with the duty to protect the public interest.

[104] On the facts of this case, there are no such mitigating factors to consider. The first two *Howe* factors ((a) above) do not apply here. The Respondent says the third factor is relevant to her case, but she does not establish there would be reduced access to lawyers by Mandarin-speaking clients if she loses her licence or is suspended.

The need for deterrence

[105] The hearing panel did not expressly consider this factor, although it may have subsumed it into its consideration of maintaining public confidence in the legal profession and disbarment.

[106] The need for general and specific deterrence is important, especially where, as here, the misconduct involves misappropriation and a series of other misconduct.

Public confidence in the legal profession and the disciplinary process

[107] The hearing panel and the Law Society linked this factor to the overarching goal of protecting the public interest and the question of whether the misappropriations required disbarment: DA Decision at paras. 41 to 59.

[108] We agree this factor is important and have given it careful consideration. The Respondent committed an array of professional misconduct, not just misappropriation, and her sanction must ensure public confidence in the legal profession is not undermined.

Range of sanctions imposed in similar cases

[109] We have considered cases provided by the parties regarding misappropriation, disbarment and exceptional circumstances. We do not find the cases useful in the sense that they provide guidance on the reasonable range of penalties in this case, whether a range between disbarment and no disbarment (as argued by the Law Society) or a range from no sanction to disbarment (as argued by the Respondent). As noted by the hearing panel, the misappropriation in this case is very different from previous cases: DA Decision at para. 81.

[110] Like the hearing panel, we are aware that, barring exceptional circumstances, disbarment is the presumptive penalty for misappropriation: *Hammond (No. 1)*; *Law Society of BC v. Harder*, 2005 LSBC 48; *McGuire*; *Law Society of BC v. Ali*, 2007 LSBC 57; *Gellert 2014*; *Tak*; *Briner*; *Law Society of BC v. Gounden*, 2021 LSBC 07; *Lowe* at paras. 11 to 23; *Law Society of BC v. Friedland*, 2021 LSBC 53

at paras. 21 to 31. We deal with this question in the following section, in which we set out our conclusion on the appropriate global penalty.

[111] Regarding the other categories of misconduct, hearing panels have imposed the following ranges of penalties:

(a) failure to comply with trust accounting rules:

(i) *Law Society of BC v. Tungohan*, 2015 LSBC 26, aff'd 2016 LSBC 45, aff'd in part, 2017 BCCA 423; *Law Society of BC v. Liggett*, 2009 LSBC 36; and *Law Society of BC v. Lail*, 2012 LSBC 32, suggest a fine and conditions are the "usual" result of repeated accounting rule breaches (see *Law Society of BC v. Liggett*, 2020 LSBC 12 ("*Liggett 2020*") at para. 25);

(ii) one-month suspension and order not to operate a trust account, except in accordance with a trust supervision agreement (*Liggett 2020* – aggravating factor was significant professional conduct record);

(iii) six-week suspension (*Law Society of BC v. Uzelac*, 2013 LSBC 11 – also breach of three practice conditions regarding trust accounting and a Rules breach for failure to report unsatisfied judgments);

(iv) two-month suspension, no operation of trust account or handling of trust funds until completion of the Law Society's Trust Accounting Basics and Trust Accounting Regulatory Requirements courses, orders to retain a chartered professional accountant and file an Accountant's report with the Annual Trust Report for three years and thereafter until relieved by the Trust Regulation department (*Friedland* – included trust misappropriation through negligence in accounting); and

(v) one-year suspension and afterwards practice situation had to be approved by the Practice Standards Committee (*Law Society of BC v. Sarai*, 2005 LSBC 17 – also breach of condition of Practice Supervision Agreement, numerous breaches of undertakings to third parties, failure to acquire and maintain adequate knowledge of practice and procedures, failure to provide service expected);

(b) breaches of undertaking:

(i) to third parties: fine of $10,000 and a reprimand (*Law Society of BC v. Sandrelli*, 2015 LSBC 17); two-month suspension and one-year practice supervision agreement with follow-up practice review (*Law Society of BC v. Goddard*, 2006 LSBC 12); fine of $2,000 and a reprimand (*Law Society of BC v. Jeletzky*, 2005 LSBC 02); six-month suspension (*Hordal, Re*, 2004 LSBC 36 (CanLII); $5,000 fine (*Law Society of BC v. Chodha*, 2011 LSBC 31); seven-week suspension (*Law Society of BC v. Dhindsa*, 2019 LSBC 36 – also conflict of interest and failure to honour trust condition); disbarment (*Ogilvie* – also fraudulent misstatements about services and failure to account for trust monies); fine of $10,000 (*Law Society of BC v. Lo*, 2022 LSBC 21); and

(ii) to Law Society: two-month suspension (*Law Society of BC v. Di Bella*, 2019 LSBC 32 – breach repeated for seven months and respondent misled Law Society about this for 11 months and also elements of dishonesty and failure to provide quality of service expected); fine of $2,500 (*Law Society of BC v. Palkowski*, 2004 LSBC 31); eight-month suspension, practise only as an employee or associate and undertaking to inform any prospective employer of facts admitted to and decision of panel (*Law Society of BC v. Spears*, 2009 LSBC 28 – also false statements to Law Society); reprimand and monitoring agreement with a doctor (*Law Society of BC v. Short*, 2009 LSBC 12); ten-month suspension (*Law Society of BC v. Dobbin*, 2002 LSBC 16 – also failure to provide competent service and to comply with a practice review); fine of $6,500 (*Law Society of BC v. Markovitz*, 2012 LSBC 25 – also conduct unbecoming a lawyer); a reprimand, four-month suspension and practice conditions upon return to practice (*Law Society of BC v. Hammond*, 2004 LSBC 33 ("*Hammond No. 2*") - also breaches of trust, breach of duties to Law Society to protect the public, including failures to respond to Law Society and failure to report judgments and substandard practices involving failure to maintain a proper office and accounting procedures designed to protect a client's monies and interest);

(c) breach of Law Society order:

(i) one-month suspension to be served consecutively with the hearing panel's suspension at issue in this review (*Guo No. 2* – also professional misconduct regarding trust funds from six

clients and professional misconduct in the present case considered);

(ii) one-month suspension (*Law Society of BC v. Coutlee*, 2010 LSBC 27 – one breach of a Law Society order and respondent made misleading suggestions before ultimately cooperating with the investigation);

(iii) three-month suspension (*Law Society of BC v. Welder*, 2012 LSBC 18 – also failed to communicate with Law Society, already suspended for three months for misconduct leading to the order breached, five conduct reviews and five citations and gained a financial advantage from the misconduct, misconduct committed knowingly); and

(iv) four-month suspension and prohibition from holding trust funds without written consent of the Law Society (*Law Society of Upper Canada v. Evans*, 2017 ONLSTH 51 – also breached undertaking to the Law Society, breached another Law Society order, misrepresentations to the Law Society, lengthy disciplinary history that had already resulted in a reprimand, a 45-day suspension, a four-month suspension, an eight-month suspension and breached practice restrictions).

Appropriate global penalty based on the above factors

[112] In this case, there was pre-theft misconduct that facilitated the theft, misappropriation breaches of the Undertaking and the August Order and recurring misconduct.

[113] As noted above, barring exceptional circumstances, disbarment is the penalty after a finding of misappropriation. The hearing panel found there were exceptional circumstances. These were: (1) the Respondent provided family funds of about $2.6 million to help eliminate the trust shortage caused by the theft; (2) the misappropriations resulted from the Respondent's attempts to deal with a massive theft of about $7.5 million and were done to minimize the global impact of this theft on her clients; and (3) with some exceptions (i.e., parties who brought lawsuits claiming damages for delayed or missing payments), most, if not all, affected clients were eventually made whole through funds paid by the Respondent and the defalcation insurance.

[114] We first determine whether the hearing panel was correct in finding the misappropriations occurred in exceptional circumstances and so did not require disbarment. Then, we decide whether the hearing panel was correct in ordering a one-year suspension.

Disbarment

[115] We uphold the hearing panel's conclusion that despite the trust misappropriations, there were exceptional circumstances that make disbarment inappropriate in this case.

[116] What constitutes exceptional circumstances in cases of misappropriation? The Law Society says exceptional circumstances generally involve situations where the dollar figure of the misappropriation was relatively modest, there was no dishonest intent (e.g., administrative convenience for dormant files and small amounts remaining in trust) or there were compelling personal health circumstances that caused the misappropriation. The Law Society also says where exceptional circumstances were found, the Law Society did not seek disbarment.

[117] However, while exceptional circumstances identified in past disciplinary actions may be informative, they do not define the meaning of exceptional circumstances. After reviewing the disbarment case law, we conclude exceptional circumstances are situations that lead a panel to find disbarment is not required to protect the public from future acts of misconduct: *Harder* 2006 at para. 9; *Law Society of BC v. Goulding*, 2007 LSBC 39 at paras. 6, 13 and 14; *Law Society of BC v. Dennison*, 2007 LSBC 51 at para. 4; *Law Society of BC v. Batchelor*, 2013 LSBC 09 at para. 52; *Gellert 2014* at paras. 42 and 46; *Lowe* at para. 23; *Friedland* at para. 24. This is the common thread that ties together cases of misappropriation where disbarment has and has not been ordered.

[118] This guiding principle is fundamental to the Law Society's mandate to uphold and protect the public interest in the administration of justice: *Act*, section 3(a). Protecting the public interest must involve protecting the public from future acts of misconduct (i.e., specific and general deterrence). If this is not done, then the public trust in the profession would be undermined: *Harder* 2006 at para. 9. This means not just protecting the Respondent's clients in the future but protecting the public by preventing future similar misconduct by anyone: see e.g., *McGuire* at para. 24.

[119] The hearing panel was alive to the underlying principle governing exceptional circumstances: see DA Decision at paras. 43, 44, 51, 60 to 65 and 83.

[120] The hearing panel found exceptional circumstances for the misappropriations justifying no disbarment (i.e., the misappropriations only occurred because of the theft and the Respondent's aim to ensure her clients' transactions completed; the Respondent contributed her own money to make her clients whole; and most, if not all, of her clients were made whole). In other words, these three circumstances meant the public was protected from future acts of misappropriation.

[121] In our view, the hearing panel was correct to conclude the circumstances were such that the public was protected from future acts of misappropriation by lawyers, including the Respondent, without disbarment. However, we differ somewhat from the hearing panel in how we reach this conclusion.

[122] In our view, disbarment is not necessary to protect the public interest and, in particular, to protect the public from future acts of misappropriation and maintain public confidence in the legal profession and disciplinary process, i.e., there are exceptional circumstances because: (1) the misappropriations only occurred in response to the theft; (2) the misappropriations were done to prevent losses to the Respondent's clients; (3) the Respondent took steps to make her clients whole, including having employee defalcation insurance, asking the Law Society for help and through counsel pursuing the insurer to pay out the claim, which it eventually did after an 18-month delay; (4) the Law Society has not alleged, and no hearing panel found, the Respondent is ungovernable; and (5) there is no evidence the Respondent was dishonest with her clients about her misappropriations.

[123] Unlike the hearing panel, we find the Respondent's use of her own money to reimburse her clients is not an exceptional circumstance justifying a sanction less than disbarment. If it were, this could send a message to the profession and the public that lawyers can buy their way out of their misconduct. However, we do consider it a mitigating factor when assessing whether the one-year suspension was correct.

[124] We conclude, given the circumstances of the Respondent's misappropriation, the likelihood of the Respondent misappropriating trust funds and any lawyer seeing a penalty less than disbarment in this case as permission to "think about it" is very unlikely.

[125] Also, the public's confidence in the legal profession is not undermined by discipline that is appropriate in circumstances we find exceptional for the reasons given above.

Penalty

[126] Under section 47(5)(b) of the *Act*, a review board may substitute a decision the hearing panel could have made under the *Act*. The broad range of available penalties set out in sections 38(5) and 38(7) further allows a panel to impose "any other orders and declarations and impose any conditions or limitations it considers appropriate."

[127] The misconduct in issue is not just the misappropriations, but also negligence in trust accounting and breaches of the Respondent's undertaking to the Law Society and breach of the August Order. Based on our assessment of the *Ogilvie* factors (see above), we find a one-year suspension alone is an inappropriate sanction.

[128] We first consider whether there could be disbarment for any or all the Respondent's other professional misconduct.

[129] Our review of Law Society decisions indicates disbarment is not warranted for breaches of trust accounting rules, breaches of Law Society undertakings or breaches of Law Society orders alone: see paragraph 111 above.

[130] In addition to cases of misappropriation, hearing panels have disbarred lawyers if they are ungovernable: (see, e.g., *Law Society of BC v. Lessing*, 2022 LSBC 07; *Law Society of BC v. McLean*, 2016 LSBC 06; *Law Society of BC v. Hall*, 2007 LSBC 26). Disbarment in other circumstances is rare but has been ordered where there was a criminal conviction for public mischief and fabricating evidence (*Law Society of BC v. Zoraik*, 2013 LSBC 13); knowing breach of a trust instrument (*Law Society of BC v. Gayman*, 2012 LSBC 12); and where the lawyer gave false answers in an application for admission (*Law Society of BC v. Power*, 2009 LSBC 23). None of these circumstances apply here.

[131] Next, we consider whether the one-year suspension imposed by the hearing panel was otherwise correct. Applying the *Ogilvie* factors, we conclude the one-year suspension was not correct as the panel should have imposed further conditions to ensure protection of the public and public trust in the legal profession.

[132] The nature and gravity of all the misconduct calls for a greater sanction. Each of these types of misconduct is a serious offence.

[133] In terms of previous conduct, the Respondent has a one-month suspension from *Guo No. 2*, two referrals to the Practice Standards department, two conduct reviews and breaches of the Undertaking and the August Order. The hearing panel also gave some weight to the Respondent's character references.

[134] The hearing panel accepted the Respondent's apology for breaching the Undertaking and August Order. However, for the most part, the Respondent continues to maintain that she was the victim of her bookkeeper's theft and to minimize her role in creating the environment that led to the theft and the fallout from it.

[135] The Respondent took remedial action through a combination of private insurance and her own money. The hearing panel found most, if not all, affected clients were eventually made whole. Under the Law Society order made in 2017, the Respondent currently practises under a practice supervision agreement and cannot operate a trust account (*Guo No. 2* at paras. 27 and 85).

[136] In terms of cases with global conduct somewhat analogous to the Respondent's breach of trust accounting rules, misappropriations and breaches of the Undertaking and the August Order, these decisions resulted in disbarment based on trust misappropriations without exceptional circumstances. As there are exceptional circumstances in this case, we do not find these cases helpful.

[137] However, there are a few disciplinary cases with some similarities to the Respondent's cumulative misconduct.

[138] In *Hammond (No. 2)*, the respondent received a reprimand, a four-month suspension and practice conditions for breach of a Law Society undertaking, breaches of trust, breach of duties to the Law Society to protect the public, including failures to respond to the Law Society and a failure to report judgments and substandard practices involving failure to maintain a proper office and accounting procedures designed to protect a client's monies and interest.

[139] The panel found the respondent could not be left safely to practise alone and strict conditions were required to protect the public. Practice conditions were sufficient to protect the public from the respondent's substandard practice, but the public confidence factor meant general and specific deterrence was the most important consideration, and this was satisfied with a four-month suspension.

[140] In *Gounden*, the respondent received a 16-month suspension with practice conditions where they intentionally misappropriated funds and did not report their misconduct, had no discipline history, admitted responsibility and fully reimbursed the client, suffered significant traumatic events and had references who said the misconduct was out of character.

[141] In *Law Society of BC v. Becker*, 2021 LSBC 11, the respondent received a 14-month suspension where their misappropriations affected hundreds of clients,

occurred over more than seven years and resulted from gross negligence. The respondent took responsibility and changed their administrative practices.

[142] In *Friedland*, there was a two-month suspension where the misappropriation was a function of significant and protracted accounting failures over nine years, there were no direct victims and an affected client wrote a letter of support.

[143] In *Lowe*, there was a five-month suspension for misconduct grounded in gross negligence with no dishonest intent. There was a steady pattern of deliberate repeated behaviour over a prolonged period resulting in misappropriation and improper handling of trust funds for administrative convenience from 43 clients. The respondent took remedial steps. A further troubling issue for the hearing panel was that, prior to the compliance audit that resulted in the investigation and citation, the respondent was audited and similar issues with their billing process were identified, but the respondent did not change their billing practices.

[144] In *Welder*, there was a three-month suspension where there was a breach of a Law Society order, a failure to communicate with the Law Society, already a three-month suspension for misconduct leading to the order breached, five past conduct reviews and five past citations, and the respondent gained a financial advantage from their misconduct, which was committed knowingly.

[145] In *Evans*, there was a four-month suspension and conditions were imposed where there was a breach of two Law Society orders, a breach of a Law Society undertaking, a breach of practice restrictions and a lengthy disciplinary history already resulting in a reprimand, a 45-day suspension, a four-month suspension and an eight-month suspension.

[146] Assessing the *Ogilvie* factors and informed by the cases referenced above, we find the hearing panel's decision to order a one-year suspension was appropriate. However, we find the panel erred in limiting the penalty to a one-year suspension.

[147] A one-year suspension is a very significant penalty that deters future conduct, reflects the seriousness of the wrongdoing and goes some way to secure public confidence in the legal profession. But we find the Respondent's cumulative misconduct, which involves gross negligence in trust accounting and practice management, misappropriations, breaches of the Undertaking and the August Order and a substantial conduct record, requires more than a one-year suspension to ensure specific and general deterrence from future acts of misconduct and to address concerns about public confidence in the legal profession and the Law Society's disciplinary process.

[148] We conclude the correct penalty is a one-year suspension and continued close supervision of the Respondent's practice.

[149] As noted above, the Respondent currently practises under a practice supervision agreement: DA Decision at para 84; *Guo No. 2* at para. 85. This was in accordance with the Bencher Orders of March 30 and April 28, 2017: *Law Society of BC v. Guo*, 2017 LSBC 14. The practice supervision agreement ends with the final disposition of the Respondent's citation underlying this review: Rule 3-10(3). That is, it will end with our conclusion on penalty.

[150] Thus, once the Respondent has served her one-year suspension, we order her to enter into a new practice supervision agreement or another arrangement acceptable to the Practice Standards Committee until relieved of this requirement by the Practice Standards Committee: *Law Society of BC v. Niemela*, 2013 LSBC 15 at para. 55.

[151] The Respondent submits a practice supervision agreement is unnecessary because the Law Society may obtain one under Rule 3-10 if it is required. However, this would not address the appropriate penalty in response to the Respondent's conduct to date, which is what we are concerned with.

[152] While the Law Society's position is disbarment is the most appropriate penalty, in response to our request for additional submissions, it says practice supervision is inappropriate. It submits a two-year suspension, followed by a number of more stringent practice conditions is necessary.

[153] In support of its alternative position, the Law Society submitted additional evidence. As discussed above, we found almost all this new evidence inadmissible. However, we note the Law Society's main submission is the Respondent's current practice supervision agreement has been ineffective. As we order the Respondent to enter into a new practice supervision agreement or another arrangement acceptable to the Practice Standards Committee after her suspension, this should allay the Law Society's concern with the current practice supervision agreement.

[154] In summary, while we uphold the one-year suspension, we require the Respondent to enter, and comply with, a practice supervision agreement or another arrangement acceptable to the Practice Standards Committee before returning to practice after her suspension. The practice supervision agreement or other arrangement acceptable to the Practice Standards Committee will remain in place until the Respondent is relieved of this requirement by the Practice Standards Committee.

Costs

[155] We dismiss the Law Society's request to set aside the hearing panel's decision on costs.

[156] The Law Society says the hearing panel erred in reducing the Bill of Costs because it did not properly consider Schedule 4, *Tariff for hearing and review costs* (the "Tariff") in its decision on costs. Rule 5-11(3) states that, subject to Rule 5-11(4), a panel or review board must have regard to the Tariff in calculating costs payable. Rule 5-11(4) allows a panel or review board to order costs not set out in the Tariff if it determines it is reasonable and appropriate to do so.

[157] The Law Society points out the hearing panel did not offer any rationale for its departure from the Tariff and the factors applicable to costs do not support the reduction in the Bill of Costs. These are: the seriousness of the Respondent's misconduct; the lack of evidence about her ability to pay; her receiving a substantially favourable sanction; and her disputing most of the allegations to the end of the proceeding.

[158] The Law Society also says the Rule 3-10 hearing was required because the Respondent continued to breach the Undertaking and August Order and so variations of the August Order were required to ensure protection of the public. The Law Society submits the Respondent should pay the costs of the application to exclude a member of the public as it was only necessary because she forced a hearing.

[159] The Respondent says if we do not disbar her, then she should get costs of this review and of the DA Decision hearing, as these were only necessary because the Law Society insisted on disbarment. We disagree with this submission as there is no evidence about what might have happened with these proceedings if the Law Society had not sought disbarment.

[160] We uphold the hearing panel's decision on costs because its factual findings about the Bill of Costs are entitled to deference. While the hearing panel did not provide much rationale for its departure from the Tariff, the DA Decision shows the panel was alive to the Tariff, and hearing panels have broad discretion to fix costs based on the circumstances of a proceeding: *Law Society of BC v. Tungohan*, 2018 LSBC 15 at para. 13.

COSTS OF THE REVIEW

[161] The parties have had mixed success on this Review.

[162] If the parties cannot agree on costs, then the parties have 30 days from the date of this decision to make submissions to us on costs of this Review.

RESULT

[163] We order the Respondent suspended from the practice of law for one year, starting March 8, 2023, or on an alternative date agreed to by the parties in writing.

[164] We order that, prior to returning to practice after her suspension, the Respondent enter, and comply with, a practice supervision agreement acceptable to the Practice Standards Committee. This requirement will remain in place and the Respondent must comply with the terms of the practice supervision agreement until relieved of the obligation by the Practice Standards Committee.

[165] We order the Respondent to pay to the Law Society costs and disbursements of the proceedings before the hearing panel of $47,329.44. The Respondent will pay instalments of $1,000 per month starting on April 1, 2023 until the final amount is paid. This schedule may be changed by written agreement of the parties.

[166] We order the parties to agree on the costs of this Review, but if they are unable to agree, then they have 30 days from the date of this decision to make submissions to us about costs of the review hearing.