COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ahmadian v. Law Society of British Columbia,* 2023 BCCA 470

Date: 20231214
Docket: CA48461

Between:

Bijan Ahmadian

Appellant
(Respondent)

And

The Law Society of British Columbia

Respondent
(Applicant)

Corrected Judgment: The text of the judgment was corrected at para. 123 and in the summary on January 23, 2024.

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Butler

On appeal from: Decisions of the Law Society of British Columbia, dated August 2, 2022 (*Ahmadian (Re)*, 2022 LSBC 45), and April 5, 2023 (*Ahmadian (Re)*, 2023 LSBC 14).

Counsel for the Appellant:	G. Cameron W. Andrews, Articled Student
Counsel for the Respondent:	K. Chewka
Place and Date of Hearing:	Vancouver, British Columbia October 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 14, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Butler

Summary:

This is a statutory appeal from a decision of a hearing panel of the Law Society of British Columbia. A compliance audit of the appellant's law practice resulted in a citation containing eight allegations of misconduct being issued against the appellant. The hearing panel concluded that the appellant had committed professional misconduct in respect of Allegations 1–7. In respect of Allegation 8, it found the appellant had breached the Law Society Rules without that breach amounting to professional misconduct. The appellant asks this Court to set aside the hearing panel's order and to remit the citation for a new hearing. Held: Appeal allowed. In its analysis of the allegations and in its handling of proposed evidence, the hearing panel committed several errors. Accordingly, all findings of professional misconduct against the appellant are set aside, Allegations 1–7 are remitted to the Law Society hearing panel for reconsideration, and Allegation 8 is dismissed.

Table of Contents **Paragraph Range**

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] The appellant, Bijan Ahmadian, challenges findings of professional misconduct made against him by a discipline panel of the Law Society of British Columbia (the "Panel"). He says the Panel did not permit him to answer the case made against him, and that the process was so fundamentally unfair that we should set aside the findings of misconduct and remit the Citation to the Law Society for reconsideration.

Background

The Citation

[2] In July and August 2019, the Law Society conducted a compliance audit (the "Compliance Audit") of Bijan Law Corporation, the appellant's law practice. The Compliance Audit identified concerns about trust shortages, funds borrowed from clients, and noncompliance with trust accounting requirements.

[3] A citation was issued two years after the Compliance Audit, on July 26, 2021 (the "Citation").

[4] The Citation contained eight allegations against the appellant of conduct contrary to the *Law Society Rules* [*Rules*] and the *Code of Professional Conduct for British Columbia* [*Code*]. In Allegations 1–4 and 8, the Citation alleged that the appellant's conduct constituted professional misconduct or a breach of the *Legal Profession Act*, S.B.C. 1998, c. 9 [*Act*] or the *Rules*, pursuant to s. 38(4) of the *Act*. In Allegations 5–7, the Citation alleged that the appellant's conduct constituted professional misconduct pursuant to s. 38(4) of the *Act*. The allegations were:

Allegation 1: misappropriating or improperly withdrawing $23,216 from trust account

1. It was alleged that on January 30, 2020, the appellant misappropriated or improperly withdrew $23,216 from his pooled trust account when he submitted an authorization for the automatic withdrawal of Property Transfer

Tax (“PTT”) to the Land Title and Survey Authority of British Columbia on behalf of clients when there were insufficient funds on deposit in the account to the credit of the clients, contrary to Rules 3-63 and 3-64(3) of the *Rules*.

Allegation 2: improperly withdrawing trust funds, with insufficient funds on deposit

2. It was alleged that on twelve occasions between May 2017 and May 2020, the appellant improperly withdrew or authorized the improper withdrawal of client trust funds when there were insufficient funds on deposit in his pooled trust account to the credit of the clients, resulting in trust shortages, contrary to one or more of Rules 3-63 and 3-64(3) of the *Rules* and rule 7.2-12 of the *Code*.

Allegation 3: failing to report and eliminate trust shortages

3. It was alleged that between May 2017 and May 2020, with respect to one or more of the trust shortages referred to in Allegation 2:

    a) the appellant did not immediately eliminate the trust shortages, upon discovery of the shortages, contrary to R. 3-74(1) of the *Rules*; and

    b) the appellant did not immediately, or at all, report trust shortages greater than $2,500 to the Executive Director, contrary to R. 3-74(2) of the *Rules*.

Allegation 4: failing to maintain accounting records

4. It was alleged that between July 2019 and April 2020, the appellant failed to maintain accounting records in accordance with the provisions of Part 3, Division 7 of the *Rules*, in one or more of the following ways:

    a) on six occasions between July 2019 and March 2020, failing to prepare monthly trust reconciliations for a pooled trust account within 30 days of the effective date of the reconciliation, contrary to R. 3-73 of the *Rules*;

b) on one or more of two hundred and fifty-seven occasions between July 2019 and April 2020, failing to record trust transactions promptly, or in any event, not more than seven days after a trust transaction, contrary to R. 3-72 of the *Rules*; and

c) between July 2019 and April 2020, making or authorizing withdrawals from a trust account(s) when accounting records were not current, contrary to R. 3-64(3) of the *Rules*.

Allegation 5: borrowing $30,000 from a client

5. It was alleged that on May 15, 2019, the appellant borrowed $30,000 from a client, contrary to rule 3.4-31 of the *Code.*

Allegation 6: borrowing $240,000 from a client

6. It was alleged that on May 23, 2019, the appellant borrowed $240,000 from a client, contrary to rule 3.4-31 of the *Code.*

Allegation 7: breaching an undertaking

7. It was alleged that on January 30, 2020, the appellant breached an undertaking given to a solicitor by registering transfer documentation, when he did not hold in his trust account sufficient funds to allow him to complete the transaction, contrary to rule 7.2-11 of the *Code.*

Allegation 8: issuing trust cheques with insufficient funds

8. Finally, it was alleged that on January 30, 2020, the appellant issued trust cheques for disbursements and the payment of sale proceeds to the opposing party, when there were insufficient funds on deposit in his trust account to the credit of these clients, contrary to Rules 3-63 and 3-64(3) of the *Rules* and rule 7.2-12 of the *Code.*

[5] The appellant says at the time of the hearing of the Citation, the Law Society was considering whether to issue another citation or citations against him as a result

of the investigation arising from the Compliance Audit. The Law Society did, in fact, issue a second citation on October 26, 2022 (since amended on August 25, 2023).

[6] For some time, the appellant's counsel tried to persuade or force the Law Society to conclude the investigation arising from the Compliance Audit, issue all citations that might arise from the investigation and consolidate the proceedings against him, so that the citations could be considered together, in the light of, among other evidence, the evidence of mental health problems that affected the appellant during the relevant period.

Preliminary ruling: August 2, 2022

[7] The Law Society's apparent reluctance or inability to bring all matters arising out of the Compliance Audit to one hearing panel led counsel for the appellant to take an uncooperative position in response to the Law Society's attempts to expedite the hearing of the first citation. His refusal to make admissions sought by the Law Society, and his request that the first hearing be adjourned so as to permit proceedings to be consolidated, were considered by the Panel when preliminary applications were addressed on August 2, 2022. The Panel held:

a) The appellant's response to a 75-page amended notice to admit, served by the Law Society on counsel for the appellant on June 2, 2022, failed to comply with the requirements of the *Rules* (because it was not responsive) and was therefore ineffective as a denial. The appellant was therefore deemed to have admitted the authenticity of 111 documents and the truth of the facts set out in 330 paragraphs of the amended notice to admit; and

b) What the Panel considered to be the appellant's "request that the Panel direct the Law Society to take steps regarding a matter separate from the citation that is the subject of this hearing, [and that the hearing be adjourned and] set at the earliest possible date" after joinder of all existing and contemplated charges against the appellant, was denied.

[8] The Panel considered another preliminary matter, the appellant's request to adduce medical evidence (a letter written by a Dr. Ranger and an affidavit sworn by a Dr. Dawkins). The parties agreed, and the Panel determined, that evidence could be admitted at the facts and determination hearing, subject to arguments about weight and relevance.

The deemed admission of the amended notice to admit

[9] In reasons later issued on November 15, 2022, indexed at 2022 LSBC 45, the Panel explained its ruling on the deemed admissions. It noted that the appellant had refused to make the formal admissions sought by the Law Society in either of the two responses to the amended notice to admit which he gave to the Law Society, the first on June 14 and the second on June 20.

[10] The Panel explained that, in his second response of June 20, the appellant did not admit to the authenticity of any of the 111 documents by stating that "THE RESPONDENT ADMITS the authenticity of NONE of the documents attached at tabs 1 to 111 of the Amended Notice to Admit dated June 2, 2022", and continuing to note the following beside the description of each numbered tab:

> The Law Society has not provided proof of authenticity, which is denied, and has failed to make reasonable and obvious admissions, which have and will prejudice the Respondent's ability to make full answer and defence on the dates currently scheduled for the hearing of this Citation.

[11] Similarly, the appellant did not admit to the truth of any of the facts set out in the 330 paragraphs by stating that "THE RESPONDENT ADMITS the truth of NONE of the facts set out in numbered paragraphs 1 to 330 of the Amended Notice to Admit dated June 2, 2022", and then continuing to note the following next to each paragraph number:

> The Law Society has not provided proof of this fact, which is denied, and has failed to make reasonable and obvious admissions, which have and will prejudice the Respondent's ability to make full answer and defence on the dates currently scheduled for the hearing of this Citation.

[12] Rule 5-4.8 of the *Rules* provides, in part:

> 5-4.8 (1) At any time … a party may request the other party to admit, for the purposes of the hearing only, the truth of a fact or the authenticity of a document.
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> …
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> (4) A party that receives a request … must respond within 21 days by serving a response on the other party in accordance with Rule 10-1 *[Service and notice]*.
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> …
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> (6) A response under subrule (4) must contain one of the following in respect of each fact described in the request and each document attached to the request:
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> (a) an admission of the truth of the fact or the authenticity of the document attached to the request; [or]
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> (b) a statement that the party making the response does not admit the truth of the fact or the authenticity of the document, along with the reasons for not doing so.
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> (7) If a party who has been served with a request does not respond in accordance with this rule, the party is deemed, for the purposes of the hearing only, to admit the truth of the fact described in the request or the authenticity of the document attached to the request.
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> [Emphasis added.]

[13] Referring to its own precedents, in particular *Law Society of BC v. Scheirer*, 2021 LSBC 51 at para. 10, and *Law Society of BC v. Mclean*, 2014 LSBC 63 at para. 13, the Panel noted compliance with R. 5-4.8 helps to define the factual and legal issues in dispute, ensuring that the hearing focuses on the material issues and does not waste time on matters that are not in dispute or need not be disputed because they can easily be proven. It held: “In no way does a statement that ‘the Law Society has failed to make reasonable and obvious admissions’ help to define factual and legal issues, focus on the material issues, or provide a clear understanding of the issues in dispute between the parties”: at para. 24.

[14] The Panel held that neither the appellant’s first (June 14) response nor his second (June 20) response (which, as explained, was more detailed but set out the same basis for refusing to make the admissions sought), constituted sufficient

compliance with R. 5-4.8(6). In a passage of its reasons now impugned by the appellant the Panel held:

> [25] Reference to the LSBC Response [to the appellant's request for admissions] is not appropriate as a response to the Law Society's NTA …
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> [26] The June 20 NTA Response, while purporting to respond to each document or fact, is not an improvement on the June 14 NTA Response. Again, by not particularizing the denials through substantive responses relating to the admissions sought, the June 20 NTA Response is ineffective and runs contrary to the goals of efficiency and fair hearings. Similar to the observations of the hearing panel in *Law Society of BC v. Welder*, 2014 LSBC 53, at para. 41, the Respondent has failed to specify which facts in the Law Society's NTA they take issue with or the evidence they would call to refute or qualify them.
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> [Emphasis added.]

[15] The Panel determined that the appellant was required to provide a substantive response. His blanket denial of facts and refusal to admit the authenticity of documents failed to comply with the requirements of R. 5-4.8(6). His response was therefore ineffective and he became subject to the consequences of R. 5-4.8(7): deemed admission of the amended notice to admit.

Adjournment for consolidation

[16] The Panel understood the appellant's position to be that the Law Society's failure to issue a further citation arising out of the Compliance Audit was causing inordinate delay and prejudice. It understood the appellant to be asking it to direct the Law Society to issue whatever further citations might be issued as a result of the investigation following the Compliance Audit at the earliest opportunity, in order to ensure fairness and a prompt resolution of all matters. It suggested the appellant was asking it to direct the Law Society to deal with matters that were not before the Panel.

[17] The Panel noted the appellant had referred to *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, in support of the proposition that administrative delay is to be avoided at all stages of Law Society disciplinary cases, and disciplinary bodies have a duty to deal fairly with their members. However, the Panel found it had no

jurisdiction to deal with anything other than the Citation and matters specified in the Citation. It concluded:

> [34] … We cannot find in the *Act*, the Rules, or the *BC Code*, anything conferring jurisdiction on us to deal with a matter not before us, nor to direct the Law Society or Discipline Committee to take any action on a matter that does not yet exist, has not been ordered joined to the matter before us, and of which we have no knowledge outside the submissions of counsel.

Facts and determination hearing

[18] The substantive facts and determination hearing took place on November 17 and 18, 2022 (technically it had commenced at the preliminary hearing in August). A decision was reserved until April 5, 2023. The Panel, for reasons indexed as 2023 LSBC 14, found the appellant's conduct constituted:

> [182] … a marked departure from the behaviour that is expected from lawyers with respect to allegations 1 to 7 of the Citation. Accordingly, … the Panel finds that the [appellant] has committed professional misconduct pursuant to section 38(4) of the *Act* as set out in those allegations in the Citation. With respect to allegation 8, the Panel finds that the [appellant] breached the Rules without the breach amounting to professional misconduct.

Expert evidence of a solicitor, Mr. Kent Wiebe

[19] At the November hearing, the appellant sought to have an affidavit of a solicitor, Mr. Kent Wiebe, admitted, and to have him qualified to testify as an expert in relation to "the mechanics and practice surrounding conveyance of real property in British Columbia". The manner in which the Panel dealt with this proposed evidence is problematic.

[20] At the hearing, counsel for the Law Society objected to the admission of Mr. Wiebe's evidence on two grounds:

a) first, that he was not neutral, because Mr. Wiebe had recently employed the appellant at his firm in May of 2022; and

b) second, on the ground that Mr. Wiebe's opinion would not assist the Panel.

[21] The second objection was not well formulated. Counsel for the Law Society did not argue that Mr. Wiebe was *unqualified* to express the opinion the appellant sought to adduce with respect to the mechanics and practice surrounding conveyance of real property. Rather, counsel submitted "his experience and understanding is completely irrelevant and usurps the panel's role in this matter". She argued: "This hearing panel is equipped to understand a basic conveyancing practice, and so for those reasons the Law Society objects to the admission of this affidavit."

[22] This is an objection apparently founded upon the contention that Mr. Wiebe's opinion did not meet the criterion of necessity, on the basis that the Panel itself was equally qualified to arrive at an opinion on standards of practice in conveyancing. That criterion, as described by Sopinka J. in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 24, 1994 CanLII 80 (S.C.C.), is intended to ensure that experts not be permitted to usurp the functions of the trier of fact and to ensure that trials do not become "nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept".

[23] The Panel permitted Mr. Wiebe to be called, examined in chief and cross-examined on his qualifications. When examined in chief, Mr. Wiebe described his very extensive practice acting for borrowers and lenders on consumer and commercial transactions. He had been counsel for a borrower, a purchaser or vendor on over a thousand transactions involving undertakings, including real estate transactions. He testified that although he had recently hired the appellant to work at his firm, he understood his obligation to provide impartial and neutral evidence to the Panel. He swore that the evidence in his affidavit was, to the best of his ability, provided "in a neutral and impartial manner not tailored in any way to assist [the appellant's] interests".

[24] Counsel for the Law Society posed no questions of Mr. Wiebe with respect to his qualifications but reserved "the right to ask him questions about his impartiality

and neutrality" (presumably after he had been qualified and testified in chief to his opinion).

[25] The Chair of the Panel herself then posed questions with respect to expertise, canvassing whether Mr. Wiebe had been involved in "presenting, writing or otherwise training other lawyers in the area of real estate". Mr. Wiebe advised the Panel he had written, as the sole author, the Professional Legal Training Course chapter on creditor remedies; had frequently lectured to bank employees, primarily on the *Personal Property Security Act*; and had twice been a presenter at the Continuing Legal Education Society's course on creditors' remedies.

[26] When asked by the Chair whether those activities directly related to real property practice, he testified he had not taught a Continuing Legal Education course on "conveyancing" (he noted he was unsure if such a course exists), but stated that there are components of real estate practice and mechanics in the educational activities in which he had been involved. He also testified that he had served as principal to four or five articling students, but he had never been qualified in court or in disciplinary proceedings as an expert in respect of residential real estate conveyancing.

[27] In response to the first ground of objection, bias, counsel for the appellant, relying on the judgment of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, argued that the onus is on the party opposing the admission of evidence to establish bias or lack of impartiality, and that if a witness has confirmed under oath that they are impartial and providing neutral evidence, that is to be accepted unless undermined by cogent evidence to the contrary.

[28] On the question of qualification, counsel for the appellant noted Mr. Wiebe is a solicitor of 20 years' experience who had conduct of thousands of transactions involving the conveyance of real property in one form or other. He alerted the Panel to the decision in *Law Society of Ontario v. Barnwell*, 2019 ONLSTH 132, where, citing *Mohan*, the Law Society Tribunal Hearing Division (Ontario) admitted evidence

similar to that proffered by the appellant in this case, (also a Mr. Wiebe but not this one) saying:

> [7] In our view *Mohan* sets out the requirement for seating an expert witness in the first place. So long as the expert can tell the panel something it could not know within the general knowledge of its members, then an expert is required to testify to that knowledge in order to assist the panel as trier of fact. Here we require the expert assistance of Mr. Wiebe in general, as the panel needs assistance to determine what the standard requirements of documents supporting an application for a letter of credit or supporting an escrow agreement are. That general evidence is more probative than prejudicial in our view and not subject to any exclusionary rule. Mr. Wiebe's qualifications to give such evidence were agreed and are, in any event, evident.
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> [Emphasis added.]

[29] In reply, counsel for the Law Society said she had not had notice of the appellant's intention to qualify Mr. Wiebe as an expert and, for that reason, had not obtained his *curriculum vitae*. This was her explanation for not being in a position to agree to or challenge his qualifications. She did not explicitly claim that there was an applicable notice requirement or that lack of notice was a ground to object to admissibility of an expert witness at a Law Society hearing.

[30] The Panel did not accede to the specific objections raised by counsel for the Law Society. It did not find Mr. Wiebe to be disqualified by bias. That is not surprising given what Cromwell J. said in *White Burgess*:

> [49] … I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
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> [Emphasis added.]

[31] Nor did the Panel accept counsel's argument that Mr. Wiebe's opinion would be unhelpful.

[32] However, the Panel refused to qualify Mr. Wiebe as an expert. Its oral reasons for doing so, in their entirety, are as follows:

> Mr. Cameron on behalf of Mr. Ahmadian has asked to qualify Mr. Wiebe as an expert in the area in relation to the mechanics and practice surrounding conveyance of real property in British Columbia.
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> On the materials presented before us, which is largely the *viva voce* evidence of Mr. Wiebe, we accept that Mr. Wiebe is doubtless an experienced solicitor in this area, but we do not find that the materials are sufficient to qualify him as an expert. So, Mr. Cameron, you may proceed, but we do not accept that Mr. Wiebe is an expert in this area.
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> [Emphasis added.]

[33] In its written reasons in respect of the facts and determination hearing which followed later, the Panel described the ruling on admissibility as follows:

> [7] … The Panel heard submissions from the parties and briefly questioned Mr. Wiebe. The Panel acknowledged that Mr. Wiebe was an experienced counsel but provided oral reasons citing insufficient notice and lack of information such as a curriculum vitae to establish his expertise and declined to admit his affidavit as evidence in the proposed area. …
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> [Emphasis added.]

[34] While the written reasons refer to lack of notice as a ground to exclude Mr. Wiebe's opinion evidence, that was not referred to in the oral judgment or relied upon by counsel as a basis for exclusion of the opinion at the hearing. Further, the Panel does not say Mr. Wiebe is unqualified. To the contrary, it says he is "doubtless an experienced solicitor" in the area of the mechanics and practice surrounding conveyance of real property in British Columbia. Instead, the Panel referred to lack of materials such as a *curriculum vitae*.

[35] Despite its conclusion (at para. 125 of its facts and determination reasons, 2023 LSBC 14), that it was required to determine whether the appellant's conduct "constitutes a marked departure from the standards the Law Society expects of its members" or "constitutes a Rules Breach", the Panel had no expert evidence on acceptable practice in the area in which the appellant was practicing at the time when his alleged misconduct took place. In fact, it excluded such evidence when proffered by the appellant.

The medical evidence of Dr. Ranger and Dr. Dawkins

[36] The manner in which the Panel dealt with the medical evidence adduced by the appellant is also problematic. The Panel described the position taken by the appellant as follows:

> [106] The Respondent urges this Panel to accept the evidence of Drs. Ranger and Dawkins and, based on these documents, find that the Respondent was diagnosed with a depressive disorder and an anxiety disorder and those disorders caused a concomitant impairment of decision-making and cognitive function. The Respondent submits that the impairments suffered by the Respondent as identified in the doctors' evidence were material contributing causes to the breaches alleged in the Citation. The Respondent submits that the doctors' statements are relevant to this Panel's decisions regarding whether the Respondent is culpable of professional misconduct, a rules breach, or whether the allegations should be dismissed.

[37] The appellant's counsel drew the Panel's attention to *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 65, and *Law Society of BC v. Grewal*, 2022 LSBC 22 at para. 37, in support of the proposition that evidence with respect to a member's mental health may assist in deciding whether the lawyer engaged in professional misconduct or conduct unbecoming a lawyer. He argued that untreated health conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities.

[38] The Law Society, for its part, submitted that medical evidence of a member's mental health is irrelevant to the determination of whether the member committed professional misconduct, and that the relevance of such evidence is properly considered at the disciplinary action stage. For this, it relied upon *Law Society of BC v. Gregory*, 2021 LSBC 34, and *Law Society of BC v. Seeger*, 2022 LSBC 29.

[39] Despite its express conclusion (at para. 122) that all of the relevant circumstances, including the member's state of mind, must be considered in deciding whether the test for professional misconduct is met, the Panel determined that evidence of the appellant's mental health was irrelevant to its inquiry. The Panel concluded:

> [113] This Panel agrees with the Law Society's submission that the medical evidence the Respondent seeks to rely on may be relevant to the

> determination of what sanction the Respondent should face at the disciplinary action phase of the hearing. However, it is not relevant to the determination as to whether the Respondent's actions amount to professional misconduct.

[40] The Panel did not expressly address the authority to the contrary, or say why, in this case, such evidence was irrelevant to its inquiry. It added:

> [114] In the alternative, if this Panel is incorrect in finding that the medical evidence is irrelevant to our decision regarding professional misconduct, we would give the medical evidence presented little weight. Both Dr. Ranger and Dr. Dawkins are family physicians and not mental health professionals. While Dr. Dawkins reports referring the Respondent to a psychologist, this Panel has no documentation as to the Respondent's diagnosis, treatment, prognosis, or other information as to the outcome of that referral. There is no nexus, as in *Seeger,* drawn between the Citation and the Respondent's conduct in part because the medical evidence was obtained before the Citation was issued. Dr. Ranger confirms she reviewed the Respondent's medical history, but can provide no first-hand information regarding that history as she was not his physician during the period covered by the events noted in the Citation.
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> [Emphasis added.]

[41] The Panel reiterated its conclusion as follows:

> [115] This Panel has not been asked to, and does not, make a finding that medical evidence could never be relevant to the F&D phase of a disciplinary hearing, or that such evidence could never bear weight in determining whether a lawyer has committed professional misconduct. In the instant case, however, this Panel finds that the evidence presented is not relevant to our determination, and in the event we are wrong, this Panel finds that the medical evidence bears little weight for the reasons outlined above.
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> [Emphasis added.]

The Panel's conclusion

[42] The Panel was thus left with the evidence in the amended notice to admit, and no admissible and relevant medical or expert evidence from the appellant.

[43] The Panel rejected the appellant's submission that the evidence did not support a finding of "misappropriation" as charged in Allegation 1.That allegation was that, in the course of representing two clients in a real estate transaction, the appellant had authorized the submission of an authorization for the automatic withdrawal of PTT when there were insufficient funds on deposit in the appellant's

pooled trust account to the credit of the clients. The appellant argued that the term "misappropriation" implies that property has been appropriated by the wrongdoer for his own use or benefit. He claimed the evidence supported only a finding that a payment from his trust account had been *authorized* when there were insufficient funds to cover it, but that the payment was *not made* until funds were in hand, and thus no client's funds were misappropriated.

[44] The argument with respect to Allegation 1 was addressed by the Panel as follows:

> [136] The Respondent points out that the PTT was not, in fact, withdrawn upon the filing of the authorization and that when it was withdrawn at approximately 5:00 pm the next day there were sufficient funds and no shortage occurred. The Respondent also notes that failing to file the PTT Return would have produced a cascading effect that would have caused the deal to fail and by doing as he did he protected the interests of all involved.
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> [137] The Respondent also takes issue with the wording of the allegation, stating that there was no "misappropriation" and that no money was actually "withdrawn", such that on the plain wording of the allegation it must be dismissed.
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> …
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> [141] It is clear that the Respondent did authorize the withdrawal of funds by submitting the authorization to pay in the PTT Return, and did so with the full knowledge that the funds were not in the account at the time the authorization was submitted. Had the funds been withdrawn as authorized, a matter beyond the control of the Respondent, it is necessary that these funds would have been drawn from trust accounts unrelated to the account from which they were authorized. That this did not happen is a fortuitous circumstance that does not excuse the Respondent's actions. Authorizing the withdrawal is a clear and obvious breach of Rule 3-63. The fact that the funds were not withdrawn until the following day is immaterial. Based on the reasoning in *Sahota* [*Law Society of BC v. Sahota,* 2016 LSBC 29], the submission of the authorization, subjected the trust funds of clients not involved in the Purchase Transaction to being withdrawn to satisfy the PTT obligation, thereby engaging the provisions of Rule 3-64.

[45] The appellant claimed that the charge in Allegation 8 was also ill founded. It was alleged that on January 30, 2020, in the course of representing two clients in a real estate transaction, the appellant issued trust cheques for disbursements and the payment of sale proceeds to the vendors when there were insufficient funds on deposit in his pooled trust account to the credit of those clients.

[46] The appellant submitted that the allegation should be dismissed, arguing that it is not a breach of the *Rules* to print and prepare cheques in advance of a transaction closing, even where there are insufficient funds on account of the payor clients at the time the cheques are so printed and prepared, so long as the cheques are held and not negotiated until sufficient funds are in hand,

[47] The argument with respect to Allegation 8 was addressed by the Panel as follows:

> [179] In the circumstance of the Respondent preparing the cheques before the Purchase Transaction closed, it was not merely … a "timing happenstance" that prevented the trust shortage from occurring. In these … instances, there was no possibility of the cheques being deposited and an actual shortfall occurring without the Respondent relinquishing control of the cheques.
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> [180] It is true that having printed the cheques, a trust ledger for those clients' trust accounts would have shown a shortfall and if the cheques had been sent or deposited the Respondent would not have been able to meet his obligations pursuant to Rules 3-63, 3-64 and rule 7.2-12 of the *BC Code*.
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> [181] In respect of this allegation, this Panel would describe the Respondent's actions as a truly technical breach. The cheques sitting on the Respondent's desk waiting to be delivered could not be honoured at the time of printing. However, this Panel finds that the fact that the Respondent still had to take further steps for the potential breach of Rules 3-63, 3-64 and rule 7.2-12 of the *BC Code* to occur, principally the step of actually sending the cheques out to be deposited, reduces the breach to the level of a minor Rules breach, rather than a marked departure from the standard of behaviour the Law Society expects from its members.
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> [Emphasis added.]

Grounds of Appeal

[48] The appellant identifies what he says are seven errors of law:

In the interlocutory reasons:

1. Finding the appellant was deemed to admit the facts and documents set out in the amended notice to admit because "it did not approve of the reasons he gave for his denials", and imposing a duty on the appellant to assist the prosecution by disclosing his theory of the case and all evidence in support of it to avoid admissions being deemed; and

2. Misconstruing the relief sought by the appellant, and finding it did not have jurisdiction to adjourn the substantive hearing of the Citation to ensure fairness to the appellant.

In the facts and determination hearing reasons:

3. Refusing to admit and consider the evidence of Mr. Wiebe;

4. Finding that medical evidence of mental illness is legally irrelevant to the question of whether a lawyer's conduct amounts to professional misconduct, and that the evidence of family physicians can be ignored because they are not "mental health professionals";

5. Concluding "misappropriation" and "withdrawal" can be established when no money was taken by a lawyer for personal gain or otherwise;

6. Concluding the absence of *mala fides* is an irrelevant factor to the question of professional misconduct and is only relevant to the appropriate sanction to be administered; and

7. Concluding trust cheques were "issued" and that this constituted a breach of the *Rules* and the *Code*, when they had not been delivered and remained in the appellant's sole control.

Argument and Discussion

Standard of review

[49] The parties agree that because this is a statutory appeal from a decision of a Law Society hearing panel, authorized by s. 48 of the *Act*, it engages the appellate standards of review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 33, 36–37. With respect to questions of law, the governing standard is correctness: *Law Society of British Columbia v. Harding*, 2022 BCCA 229 at paras. 68–70; *Abrametz* at paras. 27–29.

[50] Beyond that general agreement, there remain disputes with respect to how to characterize the alleged errors of the Panel. Some of the impugned decisions were clearly discretionary and attract deference. The standard of review is therefore canvassed separately with respect to each ground of appeal below.

Ground 1: the deemed admissions

[51] Whether the Panel correctly interpreted R. 5-4.8 is an extricable question of law, reviewable on the correctness standard. However, the Panel's determination that the appellant was deemed to have admitted the truth of the facts and the authenticity of the documents referred to in the amended notice to admit, because his reasons for denial were not appropriately responsive, engages a question of mixed fact and law to which the palpable and overriding error standard of review applies: *Harding* at para. 69.

[52] There is no doubt the *Rules* require a party who denies the truth of a fact described in, or the authenticity of a document attached to a notice to admit to provide the requesting party their reasons for doing so: R. 5-4.8(6)(b). There is also no doubt that the *Rules* provide that a party who does not respond accordingly is deemed to admit the truth of the fact described and/or the authenticity of the document attached, as applicable: R. 5-4.8(7). There is a procedure for withdrawing admissions, and jurisprudence with respect to when the discretion to permit a party to withdraw deemed admissions should be granted. In this case, however, there was no such application for withdrawal made.

[53] There is also no doubt the Panel was wrong to say the recipient of a notice to admit is required to "specify … the evidence they would call to refute or qualify" the facts described in a notice to admit which they refuse to admit. The *Rules* do not require such disclosure.

[54] However, in my view, that erroneous description of the appellant's obligation is immaterial in the case at bar. The appellant gave no reason for denying the truth of the facts contained in, or the authenticity of the documents appended to the

amended notice to admit other than his dissatisfaction with the Law Society's response to his own request for admissions. The Panel was correct in law to say the *Rules* require a substantive response to a notice to admit. Its conclusion that the response provided by the appellant did not satisfy the requirements of R. 5-4.8(6) was not a result of a palpable error. In my opinion, there is no basis for us to interfere with the Panel's conclusion that the appellant should be deemed to admit the facts described in, and the authenticity of the documents appended to the amended notice to admit pursuant to R. 5-4.8(7).

Ground 2: ruling on adjournment

[55] The standard of review of the Panel's dismissal of the motion to adjourn the facts and determination hearing is somewhat elusive. As we will see below, the appellant's appeal is not grounded in jurisdictional error (which would attract a correctness standard). It rests, rather, on the proposition that the Panel erred by misapprehending the basis of the motion for an adjournment. As explained below, however, the transcript does not support the appellant's contention that there was a misapprehension. Therefore, in order to succeed on this ground, the appellant must establish that the Panel erred in the exercise of its discretion when refusing the requested adjournment. Discretionary decisions are entitled to a high degree of deference on appeal: *Perrier v. Canada (Revenue Agency)*, 2021 BCCA 269 at paras. 45–46; *Watts v. Mountain Country Property Management Ltd.*, 2021 BCCA 426 at para. 15.

[56] The appellant applied for an order described in his notice of motion as follows:

> That the hearing of the Citation in this matter, presently set for August 2 and 3, 2022, be adjourned pursuant to Rule 5-5.2 of the *Law Society Rules, 2015*, and re-set to a date mutually agreeable to counsel for the parties.

[57] In the course of submissions, the Chair made it clear that the Panel had unquestioned jurisdiction to "manage the process" before the Panel. That is perhaps why, properly, the appellant does not suggest that the Panel considered itself to lack

jurisdiction *to make the order sought in the notice of motion* — an adjournment of the hearing of the Citation.

[58] The Panel held, correctly in my view, that it did not have jurisdiction *to direct the Law Society to conclude another investigation and issue citations*, the measures the appellant considered to be the first step in efficiently addressing all issues arising out of the Compliance Audit (the second step being a joinder motion to consolidate the citations). The appellant does not suggest that the Panel was in error when it concluded it did not have jurisdiction to make orders other than those necessary to deal with the Citation before it.

[59] There is, therefore, no jurisdictional error alleged.

[60] Before this Court, the Law Society says that in addressing its (lack of) jurisdiction to make any orders with respect to the other investigation, the Panel was implicitly deciding not to exercise its discretion to defer the hearing of the Citation pending conclusion of another investigation because it could not do anything to expedite that investigation. In fact, the Panel knew nothing about the status of that investigation: see 2022 LSBC 45 at para. 34. The Law Society says, in doing so, the Panel was weighing one factor it had to consider in the exercise of its discretion to adjourn (being the first factor enumerated in *Coutlee (Re),* 2018 LSBC 33 at para. 29, cited in the appellant's notice of motion as authority for the factors to be considered by a Law Society hearing panel on an adjournment application): the *purpose that would be served* by the adjournment.

[61] In his notice of motion, the appellant described the *factual basis* for the order sought, including the rationale for the adjournment, as follows:

> The Respondent seeks an adjournment for three reasons:
>
> (a) The Law Society has refused to make an admission of fact in relation to medical evidence that has been sworn to under oath by a physician, necessitating the calling of lengthy evidence by the Respondent from busy and unavailable professionals, on matters which should not legitimately be in dispute;
>
> (b) Without reasonably made admissions, this matter cannot conclude in the two days presently set; and

> (c) The Law Society's conduct in bifurcating an initial investigation, its dilatoriness in completing that investigation, and its insistence that two separate citations be heard (if a second citation is finally issued) is not only inefficient and costly for the Respondent and the Law Society's members, but it will seriously prejudice the Respondent if part of the allegations are heard now, adverse findings are made, and the Law Society seeks to have him found a "second time offender" at a subsequent hearing, which is only proceeding separately due to the Law Society's delay.

[62] At the preliminary hearing, the appellant's counsel emphasized the possibility of consolidation of all potential charges against the appellant emanating from the Compliance Audit as the principal reason for seeking an adjournment. That position was clearly understood by the Panel, as reflected in the following exchange in the transcript, where counsel for the appellant suggested that the Law Society was expediting the hearing of the Citation so as to "bifurcate" proceedings against his client:

> CNSL G. CAMERON: … it's unfair to, to try to use hearing dates and admissions as a tool to denying me the right to even argue for a joinder. It … shouldn't be made a self-fulfilling prophesy. And if that order is made, [the adjournment order in the terms sought by the appellant] that this hearing panel says, "we're not resetting these dates until you get something done," … that's probably going to light the fire under the Law Society that I have been trying to light for three years. And, … that order certainly, in my submission, this panel has the jurisdiction to make, to say, "We're not resetting this before us until such time as the Law Society gets its job done."
>
> THE CHAIR: Well, Mr. Cameron, my problem with that is you highlighted that what we have is the inherent jurisdiction to manage the process before us. To manage the process before us is the citation … You say there's going to be this other citation coming, but that process isn't before us. … I don't see why we have any jurisdiction or standing to do anything about it at all. …
>
> ...
>
> THE CHAIR: You're asking me to rule on, at this point, an imaginary citation.
>
> CNSL G. CAMERON: No, I'm not. … and sorry if I am being unclear. And what I'm asking this panel to do is to use its undoubted jurisdiction over the extant citation before it as a tool, as a tool, to make the Law Society actually deal with the other one by saying, "We will not reset the dates for the hearing of this matter until such time as the Law Society has progressed the other matter so Mr. Cameron and Mr. Ahmadian can bring a joinder application." So I'm not asking you to direct the discipline committee to do anything. I'm not asking this

> panel to deal with right now what's a citation in the ether. What I'm asking this panel to do is to deal with the citation that it's seized of as an internal tool to force the Law Society to come to grips with matters and get it done.
>
> THE CHAIR: Except -- I mean, at, at that point, any delay would be entirely at your feet, but I don't see, when there is no… extant citation for us to force the Law Society to do anything about, how we could do anything about a supposed joinder application. I mean, this is all – it's quite hypothetical.

[63] The appellant says the Panel misconstrued his application. It is clear from the transcript, however, that the appellant was seeking to have the Panel use its unquestioned jurisdiction to adjourn the facts and determination hearing in order to "force the Law Society to come to grips with matters and get it done". The Panel simply declined to exercise its discretion in that manner. In my view, the transcript demonstrates there was no misapprehension. It was not unreasonable for the Panel to dismiss the adjournment application because it did not consider it appropriate to accept the appellant's invitation to use the adjournment as a tool to force the Law Society to deal with matters over which the Panel had no control.

[64] I would not accede to this ground of appeal.

Ground 3: admissibility of opinion evidence of Mr. Wiebe

[65] In my opinion, the Panel dealt with the evidence of Mr. Wiebe in a very unsatisfactory manner.

[66] In its written reasons, the Panel identified insufficient notice of the intention to call Mr. Wiebe as one reason for refusing to permit him to give opinion evidence. Lack of notice was not referred to in the Panel's oral reasons for refusing to permit Mr. Wiebe to testify. Counsel for the Law Society had not objected to Mr. Wiebe's testimony on that ground, with good reason: the *Rules* do not require notice. It was an error to exclude the opinion evidence of Mr. Wiebe on that basis.

[67] The Panel gave a second reason for excluding Mr. Wiebe's opinion evidence: the "lack of information such as a *curriculum vitae* to establish his expertise" (emphasis added).

[68] The fact that counsel for the Law Society did not challenge Mr. Wiebe's qualifications as an expert is not determinative. Whether Mr. Wiebe was a properly qualified expert witness was a decision for the Panel to make, exercising a gatekeeping function similar to the role played by trial courts. The Panel's discretion in making this decision was not unfettered, however. Any decision as to whether to admit or exclude expert opinion evidence must have a proper basis in law. As this Court noted in *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2017 BCCA 287 at para. 35, expert opinion evidence is only admissible upon the court being satisfied it meets the legal requirements. Its admission must be governed by legal rules.

[69] A ruling on the admissibility of expert opinion evidence attracts a deferential standard of review. Absent an error in law, misapprehension of evidence, failure to consider relevant evidence or factors, or an abdication of the gatekeeper function, an appellate court will decline to interfere: *R. v. C.M.M.*, 2020 BCCA 56 at para. 80. Whether a proposed expert witness has sufficient experience to be qualified as an expert in a particular area "is quintessentially a matter for the trial judge": *R. v. Dominic*, 2016 ABCA 114 at para. 21; see also *R. v. Zanolli*, 2023 BCCA 163 at para. 53. Admissibility is determined under a two-step inquiry. At the first stage, the proposed witness must meet four threshold admissibility requirements, one of which is that the proposed witness must be a properly qualified expert with specialized knowledge or expertise: *Mohan* at 20; *White Burgess* at para. 53. Many cases, including *Mohan*, make clear, if there was any doubt, that a witness can acquire expertise through experience alone. As the Court of Appeal of Alberta noted in *Dominic*, at para. 22:

> … Being a qualified expert means having "acquired special or peculiar knowledge through study or experience": [*Mohan* … at 25]. The mere fact that police experience about drug use is gained through information received from others does not, by itself, diminish the validity of the special knowledge acquired in this manner. The reality is that experience is often based on the accumulated wisdom of what some might describe as "anecdotal" information learned on the job.
>
> [Emphasis added.]

[70] While the Panel said there was a lack of information to establish Mr. Wiebe's expertise, there was, in fact, considerable evidence of Mr. Wiebe's expertise in respect of the matters on which he was to give evidence. Indeed, in its oral reasons, the Panel itself recognized that the *viva voce* evidence established Mr. Wiebe was "doubtless an experienced solicitor in this area". He not only had long experience as a lawyer, but acknowledged experience in the area of the conduct under review.

[71] In my view, and in light of this acknowledged evidence, the Panel erred in looking for something further to establish Mr. Wiebe's expertise (perhaps, judging by the Panel's questions, evidence of teaching experience or publications). The application of too restrictive of an approach in the assessment of whether a proposed witness has met the threshold requirement of a properly qualified expert can constitute an error of law: *C.M.M.* at para. 84. That is what the Panel did here. It applied too restrictive of an approach in its assessment of Mr. Wiebe's expertise and, in doing so, failed to give any weight to his considerable experience. In approaching the threshold inquiry for admissibility in this manner, the Panel fell into legal error.

[72] In my view, it cannot be said that Mr. Wiebe's opinion evidence with respect to the mechanics and practice surrounding conveyance of real property would have been of no assistance to the Panel. Thus, by improperly excluding that evidence, the Panel improperly limited the ability of the appellant to respond to the Citation.

[73] It is unclear to me whether Mr. Wiebe's evidence might have been relied upon by the appellant in responding to each and every allegation in the Citation. In particular, it is unclear whether Mr. Wiebe's evidence would have touched upon Allegation 5 and Allegation 6, both of which relate to borrowing money from clients. However, in my opinion, for the reasons that follow, it is not necessary to address that question.

Ground 4: ruling on relevance of medical evidence

[74] The Panel found the medical opinion evidence of Drs. Ranger and Dawkins was not relevant to the determination of whether the appellant's actions amounted to

professional misconduct. It went on to say that, if it was incorrect, it would have given the medical evidence little weight. The parties had agreed at the preliminary hearing to admit the medical evidence, but counsel for the Law Society reserved the right to challenge the weight and relevance of the evidence. As a result, the Panel was in the somewhat awkward position of addressing a threshold question going to admissibility of evidence after it had been introduced.

[75] Whether the Panel erred in concluding that the medical opinion evidence was not relevant to its inquiry is a question of law. In *Mohan* at 20–21, the Court held:

> Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[76] Law Society hearing panels have previously considered the admissibility (and, therefore, the relevance) of evidence of a member's mental health at both facts and determination hearings and disciplinary hearings. The Panel in this case was referred to those decisions. In *Lessing*, a disciplinary decision, a Law Society panel held:

> [65] <u>The mental health issue may play a role in actually deciding whether the lawyer engaged in professional misconduct or conduct unbecoming a lawyer.</u> However, it is more likely to arise at the disciplinary action (penalty) stage.
>
> [Emphasis added.]

[77] In another hearing, *Grewal*, (where both misconduct and discipline were in issue), the panel said:

> [37] As identified in the … recommendations [of the Law Society committee on the *Development of an Alternative Discipline Process*, September 24, 2021], while there is "… not necessarily a causal relationship between mental health … issues and misconduct, untreated health conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities."

[78] The Panel appears, however, to have relied on the decisions cited to it by the Law Society where medical evidence has been found to be irrelevant in determining whether a lawyer has engaged in professional misconduct, including *Gregory*. There, the member himself did not seek to establish that his mental health contributed to the charged breach of the *Rules*. The panel, in its disciplinary action decision in the case (indexed at 2022 LSBC 17) noted:

> [67] The Respondent submits that a mitigating circumstance to his misconduct is his chronic major depressive disorder which affected his handling of this matter contrasted markedly with his normal functioning. The Respondent testified about his depression and his resulting paralysis when he tried to explain his difficulty in gaining a meaningful understanding of his client's transactions and his general avoidance of understanding his client's transactions until late November, 2018. However, the Respondent also testified at the hearing on Facts and Determination that his depression did not affect his judgment and that he was responsible for his decisions (Transcript, September 3, 2020, page 47, lines 8 to 14).
>
> [68] Based on the Respondent's own testimony, the Panel accepts that the Respondent's chronic depression did not adversely affect his judgment at the material times. The evidence before the Panel shows that the Respondent had a busy practice, with many referrals from colleagues.
>
> [Emphasis added.]

[79] The second case referred to by the Panel, *Seeger*, was simply an example of a case where medical evidence was introduced at the disciplinary action phase. The decisions relied upon by the Law Society are not particularly helpful in identifying circumstances in which evidence of mental health issues is relevant to the misconduct inquiry.

[80] The appellant says it stands to reason that evidence of his mental health may be relevant to the determination of whether the errors or omissions in this case

amounted to professional misconduct. He says that whether impugned conduct constitutes professional misconduct is to be assessed by looking at the factors identified by Savage J.A. in *Strother v. Law Society of British Columbia*, 2018 BCCA 481 at para. 102: the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the lawyer's conduct. These factors, known as the "*Lyons* factors" as they were endorsed by the hearing panel in *Law Society of British Columbia v. Lyons*, 2008 LSBC 9, have been widely adopted in Law Society discipline decisions as the governing considerations in the professional misconduct analysis.

[81] The appellant contends, reasonably in my view, that mental illness can affect the determination whether he acted with *mala fides*, one of the *Lyons* factors. The Panel appears to have concluded that evidence of mental illness is only relevant where it tends to establish that mental illness "truly and fundamentally" renders a member "incapable of performing their professional obligations". It held:

> [108] The Respondent also refers to the Ontario decision in *Law Society of Upper Canada v. Helen Patricia Luzius*, 2013 ONLSHP 193 at para. 36, and states that the test is whether the lawyer has established, on a balance of probabilities, that he had a mental illness and that his condition precluded him from fulfilling his obligations such that it would be inappropriate to find that the licensee engaged in professional misconduct. The decision states the test at paras. 49 and 50:
>
> > It is sufficient that the mental illness truly and fundamentally renders them incapable of performing their professional obligations. Of course, the burden is on the licensee to meet this test on the balance of probabilities. We are of the view that setting the bar at this level reflects a humane and informed approach to questions of mental health while upholding the primary mandate of regulating the legal profession in the public interest.
> >
> > … In circumstances where it is demonstrated that there is a compelling nexus between the mental illness and the alleged misconduct, it can neither be said to be just nor in the public interest to declare a licensee guilty of professional misconduct.

[82] This passage describes both necessary and sufficient conditions for evidence of a member's mental health to be relevant. In order to establish that evidence of mental health is relevant, it is necessary that the evidence tends to establish the member suffers from *a* condition that may have precluded them from fulfilling their

obligations “such that it would be inappropriate to find that the licensee engaged in professional misconduct”. It is sufficient, but not necessary, to show that mental illness “truly and fundamentally renders them incapable of performing their professional obligations”.

[83] A panel charged with determining whether a member’s impugned conduct amounts to professional misconduct must address the presence or absence of *mala fides*. Evidence of mental illness short of total incapacity may be relevant to that analysis. All of the allegations in the Citation have an aspect of poor management or poor judgment. It is at least arguable that none of the deemed admissions are proof of *mala fides.* For that reason, it is arguable that the proffered medical opinion evidence would, in fact, be material to the proof of professional misconduct. In my view, the medical evidence in this case was *prima facie* admissible and logically relevant to the Panel’s inquiry. It ought to have been addressed by the Panel.

[84] In his affidavit, Dr. Dawkins deposes to the truth and accuracy of his detailed summary of the appellant’s medical care between June 2016 and September 2020 (the whole of the period covered by the Citation). He says the appellant was suffering from anxiety disorder and depression during this period and that his illness affected his ability to make decisions.

[85] Dr. Ranger’s letter of February 10, 2021 addresses the appellant’s medical condition from 2016 to 2020, based on her review of his chart. She expresses the opinion that the appellant was under the care of Dr. Dawkins from June 2016 for the treatment of a depressive disorder and an anxiety disorder, severe enough to warrant treatment with two anti-depressant/anti-anxiety medications and sleeping pills. During 2016, the appellant’s symptoms were moderately severe and included difficulty with decision making and cognitive function. She described fluctuations in his condition thereafter.

[86] In my view, while it was open to the Panel to conclude that the evidence was insufficient to establish the appellant was suffering from a condition, between May 2017 and April 2020, that may have precluded him from fulfilling his obligations

such that it would be inappropriate to find that he engaged in professional misconduct, it was a legal error to treat the medical evidence as irrelevant to its misconduct inquiry.

[87] The Panel went on to say that, in any event, it would have afforded little weight to the medical evidence. That conclusion was founded upon the misconception (now acknowledged by counsel for the Law Society) that the physician experts are "not mental health professionals". Both doctors are very experienced family physicians. Dr. Ranger has been practicing since 1992 and has worked at Simon Fraser University as a family physician in the Health and Counselling service since 2003. Dr. Dawkins has been in family practice since 1990.

[88] In my view, the unfortunate failure to recognize the evident qualifications of Drs. Ranger and Dawkins to diagnose and treat mental illness, and to weigh their evidence, undermines the Panel's conclusion that the appellant engaged in professional misconduct.

Ground 5: finding of misappropriation against the appellant

[89] Allegation 1 alleges the appellant "misappropriated or improperly withdrew $23,216 from [his] pooled trust account", said to have occurred when he submitted, or authorized the submission of, an authorization for the automatic withdrawal of PTT on behalf of his clients when there were insufficient funds on deposit in the pooled trust account to the credit of those clients, contrary to Rules 3-63 and 3-64(3) of the *Rules*.

[90] The applicable Rules provide, in part, as follows:

> 3-63 A lawyer must at all times maintain sufficient funds on deposit in each pooled or separate trust account to meet the lawyer's obligations with respect to funds held in trust for clients.
>
> 3-64 (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are
>
> (a) properly required for payment to or on behalf of a client or to satisfy a court order,
>
> (b) the property of the lawyer,

> (c) in the account as the result of a mistake,
>
> (d) paid to the lawyer to pay a debt of that client to the lawyer,
>
> (e) transferred between trust accounts,
>
> (f) due to the Foundation under section 62 (2) (b) *[Interest on trust accounts]*, or
>
> (g) unclaimed trust funds remitted to the Society under Division 8 *[Unclaimed Trust Money]*.
>
> …
>
> (3) No payment from trust funds may be made unless
>
> (a) trust accounting records are current, and
>
> (b) there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid.
>
> (4) A lawyer must not make or authorize the withdrawal of funds from a pooled or separate trust account, except
>
> (a) by cheque as permitted by subrule (5) or Rule 3-65 (1.1) (a) *[Payment of fees from trust]*,
>
> (b) by electronic transfer as permitted by Rule 3-64.1 *[Electronic transfers from trust]*,
>
> (b.1) by bank draft as permitted by Rule 3-64.3 *[Withdrawal from trust by bank draft]*,
>
> (c) by instruction to a savings institution as permitted by subrule (9), or
>
> (d) in cash if required under Rule 3-59 (5) or (6) *[Cash transactions]*.
>
> (5) A lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account by cheque must
>
> (a) withdraw the funds with a cheque marked “Trust,”
>
> (b) not make the cheque payable to “Cash” or “Bearer,” and
>
> (c) ensure that the cheque is signed by a practising lawyer.
>
> [Emphasis added.]

[91] The Panel found that the appellant did authorize the withdrawal of funds by submitting the PTT authorization, and did so with full knowledge that insufficient funds were in the account to the credit of the clients at the time the authorization was submitted.

[92] Before the Panel, the appellant had pointed out, however, that the PTT was not, in fact, withdrawn from the account upon the filing of the authorization and that

when the PTT was ultimately withdrawn at approximately 5:00 p.m. the day after the authorization was filed, there were sufficient funds in the pooled trust account to the credit of the clients. The appellant thus says his conduct should not have been characterized as "misappropriation" or professional misconduct, since no money was actually "withdrawn" from the pooled account as a result of the authorization in the window of time after the filing of the authorization when there were insufficient funds on hand.

[93] The Panel determined that by authorizing the withdrawal of funds from a pooled account that exceeded the amount held in trust for the clients, the appellant had created an obligation which he did not have sufficient funds on hand to meet, in breach of R. 3-63. I can see no error in the Panel's conclusion that the appellant breached that Rule.

[94] However, given the difference in wording employed in Rules 3-63 and 3-64, I have difficulty seeing how R. 3-64(3) was breached in this case. No payment was in fact made at the time there were insufficient funds to the credit of the client to pay the PTT.

[95] The Panel found that by authorizing the withdrawal the appellant had "subjected the trust funds of clients not involved in the Purchase Transaction to being withdrawn to satisfy the PTT obligation, thereby engaging the provisions of Rule 3-64." In doing so, the Panel relied on *Law Society of BC v. Edwards*, 2022 LSBC 27 and *Law Society of BC v. Sahota,* 2016 LSBC 29. The Panel noted that had the funds been withdrawn as authorized, "a matter beyond the control of the Respondent" then the PTT payment "would have been drawn from trust accounts unrelated to the account from which they were authorized" (at para. 141, emphasis added). That is true, but it did not happen. Funds were not drawn from trust accounts unrelated to the account from which they were authorized.

[96] As no funds were drawn from the account until such time as there were sufficient funds held to the credit of the clients; no PTT payment from trust funds was actually made while there were insufficient funds on hand to the credit of those

clients. The Rule the appellant is alleged to have contravened, R. 3-64(3), prohibits "payment" unless there are sufficient funds on hand. Unlike other provisions of R. 3-64, which are not applicable here, and which in any event the appellant is *not* alleged to have contravened, it does not refer to authorization of the withdrawal of funds.

[97] In *Edwards*, the panel considered whether unauthorized taking of funds from a pooled trust account is "misappropriation" even where the funds are not taken by the lawyer, the lawyer does not benefit personally and the funds are promptly returned. The panel held:

> [42] Of note, "misappropriation" is not defined in Rule 3-64. A review of the case law indicates that "misappropriation" has been defined broadly, and occurs when the lawyer takes 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. There must be a mental element of wrongdoing or fault, yet it need not rise to the level of dishonesty as that term is used in criminal law. See *Law Society of BC v. Ali*, 2007 LSBC 18, at paras. 79 to 80; *Law Society of BC v. Harder*, 2005 LSBC 48, at paras. 55 and 56.
>
> [43] Conduct meeting this definition is misappropriation regardless of whether the lawyer received any personal benefit. It also matters not that the lawyer intended to, or did return, the funds in short order. Nor does it matter that the amount involved was small. See *Law Society of BC v. Gellert*, 2013 LSBC 32, at para. 72; *Ali*, at para. 104; *Harder*; *Law Society of BC v. Sahota*, 2016 LSBC 29, at paras. 60 to 63; *Law Society of BC v. Chaudhry*, 2018 LSBC 31, at para. 37.
>
> …
>
> [45] In the present case, the Respondent admits that he was not entitled to $2,345 of the $2,600 withdrawal of trust funds. We accept entirely that there was no active dishonesty on the part of the Respondent. We also accept that this misappropriation occurred on one day only and was rectified when the bookkeeper returned to the Firm.
>
> [46] However, given there is no evidence that the Respondent took any reasonable steps to determine that he was entitled to the trust funds prior to authorizing their withdrawal, this failure was reckless and grossly negligent and amounts to misappropriation of client trust funds.
>
> [Emphasis added.]

[98] The case did not address the question whether the issuance of an authorization that does not result in a withdrawal can amount to misappropriation.

[99] In *Sahota*, the panel considered the mental element of "misappropriation" as addressed in *Law Society of BC v. Ali*, 2007 LSBC 18, at para. 79; ***Black's Law Dictionary***, 6th Edition; *Law Society of BC v. Harder*, 2005 LSBC 48 at para. 56; and *Law Society of BC v. Gellert*, 2013 LSBC 22, at para. 71. The panel in that case recognized that "a mental element of wrongdoing or fault" is a mandatory component of "misappropriation", and found that it was present in that case in the shape of wilful blindness. There was no doubt in *Sahota* that the member had, in fact, made inappropriate use of clients' funds.

[100] The Panel in the case at bar notes that, in *Sahota*, in addition to actually making a payment where there were insufficient funds in trust to the client's credit, the member had issued cheques without sufficient funds in trust to cover them but remedied the shortfall before the cheques were presented for payment. The Panel in the case at bar observed:

> [133] In *Sahota*, one of the allegations arose from a situation where, as set out at para. 26 of the decision:
>
> > … the Respondent, while representing a vendor, paid out a portion of the sale proceeds before making a deposit to his trust account of the funds received from the solicitor for the buyer. The Respondent had the sale proceeds in hand, but the funds had not been deposited. A trust shortage resulted for the 24-hour period between the time that the funds were paid out and the time that the covering deposit was made the next day.
>
> [134] This was one such example of a "paper shortage", or a shortage that the panel in *Sahota* explained, at para. 52, as occurring
>
> > … when the Respondent delivered a trust cheque without sufficient funds on deposit at the time of issue, but by the time that the cheque was presented for payment, or cleared the trust account of the Respondent, the trust shortage had been rectified with a deposit of funds.
>
> [135] The panel in *Sahota* went on to explain why such "paper shortages" were not to be treated lightly at paras. 53 to 54:
>
> > We wish to make it abundantly clear that there is no distinction to be drawn between a so called "paper shortage" and one where a cheque is cashed in circumstances where the client sub-ledger is overdrawn. Both circumstances create a trust overdraft and an unequivocal and identical breach of the Rules. That one transaction is "saved" by a timing happenstance does not render the trust breach less troubling or more favourable.

> A trust account cheque is an undertaking to pay. When a trust account cheque is issued, it is the rule of the Law Society, based upon the "undertaking to pay" concept, that the trust cheque is capable of being presented for immediate payment.

[101] Importantly, in all of the definitions of misappropriation cited in *Sahota*, there is an element of use for a purpose other than that intended. In *Grewal*, the panel addressed "misappropriation" as follows:

> [12] It is important to say a few words about the meaning of misappropriation in the context of a lawyer's misconduct. It is defined broadly. It includes any unauthorized use of trust funds. It covers conduct that arises from a careless or casual approach to trust accounting all the way to deliberate, dishonest conduct. It exists on a continuum. Misappropriation does not mean theft. The concepts are different.
>
> [13] The most recent case that sheds light on this issue is *Law Society of BC v. Ahuja,* 2020 LSBC 31. Any unauthorized use qualifies if there is an unauthorized, temporary use for the lawyer's purpose. It does not require personal gain or benefit to the lawyer. See para. 43 and the cases cited therein. ...

[102] The Panel in *Sahota* found the member to have misused trust funds. It held:

> [71] A finding of professional misconduct without a matching determination of misappropriation does not sufficiently describe the extent to which the public trust has been abused in the circumstances of this citation. The evidence of error upon error upon error is overwhelming and frustrating. This behaviour reaches a level of misconduct that is wrongdoing simpliciter. The sheer volume of the delicts establishes the necessary element of fault. This extent of trust account mismanagement must in itself demonstrate the necessary elements of wrongdoing and fault. More is not required.
>
> [72] There is no conclusion possible other than to find that, in addition to the professional misconduct so dramatically made out on these facts, that the Respondent is also guilty of the misappropriation of his client's funds.

[103] The panel in *Sahota* clearly regarded the creation of "paper shortages" as serious (amounting to professional misconduct) but it is not clear that the panel found the creation of those paper shortages alone to amount to misappropriation. It was not necessary to do so, given the many instances of inappropriate use of trust funds.

[104] In my view, when the Panel in the case at bar concluded, at para. 141, that authorizing the withdrawal was a clear and obvious breach of R. 3-63, it was on firm

ground. However, when it held that "the submission of the authorization, subjected the trust funds of clients not involved in the Purchase Transaction to being withdrawn to satisfy the PTT obligation [and] thereby [engaged] the provisions of Rule 3-64", it erred in finding the appellant had in fact used trust funds before he had done so. In my view, it was incorrect to equate the submission of an authorization to withdraw PTT with the making of a payment. In doing so, the Panel (1) improperly turned the submission of a PTT authorization into "use" of the funds in trust so as to ground a finding of misappropriation, and (2) read into R. 3-64(3) words that are not there so as to ground a finding of a breach of that Rule.

[105] In my opinion, the conduct described in Allegation 1 might reasonably be found to amount to professional misconduct (subject to what I have said about the consideration of *mala fides*), but ought not to have been described as misappropriation.

Ground 6: treatment of *mala fides*

[106] The appellant says that, despite the Panel's recognition of the *Lyons* factors, it failed to address *mala fides* and, in particular, failed to do so in relation to Allegations 2, 3, 4, 5 and 6. That failure is said to be reflected in paras. 147–48 (in relation to Allegations 2–4) and paras. 155–62 (in relation to Allegations 5 and 6) of the Panel's reasons. The Panel's discussion of Allegations 2–4 includes the following passage:

> [147] The Respondent submits that, his hiring of, and reliance on, professional bookkeepers, his willingness to follow and adopt Law Society recommendations, and the absence of any problems subsequent to the summer of 2020, should be taken into account when determining whether these breaches amounted to professional misconduct or simply Rules breaches. Moreover, the Respondent states that the absence of *mala fides* or harm to clients should lessen the Law Society's concerns regarding his behaviour.
>
> [148] Such factors may be taken into account when determining what disciplinary action should be administered. Given the duration, repetition, and nature of the breach those factors do not affect this Panel's finding that the Respondent's behaviour in relation to these matters represents a marked departure from the standard the Law Society expects of its members, and therefore amounts to professional misconduct. While the Respondent may have relied on others to amend his errors, it remains the responsibility of the

> Respondent to ensure he meets his professional obligations and failure to do so is a marked departure from the standard expected of lawyers.

[107] The consideration of Allegations 5 and 6 ended with the following finding:

> [161] The evidence establishes and the Respondent has admitted that, on two occasions, he borrowed money from his clients. The amounts of money involved were not insignificant sums. Neither loan was of a routine nature, and even though MS "had money available" to lend, it is not clear that either client loaned money in the ordinary course of their business.
>
> [162] On the basis of the evidence and admissions, this Panel finds the allegations contained in paragraphs 5 and 6 of the Citation have been proven and the conduct of the Respondent amounts to professional misconduct. It constitutes a clear violation of the prohibited conduct described in rule 3.4-31 of the *BC Code* and is a marked departure from the conduct expected of lawyers.

[108] The appellant says the *Lyons* factors reflect the view expressed in that case that a breach of the *Rules* does not, in itself, constitute professional misconduct, and that an error or omission that constitutes a "*Rules* breach" rather than professional misconduct, is one where the conduct, while not done with any dishonest intent, is not an insignificant breach of the *Rules*: *Lyons* at para. 32; *Law Society of BC v. Smith*, 2004 LSBC 29 at para. 6; *Boles (Re)*, 2016 LSBC 2 at para. 61.

[109] Counsel for the Law Society says, correctly, that we must look to the reasons as a whole in order to determine whether the Panel actually applied the test it enunciated. It says that in addressing a number of the arguments advanced by the appellant the Panel clearly considered factors going to the presence or absence of *mala fides*. The Panel expressly weighed the appellant's co-operation with the investigation, his rapid and willing implementation of all recommendations, his self-reporting of some issues and the absence of concerns or reported problems in the period from 2021 to the hearing.

[110] She argues:

> A review of the F&D Decision discloses that the panel did not "refuse" to consider relevant factors. Any suggestion that the panel erred in law by failing to accord adequate weight to certain factors ought to be rejected. As the

Supreme Court of Canada explained in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at para. 43, such an assertion:

> …is inimical to the very notion of a balancing test. A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical. It would be dangerous in the extreme to accord certain kinds of evidence decisive weight… A test would be stilted and impossible of application if it purported to assign fixed weights to certain factors… The most that can be said, as a matter of law, is that the Tribunal should consider each factor; but the according of weight to the factors should be left to the Tribunal.

[111] However, as the appellant points out, the Panel expressly identified certain evidence that, on its face, might go to whether professional negligence had been proven (in particular the extraordinarily rapid expanse of his practice and his attempts to rely on professionals), as relevant only to discipline:

> [125] … The factors listed by the Respondent, as well as any potential medical evidence, could be mitigating factors and are matters to be considered at the disciplinary action phase of a hearing. The lessons learned and changes implemented by the Respondent, and the quality of his practice subsequent to the matters that are the subject of the Citation, do not affect whether his conduct at the time constituted professional misconduct or otherwise.

[112] There is some merit in that submission. Further, given what I have said with respect to the Panel's refusal to weigh the evidence of Mr. Wiebe, and its conclusion that the medical evidence was irrelevant, it is my opinion that the Panel did not appropriately weigh the gravity of the breaches and the appellant's state of mind and, as a consequence, erred in assessing the resulting harm to the integrity of the legal profession and the administration of justice.

Ground 7: finding on Allegation 8

[113] Finally, the appellant contends it was an error on the part of the Panel to conclude that he issued trust cheques on January 30, 2020, when there were insufficient funds on deposit in his trust account, in breach of Rules 3-63 and 3-64 and rule 7.2-12 of the *Code*. This, he says, is because he never delivered or

otherwise ceded control over those cheques until there were sufficient funds on hand and therefore never breached the applicable *Rules*. As the Panel found:

> [172] … While the cheques were printed and prepared, ready to be deposited to the accounts of the various payees, no payments or withdrawals from the Respondent's trust account were actually made. ...
>
> …
>
> [177] … the cheques were printed, signed, and (presumably) placed with the file in anticipation of the Purchase Transaction closing as expected the next day. They did not leave the Respondent's control and no third party could intervene to deposit them. If, in fact, the Purchase Transaction had failed to complete, the cheques could have been destroyed without anyone knowing they had ever been printed.

[114] The Panel reasoned, however, that a trust ledger for those clients' trust accounts would have shown a shortfall and if the cheques had been sent or deposited the Respondent would not have been able to meet his obligations pursuant to Rules 3-63 and 3-64 and rule 7.2-12 of the *Code*. It mattered not, as the Panel stated at para. 179, in the circumstances "there was no possibility of the cheques being deposited and an actual shortfall occurring without the [appellant] relinquishing control of the cheques", which he had not done (as found at para. 177). The Panel concluded:

> [181] In respect of this allegation, this Panel would describe the Respondent's actions as a truly technical breach. The cheques sitting on the Respondent's desk waiting to be delivered could not be honoured at the time of printing. However, this Panel finds that the fact that the Respondent still had to take further steps for the potential breach of Rules 3-63, 3-64 and rule 7.2-12 of the *BC Code* to occur, principally the step of actually sending the cheques out to be deposited, reduces the breach to the level of a minor Rules breach, rather than a marked departure from the standard of behaviour the Law Society expects from its members.
>
> [Emphasis added.]

[115] With respect, this passage is contradictory and irrational. The Panel found that "further steps", principally being the act of sending the cheques out for deposit, had to be taken "for the potential breach … to occur". Yet it found there was a minor *Rules* breach. The fact the breach had not yet occurred did not reduce it to a "minor breach". It meant, on the Panel's findings of fact, there had not been a breach of the *Rules* or the *Code*.

[116] Further, the evidence with respect to Allegation 8, unlike Allegation 1, did not support the conclusion that the appellant had, by printing and preparing but continuing to hold on to cheques, created an obligation or given an undertaking he did not have sufficient funds on hand to meet, in breach of R. 3-63. Nor, in my view, did it support a finding that either of R. 3-64(3) of the *Rules* or rule 7.2-12 of the *Code* had been breached by the appellant.

[117] Allegation 8 ought to have been dismissed by the Panel.

Disposition

[118] In my opinion the Panel erred in law:

a) in excluding the opinion evidence of Mr. Wiebe;

b) in concluding that medical evidence was irrelevant to the question of whether the appellant's actions constituted professional misconduct;

c) in interpreting R. 3-64(3) of the *Rules*; and

d) in finding the acts which were the basis of Allegation 1 constituted "misappropriation".

[119] The Panel also erred in its treatment of Allegation 8 in the manner described above.

[120] I would allow the appeal and set aside the finding of a breach of R. 3-64(3) in relation to Allegation 1.

[121] I would set aside the finding of a breach of Rules 3-63 and 3-64(3) of the *Rules* and rule 7.2-12 of the *Code* in relation to Allegation 8, and I would dismiss that Allegation.

[122] I would set aside all findings of professional misconduct.

[123] I would remit Allegations 1–7 to the Law Society hearing panel for reconsideration.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Butler"