

2020

NOVA SCOTIA BARRISTERS' SOCIETY

IN THE MATTER OF: *The Legal Profession Act*, S.N.S. 2004, c. 28 and the Regulations  
of the Nova Scotia Barristers' Society, as amended

BETWEEN:

The Nova Scotia Barristers' Society

-and-

Adam Rodgers

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DECISION ON SANCTIONS

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**1. The Charges**

Following a two day Hearing held in October, 2020, the Hearing Panel has found Mr. Rodgers engaged in professional misconduct by decision rendered on January 12<sup>th</sup>, 2021, as follows:

**Charge 1:** Adam Rodgers engaged in professional misconduct by encouraging or knowingly assisting with fraudulent or dishonest dealings with clients' trust monies in breach of Rule 3.2-7 of the *Code*:

1. He was aware of, was willfully blind to, and was reckless about the fact that his partner, Jason Boudrot, was withdrawing funds from clients' trust accounts without fees having been earned or prior to fees having been earned, contrary to Regulation 10.3.4;
2. He allowed to be deposited client trust funds in the firm's general account without fees having been earned and before the fees were earned, contrary to Regulation 10.2.

**Charge 2:** Adam Rodgers engaged in professional misconduct and/or professional incompetence, in that he:

1. failed to care for clients' property in a careful and prudent manner and failed to observe all relevant rules and law about the preservation and protection of clients' property entrusted to a lawyer and law firm, contrary to section 3.5 of the *Code* and Regulation 10.3.5;

**Charge 3** - Adam Rodgers engaged in professional misconduct by failing to carry on the practice of law and discharge all responsibilities to clients, the public and other members of the profession honorably and with integrity, contrary to section 2.1 of the *Code*.

## **2.Sanction Hearing**

On February 8<sup>th</sup>, 2021, a Sanction Hearing took place in Halifax. The Nova Scotia Barristers' Society presented written and oral submissions to the Panel. Mr. Rodgers attended and made oral submissions only. This Hearing was held pursuant to Regulation 9.14.11:

“If the member is found guilty, within 60 days of release of its decision pursuant to subregulation 9.14.9, the hearing panel must resume the hearing in order to determine the appropriate sanction.”

### **A. Society's Submissions and Recommendation:**

The Nova Scotia Barristers' Society submits that Mr. Rodgers conduct was of the highest degree of seriousness and in order to maintain public confidence, submits that there is a “strong common law presumption that the only suitable sanction for Mr. Rodgers is disbarment”.

The Society seeks the following sanctions to be imposed against Mr. Rodgers:

1. That Mr. Rodgers be disbarred pursuant to Section 45(4) of the Legal Profession Act;
2. That Mr. Rodgers be prohibited from applying for readmission to the Society for a period of three to five years pursuant to Section 45(4)(n) of the Act; and
3. That Mr. Rodgers pay \$12,000.00 costs, pursuant to Section 45(4)(h) of the Act.

## **B. Mr. Rodgers Submissions**

In summary, Mr. Rodgers takes issue with the Society's recommendations and with the Society's investigation. He argues that "he is a scapegoat" and that the investigation was "dogged" and harsh. He does acknowledge that he could have done more and should have. He submits that he should receive a reprimand and some practice restrictions and seeks costs against the Society.

## **Regulations**

Section 9.14.12 of the Regulations, provides:

*"Within 30 days of completion of the hearing pursuant to subregulations 9.14.11 or 9.15.3, the Chair of the hearing panel must provide to the parties and the Executive Director:*

- a) a written decision on the sanction;*
- b) the reasons for that decision; and*
- c) a resolution incorporating the sanction signed by the Chair on behalf of the hearing panel;"*

## **GENERAL PRINCIPLES AND OBJECTIVES OF SANCTIONING**

In **Canadian National Railway Co. v. McKercher LLP**, 2013 SCC 39 at para 15, **Mclachlin C.J.** wrote that:

*"[t]he purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules - in short, the good governance of the profession".1*

Gavin MacKenzie, in **Lawyers and Ethics: Professional responsibility and Discipline** wrote:

*"The purposes of the law society discipline proceedings are not to punish offenders and extract retribution but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession."*

In **Nova Scotia Barristers' Society v. Whitehead**, the Panel adopted the following concise statement of objectives for disciplinary sanctions from **Law Society of Upper Canada v. Strug**, **2008 ONLSP 88**:

*"...We have considered the several other factors set out regularly in disposition decisions, but appreciate the following as the most concise*

*statement of the objectives that we must pursue from LSUC v. Strug, 2008 ONLSHP 0088, at paras. 3 – 8:*

3. *Disciplinary orders are directed to primarily four purposes.*
4. *The first is specific deterrence, which would be an order preventing a particular lawyer from continuing in a course of conduct.*
5. *The second purpose is general deterrence, which is an order that the entire membership should take into account. It is designed to deter the membership at large from engaging in a certain course of conduct.*
6. *The third purpose can be directed towards such aspects as rehabilitation, restitution, and improving the competence of a particular lawyer.*
7. *The fourth purpose is the most fundamental, and that is to maintain public confidence in the legal profession.*
8. *Mitigating factors, including compassion, have their place in the deliberations of discipline tribunals, but we must not lose sight of the fact that our fundamental purpose in crafting disciplinary*

*orders is to maintain that public confidence in the legal profession.”*

### **SENTENCING FACTORS**

Several decisions of the hearing panels in Nova Scotia have adopted a set of factors to be considered. Recently, the British Columbia Court of Appeal in Faminoff v. The Law Society of British Columbia: 2017 BCCA 373 at para 36 sets out a similar list of sanctioning criteria:

- 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 on 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 of the respondent of criminal or other sections 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.*

## **APPLICATION OF THE FACTORS**

### **A. The nature and gravity of the conduct proven;**

At the outset, it should be perfectly clear from the decision of this Panel that the fraudulent, dishonest and illegal activities surrounding this complaint were the actions and conduct of Jason Boudrot. It was through the actions of Jason Boudrot that there was a loss of over one million dollars of clients' trust money. From a professional regulatory position, Mr. Boudrot was sanctioned by disbarment. The question before the Panel in this case is to determine the sanctions to be imposed on Mr. Rodgers with respect to the findings of the panel in terms of his conduct . The Panel did not find that Adam Rodgers aided and abetted Jason Boudrot. What the Panel has found is that through Adam Rodgers recklessness and neglect, the panel has imputed to him that he was willfully blind of the activities of Jason Boudrot, thereby allowing it to continue.

### **B. The age and experience of the respondent;**

The panel considered the age and experience of the Mr. Rodgers and overall he generally appears to practice competently and has a good reputation in the community. Aside from this matter,

there was no evidence before the panel that generally he was inexperienced or that age was a mitigating factor.

**C. The previous character of the respondent, including details of prior discipline;**

The panel was aware Mr. Rodgers received a caution concerning trust funds management in 2016. It is to be noted that a caution is not a previous conviction for professional misconduct. A caution is non-punitive in nature. Other than this caution, there appears to be nothing of a previous disciplinary nature.

**D. The impact on the victim;**

*In summary, Mr. Rodgers did not take the steps necessary to protect staff and client interests. The extraordinary impact on staff and vulnerable clients and the significant amount of harm caused by Mr. Rodgers' willful blindness is a very strong factor supporting the most severe sanction." (Society's Submission).*

As mentioned above, there is no doubt that the victims, which is a number of members of the public, were the clients, others in the firm and even to an extent Mr. Rodgers was a victim at the hand of Mr. Boudrot. Many clients have lost sizable amounts of money at the hand of Jason Boudrot. His sole partner, Adam Rodgers, could have done more to prevent this significant loss to the clients of Boudrot Rodgers.

**E. The advantage gained, or to be gained, by the respondent;**

The Society states in their Brief:

*“...However, Mr. Rodgers, in this case, did gain from his misconduct. As such, it is an aggravating factor. Mr. Rodgers was willfully blind to Mr. Boudrot’s activities. Further, he knew that his clients’ retainers were being put into the general account prior to fees being earned. The Panel commented, “It is particularly concerning in that the transfers would happen almost the same day or within a few short days after the deposit. The immediate intent that comes to mind is that the **general operating account requires funds to assist in the day-to-day operations or draws of the partners in the firm.**”<sup>46</sup> In *Law Society of Upper Canada v. Puskas*, a staff member stole money from the lawyer’s trust account. Puskas was found to be negligent but did not knowingly assist in the fraud. While the staff member was engaged in taking money, she loaned money to the lawyer that was never paid back. The *Law Society of Upper Canada Tribunal Appeal Division* found that “the benefit that the appellant derived from the frauds (albeit not knowingly)” was an aggravating factor in the sanctioning.*

The Society submits that Mr. Rodgers gained an advantage due to the fact that these monies taken from the trust account to the general account paid firm operating expenses and his partner draw.

This Panel, in our decision of January 12, 2021, did speculate that the intent of Mr. Boudrot’s actions was to funnel money from trust to the general account to assist in day-to-day operations or draws of the partners as outlined above by the Society. However, this is speculative on the part of the Panel regarding Mr. Rodgers. It is not known whether Mr.

Rodgers' billings and firm expenses justified the draw that Mr. Rodgers received, albeit the draw seems generous to Mr. Rodgers and clearly more than generous to Mr. Boudrot.

**F. The number of times the offending conduct occurred;**

The Society outlined portions of the Panel's decision as follows:

*"The Panel found that Mr. Rodgers allowed Mr. Boudrot to misappropriate from 28 of Mr. Rodgers' clients. It happened 3 times with one client and twice with another, meaning 31 false invoices were generated to misappropriate funds from Mr. Rodgers' clients. Further the Panel found:*

*[T]he amount of money that was misappropriated from the trust account files of Adam Rodgers' clients to the general account over a period of approximately two years was in excess of \$100,000.00.*

Further, the Panel found that Mr. Rodgers could have stopped Mr. Boudrot sooner:

*By not reacting to these red flags, Adam Rodgers allowed this practice of Jason Boudrot to continue. Had Adam Rodgers reported these inappropriate withdrawals from the trust account to the general account, this practice could potentially have been terminated or, certainly, ended earlier than it did..."*

These findings of the Panel do support a serious sanction.

**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;**

Mr. Rodgers cooperated with the Society throughout the investigation of Jason Boudrot and throughout the subsequent investigation of himself. However, Mr. Rodgers' lack of insight into the seriousness of his misconduct strongly supports a more serious sanction than a reprimand. Even when questioned by the Panel, Mr. Rodgers believed that his actions in ignoring transfers from trust to the general account for his clients was acceptable as long as the clients did not pay more than that which was agreed upon for legal fees. The Panel found this attitude to be "nonchalant and cavalier". To his credit, Mr. Rodgers did state at the Sanction Hearing, "I could have and should have done more."

**H. The possibility of remediating or rehabilitating the respondent;**

Although not specifically addressed, the Panel is of the opinion that Mr. Rodgers will not be a repeat offender as Mr. Rodgers better understands his professional obligations as a result of being subjected to this thorough investigation and disciplinary process. He also has faced public humiliation, financial consequences and stress of his prior actions.

**I. The impact of the respondent of criminal or other sanctions or penalties;**

There are no criminal charges or other penalties surrounding Mr. Rodgers that the panel had to consider. The panel was aware that there is a criminal investigation of Jason Boudrot.

**J. The impact of the proposed penalty on the respondent;**

The need for specific and general deterrence will be addressed below and this will have the obvious professional, personal, and financial impact on Mr. Rodgers.

**K. The need for specific and general deterrence;**

This Panel found that Mr. Rodgers should have done something about Mr. Boudrot's illegal activities; this conclusion was based on the "very high obligation of trust, as set out in the Code of Professional Conduct and the Regulations to properly deal with and protect trust funds. Mr. Rodgers breached that obligation. A specific deterrent is required to ensure Mr. Rodgers accepts and understands the gravity of his misconduct.

A general deterrence is required to maintain public confidence in the legal system. A lawyer owes an obligation, not only to other members of his profession, but to the public at large.

In William Bishop v. Law Society of Upper Canada, Mr. Bishop was found to be willfully blind and reckless and therefore he knowingly assisting a person with fraudulent conduct. In response to Mr. Bishop's argument that he did not put his clients at risk, the Court stated:

*[17] ... The appellant had a professional obligation not to engage in dishonest or fraudulent conduct. It is an obligation that he owes not only to the other members of his profession; more importantly it is an obligation that he owes to the public at large. Any suggestion, or even hint, that a lawyer can participate in fraudulent conduct as long as it does not negatively affect his/her client is one that cannot be countenanced. To hold otherwise would be fundamentally inconsistent with the privileged position that lawyers hold within our society.*

The Panel notes that the need for general and specific deterrence supports a serious sanction.

**L. The need to ensure the public's confidence in the integrity of the profession;**

The Society refers to the commentary in Chapter 2.1-1 "Integrity" in the Code of Professional Conduct:

*[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably upon the legal profession, inspire the confidence, respect, and trust of clients and of the community, and avoid even the appearance of impropriety.<sup>72</sup>*

*As previously outlined, one of the most fundamental objectives of the sanctioning process is to ensure that the public maintains confidence in the profession.*

As noted in **Bishop** (supra), when quoting from Bolton, at p. 519:

*The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits but that is a part of the price.*

**M. The range of penalties imposed in similar cases;**

The Society's submissions, as indicated above, were replete with various similar cases where a lawyer knowingly assists another person to engage in illegal activity through recklessness or willful blindness, as well as misappropriation cases where the lawyer is found not to properly deal with and protect trust funds. All resulting in disbarment, the Society, argued:

*“that the public would be outraged if the member was not being disbarred.”*

The Society submits by numerous authorities, that there is a “strong common law presumption that the only suitable sanction for Mr. Rodgers is disbarment”. A presumption is rebuttable. Disbarment is the highest form of sanction available to this Panel. Disbarment should only be considered when all forms of sanction would be insufficient. The real question is whether the conduct and gravity of Mr. Rodgers' implied conduct or knowledge sufficient to have him sanctioned to the same degree as Mr. Boudrot.

There are also cases in which, for similar conduct, the sanctions imposed were less than disbarment. In particular, in Nova Scotia, the following cases which involve elements of fraud and other illegal conduct on the part of others and lawyers and other illegal conduct which the sanctions imposed were less than disbarment:

1. The Nova Scotia Barristers' Society v. Raymond Jacquard, 2012 NSBS 1 (CanLII)
  - a. 12 month suspension
2. Nova Scotia Barristers' Society v. Anderson, 2003 NSBS 4
  - a. 24 months suspension
3. Nova Scotia Barristers' Society v. Rhindress, 2002 NSBS 9 (CanLII)
  - a. 12 month suspension

In the case of **Law Society of Upper Canada v Babij**, [2004] LSDD No 39, 2004 ONLSHP a lawyer's neglect resulted in misappropriations, engineered by his wife, of approximately \$1,900,000. The member was found to have engaged in professional misconduct. The Panel ordered that the member be suspended for a period of twelve months.

As set out in Gavin MacKenzie's book (Lawyers and Ethics: Professional Responsibility and Discipline (Carswell, 1993) in paragraph 26.17 at page 26-43:

*“Although most participants in the discipline process might agree that similar penalties should be imposed for similar cases of misconduct. The penalties imposed for similar misconduct differ widely both within and without most jurisdictions. It is largely due to the fact that one of the main purposes of the*

*processes is to protect the public. It may be entirely appropriate that a lawyer who has proven to incorrigible, be disbarred for the same conduct for which a different is reprimanded if the discipline hearing panel is reasonably satisfied that the likelihood of recurrence is minimal in the later case.*

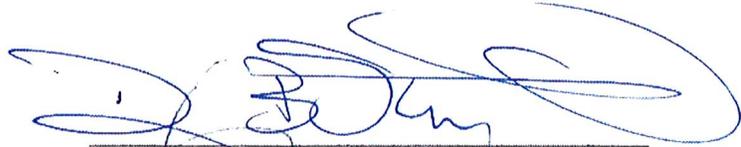
### **DISPOSITION ON SANCTION**

The Hearing Panel is confronted with the Society seeking disbarment and Mr. Rodgers essentially saying that the sanction should be a reprimand. The Panel has determined that Mr. Rodgers' neglect and recklessness does not amount to warranting the most severe sanction which is disbarment. Conversely, on the scale of sanctions, a reprimand in this case does not sufficiently fulfill the principles of general and specific deterrence nor instill public confidence. To that end, the Panel has decided that the appropriate sanction will be suspension from the practice of law for a period of twelve months. Mr. Rodgers shall complete the Professional Responsibility course, at his own expense, which is taught at the Schulich School of Law at Dalhousie University, before being re-instated. After his re-instatment, Mr. Rodgers will thereafter strictly adhere to the Code of Professional Conduct and the Legal Profession Act and Regulations Part 10 – Trust Accounts.

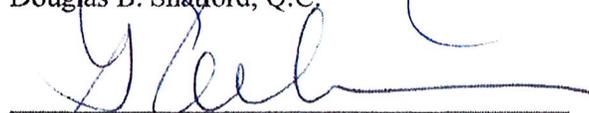
### **COSTS**

The Panel rejects Mr. Rodgers' claim for costs and orders costs against Mr. Rodgers in the amount of \$12,000.00, pursuant to Section 45.4(h).

This is the unanimous decision of the Panel dated the 18<sup>th</sup> day of March, 2021.

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Douglas B. Shatford, Q.C.

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Gail Rudderham Chernin, Q.C.

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Moka Case