

**DISCIPLINE COMMITTEE
COLLEGE OF PATENT AGENTS AND TRADEMARK AGENTS**

IN THE MATTER of a hearing of an application by the Investigations Committee of the College of Patent Agents and Trademark Agents (“**CPATA**”) regarding the conduct of **ERIC FINCHAM 2021-0606** held before the Discipline Committee according to the provisions of the *College of Patent Agents and Trademark Agents Act, 2018, c 27, s 247* (“**Act**”).

B E T W E E N:

COLLEGE OF PATENT AGENTS AND TRADEMARK AGENTS

(Applicant)

- and -

ERIC FINCHAM

(Respondent)

DECISION OF THE DISCIPLINE COMMITTEE

REASONS FOR DECISION ON PROFESSIONAL MISCONDUCT

OVERVIEW

- [1] This Application by the Investigations Committee of the College of Patent Agents and Trademark Agents (the College) seeks a finding that Eric Fincham (the Respondent) has engaged in professional misconduct by failing to serve two clients EC and SW, and by neglecting to respond or cooperate with the College in its investigation of this complaint.

- [2] The alleged deficiencies in client service relate to a failure to respond to the clients’ inquiries, a failure to carry out their instructions to make two annuity or maintenance fee payments for each client by certain deadlines, and for one client, receiving but failing to apply client funds to the payment of the annuity. The College also alleges that in doing so, the Respondent neglected to supervise his staff.

- [3] Mr. Fincham was properly served but failed to attend our Discipline Committee hearing. The College’s evidence at the hearing consisted of the testimony and witness briefs of a senior College official and the College’s investigator. The College presented direct evidence of its correspondence with the Respondent, and his failure to respond to its inquiries.

- [4] Based on this evidence, we have concluded that the College proved one of the allegations in the Notice of Application: that the Respondent breached his duty to cooperate with his regulator.

- [5] For several reasons, however, we have dismissed the College's three substantive allegations of failure to serve the two clients. In our view, there were serious gaps in the evidence presented at the hearing that preclude findings in the College's favour.
- [6] The College's most important evidence in support of these allegations was hearsay, and it raised significant concerns of admissibility and reliability. Relevant and publicly available records from the Canadian Patent Office, as well as information from the clients and their files, were missing from the investigator's report and the College's presentation. In the result, the College's admissible and reliable evidence as presented did not prove three of the allegations in the Notice of Application as drafted and twice amended by counsel.
- [7] In terms of direct evidence, we did not hear from the Respondent or his assistant, who was involved in serving the clients. We did not hear from the clients SW and EC, nor EC's US lawyer TH, who conveyed EC's instructions and requests to Mr. Fincham as Canadian counsel.
- [8] These individuals, and perhaps persons at the Canadian Patent Office, have firsthand knowledge of the Respondent's conduct in relation to these payment issues. It was SW's and TH's expressions of concern to the College that led to the College's investigation and the Discipline Committee hearing.
- [9] The evidence of allegedly deficient service to the two clients was presented through the investigator. His investigation and his evidence were insufficient in several respects. While the Respondent through his non-appearance forfeited his right to cross-examine or otherwise challenge the investigator's evidence, we were left with serious issues of admissibility and weight that have played a role in the result we have reached.
- [10] At the hearing, we asked the College to provide a redacted version of its documents, and in the reasons that follow, we have anonymized the two clients. To the extent possible, we have withheld information that would otherwise identify them.

BACKGROUND

- [11] Mr. Fincham has been a patent agent since 1976. He was licensed by the College after it came into existence on June 28, 2021. His license was suspended on September 16, 2021 on administrative grounds and reinstated on November 1, 2021. He has also been suspended since March 1, 2023 because he did not provide confirmation to the College that he had professional liability insurance.
- [12] On April 20, 2023, client SW filed an Agent Conduct Inquiry with the College, stating that his patent had been terminated for failure to pay the maintenance fee, which he claims is not true. He said he paid the fee but then his agent Mr. Fincham "lost his license".
- [13] On April 26, 2023, TH also filed an Agent Conduct Inquiry on behalf of his client EC, stating that Mr. Fincham, his agent in Canada, had allowed EC's patent to expire in 2022 for failure to pay the annuity, and did not disclose this in communications with TH in February 2023.
- [14] On April 27, 2023, the College's CEO and Registrar Juda Strawczynski wrote to Mr. Fincham "as a result of informal conduct inquiries we have been receiving over the past three weeks

from some of your former clients". After summarizing the concerns, Mr. Strawczynski asked the Respondent seven specific questions about the status of his practice, and the steps Mr. Fincham was taking to protect his clients' interests during the suspension that had begun on March 1, 2023.

- [15] The CEO requested an answer by May 1, 2023, and warned the Respondent that if he did not cooperate, a recommendation would be made to the College's Investigation Committee to open a complaint investigation.
- [16] The CEO's email and Canada Post delivery were received by Mr. Fincham's office, but he did not respond.
- [17] On June 8, 2023, the Investigation Committee initiated its own complaint regarding TH's concerns, as well as Mr. Fincham's failure to cooperate with his regulator¹. SW filed his own complaint.
- [18] The College's then Manager of Professional Responsibility, Victoria Rees, advised the Respondent on July 13, 2023 that it had appointed Daniel Drapeau, a Quebec Lawyer and Canadian Trademark Agent registered with CPATA, to investigate these complaints. She reminded Mr. Fincham that he was required to respond within 30 days to the two complaints, and expressed the Investigation Committee's concerns about his conduct, the risk to the public, and the status of his clients' files and their knowledge of his suspension.
- [19] Mr. Fincham did not respond.
- [20] The investigator wrote to the Respondent on July 27, 2023, requesting an interview and an opportunity to review the relevant client files no later than August 9, 2023.
- [21] Mr. Fincham's assistant BD replied on July 27, saying the Respondent "is not in the office due to a medical situation."
- [22] The investigator responded on July 31 with four questions. Two of them reiterated the College's inquiries about Mr. Fincham's practice. The third asked when the Respondent "[ceased] practising for medical reasons", and the fourth asked when he would be back in the office or able to respond to the investigator. Without reference to the College's duty to accommodate a genuine disability, the investigator suggested that an inability to respond to College communications "could constitute a violation of art. 68(b) of the bylaws"
- [23] The Respondent replied on August 9, 2023:

After receiving your e-mail, I would ask you to let me know under what authority you are requesting the information in your e-mail. As I am sure you are aware, I am no longer a member of CPATA/CABMC.

As an aside, I would also mention that the origin of these matters resulted from the failure of CPATA/CABMC to notify me of the transfer of authority from CIPO to yourselves, thereby resulting in letters to my clients stating that I no longer represented them.

- [24] The investigator and the Respondent wrote back and forth on August 10, 18, and 21. The investigator granted a time extension at the request of the Respondent, but instead of providing a response, Mr. Fincham continued to take issue with CPATA's actions, including its "reprehensible" decision "to post notice at my office that we were 'closed'".
- [25] On August 21, the investigator reminded Mr. Fincham that he had a duty to cooperate, and the failure to respond would be reported to the Investigation Committee.
- [26] On September 5, 2023, the investigator set a final deadline of September 11, 2023, repeated the questions he had asked, provided some of the relevant correspondence between Mr. Fincham and his clients, and summarized the allegations the investigator was investigating.
- [27] On September 11, 2023, the investigator provided his investigation report in draft form, and invited the Respondent's comments by September 15.
- [28] The Respondent did not reply to the investigator's correspondence of August 21, September 5 or September 11, and he did not provide any comments in response to the draft report. The investigator sent his report to the Investigations Committee on September 15, 2023.
- [29] On November 16, 2023, the Investigations Committee decided to make this Application to the Discipline Committee. Ms. Rees advised Mr. Fincham on November 23, and informed the Respondent of the law firm that was retained by the Investigations Committee and would be serving a Notice of Application on him.

THE APPLICATION

- [30] The November 16, 2023 Notice of Application contains four allegations and 10 particulars.
- [31] The allegations (omitting references to the Rules of Professional Conduct) in the Notice of Application that was served are:
1. The Respondent failed to pay the annuities for at least one patent (EC) and one patent application (SW).
 2. The Responding [sic] failed to pay the annuities for the 7th and 8th patent application (SW), and the 14th and 15th annuities for a patent (EC), and failed to respond to clients' inquiries for information about the annuity costs due. The Respondent also failed to supervise staff and/or assistants with his office.
 3. The Respondent received client funds to pay at least one annuity (EC), and failed to apply these funds toward payment of the annuity.
 4. The Respondent failed to respond to a communication from the College, and failed to cooperate with the College in their investigation of this complaint.
- [32] The particulars are:
- i. At all material times, the Respondent was a patent agent licensee until he was suspended on March 1, 2023 for failure to confirm professional liability insurance

coverage.

- ii. EC retained the Respondent and his company, Eric Fincham and Company Inc., in respect of certain patents held by EC, including the payment of patent annuities.
- iii. The Respondent failed to pay the 14th Patent Annuity with respect to a particular patent held by EC, which was due on March 3, 2021. He also failed to pay the 15th Patent Annuity which was due March 3, 2022.
- iv. Further, the Respondent's assistant falsely advised EC that the 14th Patent Annuity had been paid.
- v. The Respondent also failed to respond to EC's inquiries.
- vi. Dr. W retained the Respondent and his company, Eric Fincham and Company Inc., in respect of certain patents held by C, including the payment of patent annuities.
- vii. The Respondent failed to pay the 7th Patent Annuity with respect to a particular patent, which was due November 24, 2021, despite the fact that Dr. W had paid Eric Fincham and Company Inc. \$US345 for that purpose.
- viii. The Respondent failed to pay the 8th Patent Annuity which was due on November 24, 2021, for which Dr. W did not pay in advance due to the Respondent's failure to provide Dr. W the details for payment or invoice which was requested by Dr. W.
- ix. The Respondent failed to respond to the College's investigator seeking a response to these matters.
- x. The Respondent also failed to respond to the College investigator's draft preliminary report in respect of this matter.

[33] In a May 31, 2024 letter to the Respondent, College counsel advised him:

In preparing for the upcoming hearing, we note that paragraph 2 of the Notice of Application says the "7th and 8th patent application" instead of the "7th and 8th annuities for the patent application".

At the hearing, we will alert the Panel accordingly. In particular, the IC will submit that although the Notice of Application says the "7th and 8th patent application" instead of the "7th and 8th annuities", it does not materially change the allegation. What is alleged in paragraph 2 about failure to provide payment on behalf of a client is clear. Accordingly, there is no prejudice to you from the IC alerting the Panel of this at the hearing.

In our view, you were aware of the allegations that you failed to pay the 7th and 8th Patent Annuities during the course of the investigation and as a result of the particulars of the allegations at subparagraphs 5(vii) and (viii) of the Notice of Application. Moreover, it is our position that emails between your office and Dr. W about a failure to pay the 7th and 8th Patent Annuities and a screenshot of the Canadian Patent Office database's details for Dr. W's patent will prove the allegations clearly.

- [34] Then, at the hearing on October 2, 2024, College counsel asked the Committee to correct further errors in the Notice Application.
- In para (iii) of the particulars, the dates should be March 3, 2022 and March 3, 2023 respectivelyⁱⁱ.
 - Para (vi) should say “held by SW”.
 - In para (viii), the date should be November 24, 2022.
- [35] We accepted counsel’s submission that regulatory pleadings must be adequate, not perfect, as long as there is no surprise to the respondent that causes prejudiceⁱⁱⁱ.
- [36] Accordingly, at the beginning of the hearing we made the two sets of amendments to the Notice of Application that are set out above. No further amendments were requested by the College at the hearing.
- [37] The Application therefore proceeded on the following basis.
- [38] The second allegation, as it referred to SW, was amended to read “The Respondent failed to pay the 7th and 8th annuities for a patent application (SW)...”.
- [39] With respect to the four allegations, the College sought to prove the following particulars of misconduct against the Respondent (amendments underlined):
- i. At all material times, the Respondent was a patent agent licensee until he was suspended on March 1, 2023 for failure to confirm professional liability insurance coverage.
 - ii. EC retained the Respondent and his company, Eric Fincham and Company Inc., in respect of certain patents held by EC, including the payment of patent annuities.
 - iii. The Respondent failed to pay the 14th Patent Annuity with respect to a particular patent held by EC, which was due on March 3, 2022. He also failed to pay the 15th Patent Annuity which was due March 3, 2023.
 - iv. Further, the Respondent’s assistant falsely advised EC that the 14th Patent Annuity had been paid.
 - v. The Respondent also failed to respond to EC’s inquiries.
 - vi. Dr. W retained the Respondent and his company, Eric Fincham and Company Inc., in respect of certain patents held by Dr. W, including the payment of patent annuities.
 - vii. The Respondent failed to pay the 7th Patent Annuity with respect to a particular patent, which was due November 24, 2021, despite the fact that Dr. W had paid Eric Fincham and Company Inc. \$US345 for that purpose.
 - viii. The Respondent failed to pay the 8th Patent Annuity which was due on November 24, 2022, for which Dr. W did not pay in advance due to the Respondent’s failure to provide Dr. W the details for payment or invoice which was requested by Dr. W.
 - ix. The Respondent failed to respond to the College’s investigator seeking a response to these matters.

- x. The Respondent also failed to respond to the College investigator's draft preliminary report in respect of this matter.

- [40] It is evident from the background information set out above, uncontradicted by the Respondent, that the direct evidence of Ms. Rees and the investigator establishes allegation 4 of non-cooperation with the College and particulars (ix) and (x) of failure to respond to the investigator. I will return to this point when I summarize the panel's conclusions.
- [41] The bulk of the hearing addressed allegations 1 to 3 (failure to serve clients and related issues) and particulars (iii) to (viii) on which the College put forward the evidence of the investigator, who reported the information he collected in his investigation.
- [42] The College told us in its opening statement that we would have to assess the credibility of its two witnesses in order to make findings on a balance of probabilities that the Respondent failed to maintain the standards of the profession.
- [43] In fact, credibility is not a live issue in this case. The allegation of non-cooperation is proven by the Respondent's own response and non-response to the College and the investigator. On the substantive allegations of client service, the evidentiary issues are the admissibility and reliability of the investigator's evidence.
- [44] After hearing the College's evidence, we had to determine whether the three remaining allegations and the related particulars were proven on a balance of probabilities without Dr. W's and TH's (or the client EC's) evidence.

EVIDENCE OF THE INVESTIGATOR

- [45] Mr. Drapeau explained his retainer by the Investigations Committee and the process that he followed. He corresponded with the Respondent, the Respondent's assistant, SW and TH, and he interviewed SW. The investigator testified that TH declined to be interviewed.

SW's patent application

- [46] The Respondent provided services to SW with respect to a patent application through Eric Fincham and Company Inc., a corporation of which Mr. Fincham is the majority shareholder, president, secretary and treasurer. SW resides in Europe and is not fluent in the English language, but he communicated with the investigator with the assistance of an interpreter.
- [47] The investigator wrote to SW on July 27, 2023, asking for a Zoom meeting and any documentary evidence.
- [48] The investigator interviewed SW by Zoom on August 11, 2023 with the participation of SW's assistant and interpreter, as well as a law student who assists the investigator.
- [49] In his interview summary, the investigator described SW's complaint as follows:

The complaint concerns Mr. Eric Fincham's failure to pay the 7th Patent Annuity (due 24 November 2021) for which he was paid \$US345 by SW and his failure to pay the

8th Patent Annuity (due 24 November 2021 [sic]) for which SW did not pay in advance due to Mr. Eric Fincham's failure to provide SW the details for payment or invoice which was requested by SW.

- [50] Once a patent application is submitted, maintenance fees (sometimes referred to as annuities) are paid annually to keep the application alive.
- [51] As noted, we did not hear from anyone with direct evidence who could identify, provide context or be cross-examined regarding the documentation that the investigator put before us. That said, we will summarize that documentation in the following paragraphs.
- [52] On October 31, 2021, Mr. Fincham's assistant advised SW that an annuity of \$US345 was due on November 24, 2021. The email asks for instructions. A bank confirmation indicates that payment was made by SW to the Respondent's company on November 3, 2021.
- [53] The investigator supports this confirmation with a November 18, 2021 email from SW to the Respondent's office indicating that he had paid the \$US345. The rest of that email was not explained, but it shows that SW was responding to correspondence from Mr. Fincham's office that we did not receive.
- [54] The exchange of correspondence appears to raise several issues apart from the routine annual maintenance fee payment. The issues include confirmation of the amount; whether this was the 6th or the 7th maintenance payment; whether the patent application was still alive; and whether SW needed to execute a power of attorney.
- [55] In his November 18, 2021 email, SW writes, in part:
- "This is rather confusing. I received information about the required payment for patent maintenance from several countries, but it was always referred to as the 7th patent maintenance. I did not receive such information from Canada, so I wrote a letter to you. Do you mean that I will not be informed by you of forthcoming payments that are necessary to sustain my patent? As I mentioned, other countries issue an invoice for the 7th year of the patent. In the last letter you wrote that it concerns the 6th – please check, it is important as the cost for the 6th year and the 7th year is usually different and higher for the 7th year. As for the amount paid, you wrote that you see a deposit of \$305US and it is \$330US that is required. Please check how much more should I pay?"
- [56] We did not receive any reply or context to explain what the Respondent's office and SW were discussing.
- [57] The investigator next pointed to SW's email of November 3, 2022 to the Respondent's office, stating: "I would like to pay for maintaining my patent Annuity Fee No. 8....Please send me the details for payment or invoice."
- [58] The investigator then provided some email correspondence on November 16, 2022 indicating that Mr. Fincham's office asked for and received a power of attorney from SW. The Respondent's assistant says:

"I know we did it before, however, we will do it again to ensure they have it in hand. I

will also enclose a copy of the Universal Assignment again to ensure they have it in hand. At the same time, I will file the P of A, pay the annuity for this year, and wait for a reply. Kindly confirm that you agree with the above.”

[59] We did not receive any confirmation that SW provided to the assistant; however, the correspondence suggests that he did execute a power of attorney.

[60] The next correspondence provided by the investigator is on November 24, 2022, which was the anniversary date. SW writes to the Respondent’s office:

“I received the information that the restoration of the patent within one year from its loss is possible by submitting an application. Have you submitted an application? Today is the last day! Please give me the information on this.

[61] The investigator testified that SW told him that the November 16, 2022 email was the last communication that SW received from Mr. Fincham’s office, and there was no reply to SW’s November 24, 2022 email. As noted, we did not receive evidence from SW, or the Respondent or his assistant, with direct knowledge about this.

[62] The investigator states in his report:

A review of the details appearing on the Canadian Patent Office database (shown below) confirms that the 7th Patent Annuity (due 24 November 2021) and the 8th Patent Annuity (due 24 November 2022) were not paid.

[63] The investigator then provides a portion of the publicly available records from the Canadian Patent Office. Much more is available online or from the actual record held at the Canadian Patent Office, and it is not clear why complete information (in addition to the firsthand testimony of any of the principal players) was not sought by the investigator, or put in evidence by the Investigations Committee.

[64] For reasons set out below, it appears on the face of the documentation that the investigator included in his report that his conclusions regarding payments owed by SW are not correct.

[65] During his testimony, we pointed the investigator to some of the apparent inconsistencies, which would have been clarified by submitting the full public records or by obtaining more complete or reliable evidence from the individuals with firsthand knowledge or from staff at the Patent Office.

[66] The investigator’s response was that he endeavoured to be thorough, but also had to balance the time spent and the money charged to the Investigation Committee.

[67] It is clear that a full review of the Canadian Patent Office record would permit clarification of what the conduct allegations concerning service to SW should have been. That review might also demonstrate that the allegations that were made, or some other allegations of failure to serve that were not made, have been proven. It is not the Discipline Committee’s role to do our own research, or otherwise to go beyond the evidence presented by the parties and the inferences to be drawn from such evidence.

- [68] For present purposes, therefore, we will indicate our conclusions from our review of the evidence and documentation that the Investigations Committee provided at the hearing.
- [69] It is apparent that the first non-payment was the 6th, not the 7th, maintenance fee. The 6th fee was due on November 24, 2021, and SW makes some reference to this in his November 18, 2021 email quoted earlier. According to the database excerpt the investigator included, the 5th maintenance fee was due and paid on November 24, 2020.
- [70] An unspecified document (which has to be part of the record held at the Canadian Patent Office) was then registered on May 10, 2021, with a payment of \$100, and then there is a “back payment of fees” of \$306 on June 2, 2021. The regulatory jurisdiction of the College came into effect on June 28, 2021.
- [71] When we pointed out to the investigator that it appeared to be the 6th payment that was the first to be left unpaid, he agreed, but said the 6th was refused by the patent office, and “ultimately the complaint I had was the 7th and 8th.” It is not clear on the evidence whether and if so why the 6th payment was refused, or whether Mr. Fincham was at fault.
- [72] The screenshot from the database in the investigator’s report includes a heading “Abandonment History”, which refers to an “Abandonment Date” of August 10, 2021 with “Reason: Appointment of Patent Agent”. So it appears there was a failure by the Respondent and/or SW to respond to a notice requiring the appointment of a patent agent.
- [73] Again, the correspondence between SW and Mr. Fincham’s office refers to a power of attorney being required, which occurs when a transfer of agent is made and the POA is executed by the transferee. We received no testimony or context about this issue in relation to SW.
- [74] From the information provided by TH (discussed later in these reasons in relation to his client EC) concerning his allegation relating to EC, there is reference on August 25, 2021 to EC receiving “a notice from the Canadian Patent Office that Mr. Fincham was no longer working” and the Respondent’s office having “indicated that if our client wished to continue to be represented by Mr. Fincham, his office could prepare a petition for our client’s signature.” There is then a suggestion in April and May 2022 that a new POA was required in order to maintain the patent.
- [75] We did not receive any evidence about whether the correspondence with SW related to the same issue of transferring representation.
- [76] Then, also under “Abandonment History”, beside the date May 24, 2022 (when a late payment fee would be due, six months after non-payment on November 24, 2021), the record says “Failure to pay application maintenance fee”.
- [77] From these records, it is not clear that a maintenance fee could have been paid in November 2021, or in November 2022. The investigator’s screenshot includes an entry of “Dead Application” on August 10, 2022.
- [78] In the absence of complete and reliable evidence showing the full picture of the dealings amongst the Patent Office, SW and the Respondent’s office, and the issues on which action by SW or Mr. Fincham was required but not taken, we are unable to conclude that Mr.

Fincham engaged in the misconduct that is alleged by the College.

- [79] It is quite possible that a proper evidentiary record, and a full airing of the complete publicly available record from the Patent Office, would point to some kind of misconduct by Mr. Fincham, including a failure to serve, failure to respond and failure to supervise staff, in relation to the filing and payment obligations of a patent applicant in the position of SW.

EC's patent

- [80] TH, the US Patent Attorney, represented EC, who was named as inventor and owner on an expired Canadian patent. Through his Agent Conduct Inquiry to the College, TH asserted that Mr. Fincham failed to pay EC's 14th patent annuity, due March 3, 2022, and his 15th, due March 3, 2023. In his investigation report, the investigator says "while TH alleges having paid for an annuity, it is not clear which of these two annuities he alleges to have paid."
- [81] On July 26, 2023, the investigator sent TH a request for information supporting his Agent Conduct Inquiry, and requested a zoom meeting.
- [82] On August 28 and 31, 2023, TH provided a response and then a detailed chronology of interactions with Mr. Fincham from 2021 to 2023.
- [83] On September 4, 2023, based on this information, the investigator sent TH a summary of the facts as he understood them. TH declined to respond, and he declined to be interviewed. The last correspondence with the investigator on September 4, 2023 that we received in evidence reads "I do not really have time for this right now. My apologies."
- [84] Again, the College provided no direct testimony from the client EC, his US counsel or any of the other participants in the matters at hand. The investigator tendered the following correspondence that he received.
- [85] On April 29, 2022, Mr. Fincham's assistant advised TH that the 2022 fee was due on March 3, and she had paid it. She also sent a POA for EC to sign if he wanted the Respondent to represent him.
- [86] TH's emails of May 4, 22 and 23, 2022 suggest that the patent had expired, and he had not received an invoice to pay a maintenance fee on March 3. The Respondent's assistant replies on May 23 that EC will have to sign a POA to appoint a new agent if he wants to maintain his patent. TH then sends back the executed POA.
- [87] TH's email of February 1, 2023 indicated EC wished to pay the 2023 annuity, due by March 3, 2023, and asked for the cost.
- [88] On April 26, 2023, TH's email to Mr. Fincham indicates that the Respondent's assistant was not replying to emails about whether the payment had been made. TH says he was informed that "the payment has expired for non-payment of annuity last year, and we paid you for paying this annuity. Please contact us immediately."
- [89] The April 27, 2023 reply from Mr. Fincham's assistant says "the fees have always been paid; however, after reviewing the file, I believe there has been a clerical error which was not

noticed. I can provide you with copies of the documents you need to address the error. We will wait to hear from you in this regard.”

- [90] TH's emails of May 3 and 11, 2023 follow up and request the documents.
- [91] Screenshots from the Canadian Patent Office database that the College provided indicate that maintenance fees were paid annually up to the 11th anniversary date, March 4, 2019. Then there is a back payment of fees on March 2, 2021, and a “13th” anniversary payment on March 3, 2021.
- [92] The investigation report does not provide any payment history beyond that date. There is no abandonment history. There is no record of whether the 14th and 15th patent annuities (due March 3, 2022 and March 3, 2023 respectively) were paid. The complete public record from the Patent Office could have provided more clarity, but it was not submitted in evidence, and again, it is not our task to research the issue to supplement the evidence provided by the College.
- [93] We also have no evidence to contradict the hearsay written statement by the Respondent's assistant that the 2022 payment was made, and there must have been a clerical error by the Canadian Patent Office. There is certainly no basis on which to conclude she “falsely” advised that payment was made. Finally, we have no direct evidence about whether an invoice was in fact provided or payment advanced to Mr. Fincham by TH in either year.

CONCLUSION ON HEARSAY

- [94] It was apparent from our review of the material before the hearing that a hearsay issue would arise. We were informed prior to the hearing that only the College's representative and the investigator would be witnesses.
- [95] The substantive information concerning the services delivered by Mr. Fincham to the two clients, which is relevant to allegations (iii) through (viii) in the Notice of Application as twice amended, was almost entirely hearsay. This evidence related to the Respondent's and his assistant's instructions, records, actions and communications with the Patent Office, SW and TH (or indirectly TH's client EC, who was presumably giving instructions to TH to convey to the Respondent).
- [96] Some evidence of these interactions was provided second hand by the investigator through documents and written and oral communications made by those five individuals and the Patent Office. None of them identified the documents at the hearing or testified as to the truth of the contents of the information provided by the investigator.
- [97] We received the investigator's evidence, including the contents of his report, after alerting College counsel to the hearsay issue while she was making her opening statement.
- [98] During Mr. Drapeau's testimony and again during the College's closing submissions, we asked questions and raised several issues regarding the sufficiency of its evidence. When counsel cited several cases on credibility, we pointed out that our concern was with the reliability of the College's evidence of substantive failures (as opposed to a failure to cooperate with the regulator) by the Respondent.

- [99] The College did not request an opportunity to make further submissions after the hearing. In addressing the admissibility and reliability of hearsay evidence that we flagged, we have relied on established principles.
- [100] Under civil rules of evidence, hearsay is admissible where it is necessary and it is reliable. But under s. 55(1)(c) of the College of Patent Agents and Trademark Agents Act, “the Discipline Committee has the power...to accept any evidence, whether admissible in a court of law or not.”
- [101] The effect of such provisions is that the adjudicator is not bound to accept hearsay evidence but cannot reject it out of hand simply because it is hearsay. The issue is whether it is necessary and reliable. More precisely, is the evidence sufficiently reliable and probative to justify its admission, taking into account the need for a fair and expeditious hearing, and to give it weight? We therefore heard all of the College’s evidence, as well as its submission that we should accept the hearsay information that came in through its investigator.
- [102] Our first task after considering the College’s evidence in totality and in context is to determine whether the evidence relating to the services provided by Mr. Fincham was necessary and reliable.
- [103] There was no suggestion that the College asked any of the six possible witnesses with firsthand information about the matters in issue to attend the hearing.
- [104] We received no evidence or submission to demonstrate that any of the individuals with firsthand knowledge were unavailable or could not be compelled to testify. There was no suggestion that SW could not testify in person or via zoom with an interpreter, and there was no evidence that he was asked to do so. TH declined to be interviewed more than a year earlier, and again there was no evidence that he or his client would not or could not testify in person or on zoom before the Discipline Committee.
- [105] While the Investigations Committee provided ample notification to the Respondent of its concerns, this Application and this hearing, there was no evidence of any attempt to request or compel him or his assistant to testify. Similarly, there was no suggestion that anyone from the Patent Office was asked to testify.
- [106] In addition, as we have noted earlier in these reasons and below, the investigator acknowledged that direct information was available to him that could have been obtained by a more complete investigation.
- [107] For these reasons, we cannot conclude that hearsay evidence of Mr. Fincham’s services to these two clients was necessary.
- [108] Most importantly, we also have significant concerns with the reliability of the evidence that we received.
- [109] In our summary of the evidence, we have commented at various points on relevant documents and information that the investigator did not ask for, obtain or include in his report. He did not suggest that he had a complete record.
- [110] Only the participants in the exchanges of emails and other oral and written communications

between and among the Respondent's office, the clients and the US lawyer and the Patent Office could confirm whether there was follow up, reply, reasons, advice, uncertainty about instructions or a host of other possible explanations for the Respondent's action and inaction, where some of the documentation suggests a failure to serve. That is a sampling of the kinds of unreliability that arose in this case.

- [111] At times the investigator acknowledged these omissions, and provided the explanation that he wanted to limit the time and expense he was incurring. In many cases, we pointed to information that was readily available, central to the determinations that we must make, yet missing from the investigation report and the evidence of the investigator.
- [112] In our respectful view, it is therefore unsafe to accept, or in the alternative, to give any significant weight to, the College's evidence as supporting a finding of professional misconduct in relation to allegations 1 to 3 and particulars (iii) through (viii). We therefore dismiss these allegations, as described in those particulars.
- [113] In coming reluctantly to this conclusion, we must bear in mind the significance and gravity of a finding of professional misconduct and its reputational and financial consequences in a professional regulatory setting. We have also taken account of the importance of clear and convincing evidence that meets the standard of a balance of probabilities.

CONCLUSION ON FAILURE TO COOPERATE

- [114] As noted at the outset, the College established allegation 4, as described in particulars (ix) and (x). The College demonstrated that Mr. Fincham failed to meet his obligation to respond promptly and completely in good faith to the College's regulatory inquiries between April and July 2023, and Mr. Drapeau's investigative inquiries between July and September 2023, as outlined earlier in these reasons. Indeed, Mr. Fincham has not provided answers to date.
- [115] Regulatory law and practice is clear that in return for the privilege of membership in a professional body like the College, licensees must respect the authority and the mandate of the regulator. The College must respond quickly and effectively to protect the public and to promote the ethical and competent delivery of patent and trademark services by licensees. To do so, licensees must be honest, open and helpful to the College.
- [116] On the failure to cooperate, this is not a close case. Mr. Fincham did not reply at all to letters from the senior officials of the College. When the investigator tried to get in touch, Mr. Fincham's assistant suggested at one point, without any follow up or support, that a health issue was at play. Clearly, with proper backup, a request for accommodation could result in time extensions or other means of alleviating barriers that prevent a licensee from complying with the duties they owe to their regulator.
- [117] No such evidence, and no specific request for accommodation, was made by the Respondent. One of his replies suggests that he did not accept the authority of the College. Whatever he intended by that, it is clear that he did not respond to either the College or its investigator promptly, completely and in good faith.
- [118] Mr. Fincham therefore breached the Principle underlying Part 7 of the Code of Professional Conduct, and Rule 7(3), and thereby committed professional misconduct. Those provisions read as follows:

Part 7 Duties to College, Members and Other Persons

Principle

An agent must assist in maintaining the standards of the profession in dealings with the College and members of the profession generally. An agent's conduct toward other agents must be characterized by courtesy and good faith.

Rule 7

(3) An agent must respond promptly and in a complete and appropriate manner to any communication from the College relating to their conduct.

NEXT STEPS

[119] We ask the Discipline Proceedings Coordinator to arrange a hearing to consider the appropriate penalty and costs order. Further direction may be provided regarding the length of hearing, filing deadlines and other case management matters.

DATE ISSUED:

December 10, 2024

Panel of the Discipline Committee:



Raj Anand, Chairperson



Benoit Yelle (Dec 10, 2024 19:48 EST)

Benoit Yelle



Sam Lanctin (Dec 11, 2024 10:10 AST)

Sam Lanctin

ⁱ The complaint also included concerns raised by one other client of the respondent, but that client did not provide any information to the College or its investigator. Accordingly, there were no allegations relating to this client in the Application that came before us.

ⁱⁱ This error stemmed from the investigation report, which the investigator corrected at the outset of his evidence.

ⁱⁱⁱ *Del Bianco v. Alberta Securities Commission*, (2004), 334 WAC 361 (CA), at para 11; *Gale v. CPSO*, 2003 CanLII 30486, at para 108