2020 LSBC 31
Decision issued: June 26, 2020
Citation issued: December 15, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a section 47 review concerning

SUMIT AHUJA

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date:	March 12, 2020
Review Board:	Michael F. Welsh, QC, Chair John Lane, Public representative Geoffrey McDonald, Bencher Nina Purewal, Lawyer John D. Waddell, QC, Lawyer
Discipline Counsel:	William B. Smart, QC Trevor Bant
Counsel for the Respondent:	Henry C. Wood, QC

OVERVIEW OF ISSUES ON REVIEW

[1] The hearing panel in this matter issued its decision on Facts and Determination on August 21, 2019 (2019 LSBC 31). The hearing panel determined that Sumit Ahuja (the "Respondent") committed ten instances of professional misconduct. The Respondent admitted to the allegations of professional misconduct in all ten instances. This comprised all allegations brought by the Law Society as, at the outset of the hearing, the Law Society declined to proceed with an eleventh allegation. The Respondent also admitted to the facts giving rise to these findings of professional misconduct.

[2] The Law Society now applies for a review of four of the findings of professional misconduct. The Respondent opposes and seeks to have the hearing panel's decision maintained.

[3] To complicate the issue, the Law Society wants neither the findings of professional misconduct themselves, or the facts that underlie them, reviewed. Along with the Respondent, it wants them left untouched. Instead, the Law Society wants the hearing panel's characterization or labelling of the underlying professional misconduct reviewed, submitting that the hearing panel made an error of law in that characterization or labelling.

[4] Specifically, the Law Society submits that the hearing panel legally erred by declining to characterize that misconduct as "misappropriation," a well-defined term in prior Law Society Tribunal decisions and a term that appears in the *Legal Profession Act* and Law Society Rules. The Law Society submits that the hearing panel has effectively created a new category of professional misconduct. The Law Society further submits that the hearing panel erred by using evidence of the Respondent's addictions to characterize the nature of the misconduct, rather than as a mitigating factor when determining an appropriate sanction. Finally, the Law Society asserts that the hearing panel erred by creating a new partial defence related to lawyers engaging in professional misconduct while in active addiction.

[5] The Respondent submits that the hearing panel did not err in law. He asserts that, while it was admitted he committed misconduct, the nature of that misconduct was at issue in the hearing, and the hearing panel was required to make findings of fact and assess his degree of culpability. Those findings inform the disciplinary phase of the process and not just the sanction phase. The Respondent submits that the Law Society is asking the Review Board to disturb findings of fact and the Review Board is required to show deference to those findings of the hearing panel.

[6] This review presents a four-fold set of issues:

(a) The first issue is if a review board can review an alleged error of law in how a hearing panel characterizes a finding of professional misconduct, or if it can only review the correctness of that professional misconduct finding itself.

(b) If a review board has jurisdiction to review the characterization, the second issue is to decide whether the characterization of the professional misconduct in this case was a matter of law reviewable for correctness, or instead a finding of fact for which deference to the panel findings must be given.

(c) The third issue, if it is a matter of law, is to determine if the panel erred.

(d) The last issue, if there was an error of law, is to state the correct characterization of that professional misconduct.

JURISDICTION OF THE REVIEW BOARD

[7] The Review Board's jurisdiction flows solely from section 47 of the *Legal Profession Act*. Under that section, a review board may confirm the decision of a hearing panel or substitute a decision the panel could have made under the *Act*.

[8] In this case, in accordance with section 38(4)(b)(i) of the *Act*, the hearing panel found that the Respondent committed professional misconduct in all four instances under review. Thus, the first issue; where neither party wants a substitute decision and instead both parties want these four decisions confirmed, does this Review Board have jurisdiction to undertake a review at all?

[9] The situation is somewhat akin to that in criminal appeals where an error of law is made by a trial judge that the appellate court concludes does not potentially affect the verdict or result in a miscarriage of justice. If this is the case, then under section 686(1)(b)(iii) of the *Criminal Code*, the appellate court is not to set aside the verdict. It is a statutory limit on its appellate jurisdiction.

> It is worthwhile taking one small step back for a moment to acknowledge that not every error in a criminal trial warrants appellate intervention. …
>
> The overriding question is whether the error on its face or in its effect was so … irrelevant to the ultimate issue in the trial … that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made."
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> *R. v. Van*, 2009 SCC 22, [2009] 1 SCR 716, at paras. 34 and 35

[10] In this case, it can be argued that the characterization of the professional misconduct, whether as misappropriation or by some other label, had no effect on the ultimate determination of the hearing panel, namely, a finding of "serious professional misconduct." If no one seeks to displace that ultimate determination, then arguably there is thus nothing for this Review Board to review.

[11] In order to provide the context for an analysis of whether this Review Board can undertake a review at all, an examination of the hearing panel decision must be made.

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

[12] The specific findings under the citation for which review is sought are allegations 2, 3, 4 and 5. All five involve allegations that the Respondent "misappropriated or improperly handled client funds." The following quotations from the hearing panel's decision, at paras. 7, 8 and 10, lay out a summary of the facts behind each allegation and the issue that faced the hearing panel which has, in turn, led to this review.

> The Law Society and the Respondent entered into an Agreed Statement of Facts that sets out the Respondent's admissions of fact and admissions of professional misconduct. In summary, the Respondent admits to the conduct at issue in these proceedings and admits, unreservedly, that it constitutes professional misconduct.
>
> With specific respect to the four allegations that deal with misappropriation, the Respondent admits to the conduct alleged, admits that he improperly handled some or all of the funds in question and admits that he used client funds for his personal expenses, including the purchase of drugs. The Respondent admits that this conduct is professional misconduct, but he refrains from making an express admission of "misappropriation".
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> …
>
> The Respondent admits that the entirety of his conduct … constitutes professional misconduct, but as stated earlier, he does not make a specific admission to misappropriation, although he admits that conduct would ordinarily be caught by that term.

[13] The Respondent's misuse of client funds was discovered by Law Society investigators after he had reported himself for other misconduct not at issue in this review.

[14] The panel had expert medical evidence before it respecting the Respondent's addictions. " … [B]oth the Law Society and the Respondent called evidence from medical practitioners to describe, amongst other things, the nature of addiction, the general course of the disease, how addiction affects individuals physically and mentally and to give their medical opinions pertaining to the Respondent. The doctors' evidence did not significantly diverge."

[15] All this evidence related to the effects on the Respondent of his addictions, in particular as they affected his brain function. The Law Society's expert witness, Dr. Farnan, called it "flawed thinking" associated with active addiction, which the panel found the evidence established that the Respondent had at the times he took his clients' funds. The hearing panel quotes him at para. 21:

> Dr. Farnan was asked about any possible nexus existing between the Respondent's medical diagnosis of addiction and the behaviours that occurred and that are the subject of the Citation. In his report, he stated:
>
> > This is not an easy question to answer in retrospect, but based on the information available to me I would consider Dr. Melamed's opinion to be reasonable and that there was, more likely than not, an acceptable connection between Mr. Ahuja's untreated and unstable addiction in 2016 and early 2017, and the behaviours that were considered to be misconduct.

[16] Dr. Melamed, called as an expert by the Respondent, conducted an independent medical evaluation of him for his then law firm and provided reports, to which she testified. The panel says this of her evidence at paras 30 to 32:

> In specific response to the question of whether the Respondent's medical conditions impaired his capacity to exercise moral, ethical or professional judgment at the time of the events that gave rise to the Citation, Dr. Melamed wrote as follows:
>
> > Addiction is defined as a chronic relapsing disorder that is characterized by a compulsion to seek and take drugs, loss of control in limiting intake, and the emergence of a negative emotional state (e.g. dysphoria, anxiety, irritability) when access to the drug is prevented.
> >
> > Addiction erodes healthy moral judgment and, in my opinion, could have resulted in Mr. Ahuja having lost the capacity to exercise healthy moral, ethical or professional judgment.
>
> During her oral evidence, Dr. Melamed remarked that "a hallmark of addiction is dishonesty."
>
> On the question of causation, that is, whether there is a link or a nexus between the illness and the dishonest decision or act, Dr. Melamed opined

> that a person with a normal moral compass will not steal while a person in addiction cannot make normal moral decisions.

[17] The Respondent and his wife gave evidence as to his addictions to alcohol and cocaine and of the destructive consequences of those addictions for both of them and for their young children until the Respondent, with the assistance of his law firm, went into residential treatment and continued rehabilitation afterward.

[18] Counsel for the Law Society cross-examined the Respondent. The panel stated at paras. 74 and 75:

> On cross-examination, the Law Society probed the Respondent's evidence that he was living in chaos but still appeared to be able to properly perform his duties in court. The Respondent readily admitted that he was attending to his court appearances and meeting with clients. He was pressed for an explanation about how he could be preforming [*sic*] well while being in the throes of serious acts of addiction. Specifically, the Respondent was asked whether, at the time he took money from his clients and used it for his own personal purposes, he knew that the money should go into a trust account. If so, he was asked his reason for not putting the money into trust.
>
> The Respondent struggled with this question. He clearly and firmly agreed that he knew all money should go into trust. His explanation was "I was desperate. I can't let my wife or firm down or find out. My mind was everywhere. I am using alcohol and cocaine, the most I had." He was asked about his state of mind when he made his self-report to the Law Society in March 2017. That self-report was limited to his failure to attend court and his admission with respect to alcohol and cocaine use. In an interview with a Law Society investigator, the Respondent was asked and answered:
>
> > Q When you made your self-report to the Law Society in March 2017, and clearly at that time you made some admissions with respect to alcohol and cocaine, did you not think at that time to come forward to the Law Society about the cash and consideration you took from people without recording it?
> >
> > A I was so caught up with what was going on then I didn't even think about it. It didn't cross my mind. I think about it now, why didn't I say something then? It didn't cross my mind. That was a really — March 2nd, that's the last day I was

> drinking. I wanted to kill myself. That's how bad it got me to. I don't know what I was thinking. Should I have told you guys? Yeah. I just didn't.

[19] None of the evidence was the subject of dispute in the hearing. The point of departure between the Law Society and Respondent's counsel was as to its significance in terms of characterizing the Respondent's professional misconduct. As the panel stated at paras. 82 and 87:

> The Law Society acknowledged the Respondent's considerable efforts to deal with his addiction as laudable and relevant to penalty, but argued forcefully that they should not be taken into account as a factor to refrain from describing the Respondent's use of client trust funds for his personal expenses as "misappropriation."
>
> …
>
> At the hearing, counsel for the Respondent explained that the Respondent admitted that he used certain clients' money for "his personal expenses" but did not explicitly admit "misappropriation" so that this Panel could re-examine the manner in which the profession views misconduct in the context of addiction. Where, as here, there is a nexus between the lawyer's misconduct and the lawyer's active addiction, and even though the misconduct could be caught by the traditional term of "misappropriation", counsel for the Respondent urged us to acknowledge that nexus by describing the misconduct with language that is less condemnatory or stigmatizing of the lawyer living with addiction.

[20] The panel further summarized the medical evidence that shows that addictions are a disease that affects the "hardwiring" of the brain, changing personality and self-concept, and interfering with healthy decision-making.

[21] To further quote from the decision under review, from paras. 118 to 120:

> Dr. Melamed gave evidence that, if the Law Society uses the highly condemnatory language of "misappropriation" in cases involving lawyers in active addiction, lawyers may be less likely to come forward, with the result that their condition of addiction will worsen and they will be farther along the road and beyond the limits of recovery.

> Counsel for the Respondent invited us to consider how we characterize what occurred in this case, that is, a lawyer taking clients' monies for the lawyer's personal use while in active untreated addiction.
>
> In summary, counsel for the Respondent acknowledged that the Respondent engaged in conduct that could be caught by the traditional term of "misappropriation" but urged this Panel to use less condemnatory language to describe that professional misconduct.

[22] The panel found that there was a link between the Respondent's addictions and the admitted misconduct. The panel viewed that link to be an important fact relevant to determining the misconduct at issue. The panel commented at para. 129:

> While the Respondent did not suggest in any way in his evidence before us that he is not responsible for his actions, we are persuaded by the doctors' expert evidence that there is a "definite correlation" or nexus between the Respondent's severe addiction and his misconduct. This correlation or nexus, in our view, is an important factor that goes to a determination of the nature of the misconduct itself, rather than a factor only potentially relevant as a mitigating factor at the penalty phase of the hearing.

[23] The panel recognized the use in prior discipline decisions of the term "misappropriation" and how that term is applicable in this case with respect to the actions of the Respondent. Nevertheless, and on its own initiative, the panel declined to use that term in characterizing the Respondent's acknowledged professional misconduct. Instead, it concluded at paras. 130 to 132:

> In the *Legal Profession Act*, the term "misappropriation" is used solely in s. 16 with respect to participation by the Law Society in programs to compensate victims of inter-provincial misappropriation or wrongful conversion by lawyers. In the Law Society Rules, the term "misappropriation" is used in a reference in Rule 1 to a section of the *Act* that has been repealed and in Rule 3-46, to permit (but not obligate) the executive director to make disclosure of misappropriation where a claim under trust protection insurance has been made. The term "misappropriation" is not used in the *Code of Professional Conduct*.
>
> Given the limited extent to which the term "misappropriation" is used in the *Act*, Rules or *Code*, and the fact that no claim under trust protection insurance has been made in this case due to the Respondent having made all of his clients whole, this Panel finds that describing the Respondent's

> actions without using the term "misappropriation" will not result in any real or substantial degradation in the authority of the Law Society to effectively govern the Respondent or in its ability to respond to his past behaviour.
>
> After considering all of the evidence before us and the submissions of the parties, we conclude that the Respondent's behaviour and decision-making processes at the time of the misconduct was sufficiently different from a lawyer unaffected by active addiction that it is appropriate to avoid the term "misappropriation" in this case. The Respondent's misconduct, because of the effect of the disease, was "wilful" but it was not "wilful" in the same sense that one speaks of the conduct of one who is not in a severe or advanced state of untreated addiction. Accordingly, we conclude that it is appropriate to characterize the Respondent's conduct as a marked departure from the standard of conduct the Law Society expects of lawyers. It therefore constitutes serious professional misconduct, which we characterize as "conversion of client funds to his personal use while in active addiction."

[24] We say "on its own initiative," as counsel for the Respondent candidly admitted in the hearing before the Review Board that he did not propose that wording, and would have been content if the panel had used "misappropriation of client funds to his personal use while under active addiction" or some similar wording that tied the taking of the funds to the active addiction.

JURISDICTION AND STANDARD OF REVIEW

[25] Counsel were united in submitting that the proper standard of review from a hearing panel to a review board on issues of law remains "correctness," even with the release by the Supreme Court of Canada in December 2019 of its new trilogy of decisions on judicial review. Those cases, in particular, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, have made fundamental changes in how courts are to review decisions of administrative bodies based on alleged errors of law. Counsel for the parties submitted that those changes do not affect how a review board on an internal review (as opposed to a court review) should deal with alleged errors of law.

[26] As stated in *Vavilov*, at para. 33, the presumption of reasonableness as the basis for judicial review "is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts." This internal review is being made by us as an administrative tribunal in accordance with the

Law Society tribunal system under the *Legal Profession Act*, as opposed to an external reviewing court.

[27] In *Harding v. Law Society of BC*, 2017 BCCA 171, the court accepted the submission of the Law Society that the "internal standard of review" by a review board within the Law Society tribunal system is different from the judicial standard of review by a court of a Law Society tribunal decision. Kirkpatrick, JA, for the court, said at paras. 4 to 6:

> Section 47(5) does not specify the standard of review to be applied by a review board. Thus, the applicable internal standard of review has been developed by review boards.
>
> In my opinion, it is settled law that the standard of review to be applied by this Court in appeals of disciplinary decisions is reasonableness: [*extensive citations omitted*.]
>
> The internal standard of review to be applied by a review board reviewing a hearing panel decision is the central issue in this case. The Law Society submits that the internal standard of review developed by review boards is the longstanding standard articulated in *LSBC v. Hordal*, 2004 LSBC 36 and *LSBC v. Berge*, 2007 LSBC 07 (the "*Hordal/Berge* standard"). These decisions establish that the standard is correctness, except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact.

[28] The Court of Appeal further found that the Law Society tribunal system can, in its decisions, set its own standard of review, with which the courts will not interfere, so long as that standard of review is reasonable. (See paras. 25 and 26.)

[29] Based on this case law, and accepting the joint submissions of the parties, we find that the standard of review by a review board remains correctness, save for alleged matters of fact based on assessment of witness credibility, for which the standard is clear and palpable error by the hearing panel in its factual findings.

[30] As this Review Board is not asked to review the four findings of professional misconduct themselves, but instead whether the panel should have characterized them as "misappropriation" as opposed to "conversion of client funds to his personal use while under active addiction," the next question is whether these characterizations can themselves be reviewed for correctness as alleged errors of law.

[31] The legal effect of findings of fact or of undisputed facts is a question of law. In *R. v. JMH*, 2011 SCC 45, [2011] 3 SCR 197, at para. 28, the court cited this passage from *R. v. Morin*, [1992] 3 SCR 286:

> If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.

[32] The findings of fact by the hearing panel are entitled to deference and, absent clear and palpable error, the review board must not disturb them. However, the legal conclusions of the hearing panel based on those facts are subject to review for correctness.

[33] We consequently find that whether or not to apply the term "misappropriation," where the legal test for its use is met on the facts, is a question of law. But, being a question of law does not necessarily mean it is reviewable for alleged error. As noted in the quotation from *Van*, not every alleged error of law may be subject of review.

[34] In determining if this alleged error in legal characterization is reviewable, the decision of the review panel in *Law Society of BC v. Johnson*, 2016 LSBC 20 is instructive.

[35] In *Johnson*, while the hearing panel was unanimous in what the review board, at para. 5, called "the result," namely, a finding of professional misconduct, the review board noted that the panel members "… diverged in the manner in which it reached that end. The issue of provocation is where their reasons diverge."

[36] One panel member framed the issue as being whether the respondent swearing at a police officer in a courthouse was excusable on the basis of whether or not it was provoked. That panel member found it was not, in the circumstances. The majority of the panel held that presence of provocation is not a relevant consideration in a determination of professional misconduct.

[37] The review board in *Johnson* stated, at para. 11:

> [F]raming the issue of provocation as a defence is not the correct approach in dealing with an allegation of professional misconduct. In

> administrative hearings provocation is only a factor among many other possible factors to be considered by a hearing panel to determine if the conduct of the Respondent is a "marked departure" from the conduct the Law Society expects of its members (*Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171). To entertain a "defence of provocation," phrased in that way, has the potential to move the focus of the hearing away from this standard test.

[38] Similarly, in this case, despite the ultimate "result" of a finding of professional misconduct, this Review Board finds that the panel's decision not to use the term "misappropriation" to describe the manner of that misconduct is reviewable by us for correctness. It is not a finding of fact. "Misappropriation" is an established legal categorization of certain professional misconduct. As in *Johnson*, it is not just the result, but also the manner of legal characterization of that result, that is reviewable. There are two reasons.

[39] Firstly, that characterization has its own legal consequence, as the authority of the Executive Director to make disclosure under Rule 3-46(5) is based on a finding of "misappropriation" by a hearing panel or a court.

[40] While the panel held that those circumstances did not apply for the Respondent, as the clients had been "made whole", they may in other cases, inhibiting the ability of the Executive Director to act under Rule 3-46(5). This is similar with the proposed "defence of provocation" in *Johnson*. While none of the hearing panel members found it applied in that case, the review board noted the problems with its potential use in other cases.

[41] Secondly, there is a question of whether classifying conduct as "conversion of client funds to … personal use while in active addiction" instead of "misappropriation" is a helpful way of analyzing professional conduct, or if instead it has the potential to move the focus of the hearing away from a standard test for an analysis of professional misconduct.

[42] This Review Board consequently answers the first question on our jurisdiction to review in this case in the affirmative, and further concludes on the second question that, whether or not to characterize professional misconduct as "misappropriation" where it meets the definition of that term, is a question of law.

DID THE HEARING PANEL ERR IN LAW?

[43] We begin by reviewing what constitutes misappropriation. The hearing panel was well aware of what that term means in law, as the following quotations from its decision, at paras. 83 to 85 and 108, show.

> Counsel reminded us that "misappropriation" has been defined broadly as any unauthorized use of clients' funds. The Law Society directed us to *Law Society of BC v. Sahota*, 2016 LSBC 29, where the panel set out at paras. 61 to 63 an overview of misappropriation:
>
> > ... Any unauthorized use qualifies. It does not need to amount to stealing, as long as there is an unauthorized temporary use for the lawyer's own purpose. Personal gain or benefit to the lawyer is not required.
> >
> > Further, the panel in *Law Society of BC v. Harder*, 2005 LSBC 48, provided at para. 56 the following helpful language to the quest for clarity on this issue:
> >
> > > A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 NJ 209 @ 221 [SC 1989] where the Court stated:
> > >
> > > > Misappropriation is "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." …
> > > >
> > > > The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.
> >
> > Thus, all that is required is for the lawyer to take the money entrusted to him or her knowing that it is the client's money and that the taking is not authorized.

As to the mental element required to find misappropriation, counsel for the Law Society directed us to *Law Society of BC v. Gellert*, 2013 LSBC 22, where the panel stated at para. 71, in part:

> Misappropriation ... occurs where the lawyer takes those 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. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law.

Counsel for the Law Society argued that the range of misconduct that has been described as misappropriation includes:

a. taking client funds and returning them in short order or doing so under severe personal financial pressures: see *Gellert* at para. 72;

b. taking client funds by repeated negligence and careless inattention to trust accounting obligations: see *Sahota*; and

c. wilful blindness about whether "clients had been billed for disbursements that were not incurred and that [the lawyer] was therefore not entitled to withdraw monies held in trust for them to pay those bills …": see *Law Society of BC v. Sas*, 2015 LSBC 19 at para. 226.

…

We recognize that a finding of misappropriation does not require a mental element that rises to the level of dishonesty as that term is used in criminal law: see *Gellert* at para. 71; and *Harder* at para. 56. As the panel in *Gellert* put it at para. 73:

> The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. … Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Law Society of BC v. Ali*, 2007 LSBC 18, paras. 104, 106).

[44] As noted from the quotations from its decision set out earlier, the panel, on the admission of the Respondent's counsel, found that the Respondent's actions could be legally characterized as misappropriation, but declined to do so in favour of its own label.

[45] Was the panel correct in its decision not to follow this established precedent in classifying the professional misconduct of the Respondent? This Review Board finds that it was not. In saying this, we respect and defer to all of the panel's factual findings, which both parties accepted on this Review. The concerns that motivated the panel are well-founded, and are reflected in the Law Society's own recent initiatives in approving and implementing the recommendations of its Mental Health Task Force to remove the stigmas around addictions and mental health issues, and to improve supports to those who have them, their families and their colleagues.

[46] The hearing panel accepted, and the Respondent admitted, that the legal test for misappropriation was met on the facts in this case. And although it refused to apply it, the panel also fully knew the law on what constitutes misappropriation. While a hearing panel is entitled to deference on any of its findings of facts, it cannot find all of the factual elements necessary to form a legal conclusion and then decline to make that conclusion. As a result, this Review Board finds that the panel committed a legal error in re-classifying the conduct so as to avoid having to call it the very thing it found had legally occurred.

[47] Also, as with the review board's comment in *Johnson*, to "entertain" a new characterization phrased in the panel's wording has the potential to move the legal focus away from this standard legal test in classifying professional misconduct when funds are improperly taken by a lawyer. The possible result could involve arbitrary outcomes at the Facts and Determination phase focused on remediation rather than consistent legal characterization. Matters of remediation are generally better developed and applied at the Disciplinary Action phase of a particular matter.

[48] We also find that this alternative wording is neither helpful nor needed in terms of clarifying the effects of addiction on a lawyer's behaviour and actions. It does not address the concern noted by Dr. Melamed about use of "highly condemnatory language" that may prevent lawyers with addictions from coming forward to report themselves. "Conversion" can be considered a more condemnatory term than "misappropriation." A number of offences in the *Criminal Code* include the word "conversion" as a manner of committing the offence, including theft and criminal breach of trust. It is also an actionable tort. "The tort of conversion 'involves a wrongful interference with the goods of another, such as taking, using or destroying

these goods in a manner inconsistent with the owner's right of possession.'" (*373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, [2002] 4 SCR 312 at para. 8)

[49] As counsel for the Respondent conceded in the Review Board hearing, the real issue of concern for his client is not the word used for the taking of the funds, but a recognition, based on the evidence, of the effect of addictions on the Respondent's behaviour and brain function. As noted earlier, counsel for the Respondent would have been content with the phrase "misappropriation of client funds to his personal use while under active addiction."

[50] We also find that the potential ramifications under the Law Society Rules in other cases of finding or not finding "misappropriation" (limited as the panel notes they are), supports this conclusion.

[51] Therefore, on the third question, this Review Board finds the hearing panel made an error of law in affixing its own label to the Respondent's taking of client funds when it found that, legally it met the test for characterization as misappropriation.

[52] On the final question, this Review Board finds that the correct legal characterization of the Respondent's actions is "misappropriation", but accepts the factual underpinnings of the addictions that led the Respondent to that misappropriation.

DECISION ON REVIEW

[53] The determinations of the hearing panel that the Respondent committed professional misconduct with respect to allegations 2, 3, 4 and 5 of the citation are confirmed, but on the basis that the Respondent misappropriated the funds in question in each of the allegations.

[54] We do not disturb the factual finding of the hearing panel that, whatever the legal term used, the Respondent took funds for his personal use while in active addiction. As counsel for the Law Society concedes, this will be a factor that should be considered by the hearing panel at the Disciplinary Action phase of the hearing.