2006 LSBC 48
Report issued: December 7, 2006
Citation issued: March 26, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Dale Bruce Harder

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: July 13, 2006

Panel: Ralston S. Alexander, Q.C., Chair, G. Ronald Toews, Q.C., Ross Tunnicliffe

Counsel for the Law Society: Maureen Baird, Jude Samson
Counsel for the Respondent: Christopher E. Hinkson, Q.C., Una Radoja, articling student

Background

[1] On November 10, 2005, in a decision on Facts and Verdict, this Panel found that the Respondent had professionally misconducted himself in respect of ten counts of a citation issued by the Law Society on March 26, 2003. For the purposes of the initial hearing, the Respondent acknowledged that the facts underlying all but one of the counts had been made out and acknowledged that those facts as made out constituted professional misconduct on his part. The Panel heard four days of evidence and argument in respect of count 7 of the citation, which alleged:

> You misappropriated funds received in trust by you, in your capacity as a Barrister and Solicitor in that, between April 2000 and November 2001, you withdrew funds held in trust on behalf of your clients without their knowledge, consent, or authorization and without services provided or an account being prepared and delivered to said clients.

[2] The Panel found that count 7 of the citation had also been made out by the Law Society, and that the Respondent had professionally misconducted himself in respect of that count as well.

[3] The Panel reconvened on July 13, 2006 for the purposes of considering an appropriate penalty in the circumstances. The parties submitted an Agreed Statement of Facts on Penalty, and a copy of that agreed Statement of Facts is attached to these reasons. Both the Law Society and the Respondent made oral and written submissions.

Submissions of the Law Society

[4] Counsel for the Law Society noted that, on the wind-up of the Respondent's practice, 20 claimants participated in a pro rata distribution of the funds that remained in his trust account when he

ceased practice. Through that process they received approximately 60 cents for each dollar that was owed to them. The Law Society noted that of the 20 participants in the pro rata distribution, only four advanced a claim to the Special Compensation Fund. There were four additional claimants to the Special Compensation Fund in respect of the Respondent, and approximately $23,500 was paid to compensate those individuals for the Respondent's misappropriations.

[5] Counsel for the Law Society urged the Panel to give less weight to letters of reference provided on behalf of the Respondent where they describe facts that are inconsistent with those found by the Panel, where they express opinions that the authors of the letters are not qualified to give and where they make recommendations concerning an appropriate penalty.

[6] The Law Society referred to James T. Casey in his book *The Regulation of Professions in Canada*, loose-leaf ed. (Toronto: Thomson Canada Ltd., 2003) where that author noted that the fundamental purpose of sentencing for professional misconduct is to ensure that the public is protected from acts of professional misconduct.

[7] The Law Society referred to the following statement from *Bolton v. Law Society,* [1994] 2 All ER 486 (CA) at 491:

> Any solicitor who has shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. ... The most serious involves proven dishonesty, whether or not leading to criminal proceeding and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.

[8] In a further excerpt from *Bolton* (supra), the Law Society noted that there are often as many as four elements to be considered in making the penalty order in a discipline matter. The first two elements described are a penalty element and a deterrent element. The case suggests that there are often two other purposes served by such an order: firstly, to ensure that the offender does not have an opportunity to repeat the offence, and the second purpose is described as the most fundamental of all purposes, that being:

> ... to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. ... A profession's most valuable asset is its collective reputation and the confidence which that inspires.

[9] The Law Society made reference to Gavin McKenzie, in *Lawyers and Ethics: Professional Responsibility and Discipline,* loose-leaf ed. (Toronto: Thomson Canada Ltd., 2005). In that reference, Mr. McKenzie noted at 26-1:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

[10] Mr. McKenzie went on:

> ...in a 1985 decision [*Re Milrod*] a discipline hearing panel in Ontario recommended that a lawyer who had been found guilty of misappropriation be disbarred notwithstanding evidence that he satisfied the

panel that he was " a man who for 17 years had an unblemished record, who placed service to his clients ahead of personal gain, who was a good father and respected member of his community, and who acted at a time when he was under considerable financial and emotional stress ... " . The panel's reason:

> The Society cannot countenance theft by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities; experience shows that the penalty attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career.

[11] Counsel for the Law Society then asked the Panel to consider the various characteristics that are set out as relevant factors to be considered when determining an appropriate penalty as those are described in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. The discussion of some of those characteristics urged upon the Panel for consideration follows.

[12] The nature and gravity of the conduct proven - under this heading the Law Society noted that the misconduct was of the most serious kind, including the finding of knowing misappropriation, in an amount between $42,396.11 and $56,626.21. It was noted that the funds were used for the Respondent's personal benefit to pay his personal and his business expenses.

[13] The Law Society stressed that the Respondent knew what he was doing when he took these funds and that the offending behaviour went on for months or years. Moreover, numerous clients and individuals were affected by the misconduct.

[14] As the Respondent was in his late 50s at the time of these events, it could not be suggested that the events arose from a lack of experience. The Law Society further highlighted that the Respondent has not yet accepted responsibility for misappropriating the client trust funds. Throughout the hearing, the Respondent attempted to attribute blame for these actions to either his depression or to an inexperienced and untrained bookkeeper. The Law Society noted that the Respondent continued to deny responsibility for the misappropriations in his submissions to the Special Compensation Fund Committee.

[15] Counsel for the Law Society requests the Panel to promote specific and general deterrence in this case. It was suggested by the Law Society that the Respondent and other members of the profession must clearly understand that these types of misconduct will not be tolerated.

[16] Counsel for the Law Society requested that the Panel note that, in addition to the misappropriation, there were a number of other significant counts in the citation including the failure of the Respondent to pay funds deducted from employees and collected from clients on account of tax, to the Canada Revenue Agency.

[17] The Law Society acknowledged the existence of several mitigating factors to be considered by this Panel, including no history of prior misconduct, evidence of previous good character and reputation in the community, the fact the Respondent was suffering from depression at the time of misconduct, the fact the Respondent provided an Agreed Statement of Facts and admissions that reduced the length of the hearing, and finally the fact that the Respondent voluntarily agreed to cease practising law.

[18] The Law Society referred to some additional case authorities, and we will discuss them later in these reasons.

[19] The Law Society urged the Panel to disbar the Respondent on the basis of the misappropriation

finding alone. It went on to argue that disbarment ought to be imposed in light of the number and gravity of the allegations that have been proven. It argued that disbarment is generally the appropriate penalty when the Respondent has been found guilty of a misappropriation.

[20] The Law Society finally requested an award for costs against the Respondent on the basis of 60 percent of the actual costs incurred by the Law Society. In making this request, the Law Society noted that the costs are reasonable in the circumstances, that the investigation required was lengthy and complex, that the costs provided do not include any costs of an earlier engagement by in-house Law Society counsel, the fact that the hearing consumed four full days and the fact that the hourly rates charged to the Law Society by its ad hoc counsel are significantly discounted from the rates typically charged by those lawyers. The Law Society noted that although the Respondent did cooperate with the Law Society in the presentation of the case, it was, in fact, his misconduct that required the case to be conducted in the first instance.

Submissions of the Respondent

[21] The Respondent submitted, through counsel, that his misappropriation, as found by the Panel to have occurred in respect of count 7 of the citation, is " misappropriation with an explanation." The explanation, taken from the Panel's decision on Facts and Verdict, was that the Respondent " did indeed suffer from a significant and ongoing depression which has a dramatic impact on both his method of practice and his ability to do so."

[22] Counsel for the Respondent elaborated upon the deteriorating health condition of the Respondent from a period of time in the early 1990s through to 2000 and 2001, when these matters came to a head. He recalled the evidence of one of the Respondent's office staff who described his physical condition as being malodorous, and noted that sometimes he would not show up for work.

[23] Counsel for the Respondent referred to a letter from a fellow Kelowna practitioner, who had interacted with the Respondent over a 15 year period of time commencing in or about 1990. This lawyer noted some form of a mental disorder, including high levels of stress, a disheveled personal appearance and shaking hands. This same lawyer observed that, as time went on, it was generally known that the Respondent suffered from depression. He also noted that he was having considerable trouble in meeting the exigencies of the remnants of a busy practice. He observed that the practice had gotten out of control and that the Respondent was unable to cope with it. He concluded by noting that " all of the above examples are simply to demonstrate that Mr. Harder had totally lost control of his practice. I am positive he was scrambling from file to file trying to manage the volume and complexity of the issues that were beyond his capacity." Counsel for the Respondent concluded, in considering the impact of the health issues, by noting that " this was a man who was ill, confused, and lacking sufficient help to get his professional and personal life back on track. His world was spiralling out of control. The nature of the conduct cannot be considered to be as severe as the conduct of a lawyer who, in a deliberate and calculating fashion, intends to steal client funds."

[24] Counsel for the Respondent brought the Panel's attention to the fact that the Respondent was at one time a high profile and significant volunteer in the greater Kelowna community. He served as a City Councillor, as a member of the Human Rights Commission, as Trustee and Vice-Chairman of the Kelowna General Hospital Board, and he noted that many members of the Kelowna Bar have provided strong laudatory letters in support of the previous character of the Respondent. One such letter included the following observation:

One of the Respondent's colleagues has said of him as follows " there is an expression I have recently

heard from former clients and associates of Mr. Harder that " there is not a dishonest bone in his body." I would add my own concurrence with that statement. I truly believe that the wrongdoing committed by Mr. Harder was the direct result of his serious medical condition that prevented him from meeting his obligations and resulted in his total inability to manage a law practice as a sole practitioner. I cannot believe that there was any wilful wrongdoing on his part whatsoever.

[25] In his continuing consideration of the principles enunciated in *Ogilvie* (supra), counsel further responded that the impact on the victims was exacerbated by the delay of the pro rata distribution, for which the Respondent could have had no responsibility.

[26] Counsel noted that the advantage sought to be gained by the Respondent in this activity was to keep his head above water in avoiding creditors and continuing to practise so that he could continue to sustain his staff and his family. The Respondent argued, through counsel, that there could be no suggestion on the evidence that the Respondent intended to deliberately and actively steal clients' trust funds.

[27] Under the *Ogilvie* heading regarding the number of times the offending conduct occurred, Respondent's counsel suggested that the Panel should not treat these matters as a series of separate incidences of misappropriation, each from a separate client's trust fund, but instead the Panel should consider the matters as one continuous incidence of misconduct that began with the onset of the health issues.

[28] Counsel for the Respondent urged that the Panel overlook the fact that the Respondent has not acknowledged the misconduct and should instead credit the Respondent with an entitlement to defend against the allegations by offering his evidence as he did and that he should not face more serious penalties by reason of his failure to provide an acknowledgement of responsibility. Counsel also suggested that there is evidence the Respondent is remorseful in respect of the circumstances and that we should not assume that the Respondent is not remorseful.

[29] The Panel was asked to consider the impact that the penalty will have upon the Respondent's recovery from his depression and general mental health. In particular, it was suggested to the Panel that the Respondent is clinging to reality by a very narrow thread and that it is possible that a severe sanction for the misconduct that we have found will prevent any possible rehabilitation of the Respondent and may have more serious consequences than that. Counsel suggested that the Respondent has already lost everything that was meaningful to him, including his practice, his family and his reputation.

[30] On the issue of specific and general deterrence, it was noted that the Respondent's personal circumstances, wherein he is essentially destitute and his professional life and reputation have been largely destroyed, should be a sufficient specific deterrent. In dealing with the aspect of general deterrence, counsel suggested that the circumstances of this case are sufficiently unique that general deterrence would not be a significant factor. He asks that the displeasure of the Law Society with the misconduct be exhibited by a suspension rather than by disbarment.

[31] Counsel for the Respondent also referred the Panel to a number of authorities and we will consider those authorities later in these reasons.

[32] On the issue of the need to ensure public confidence in the administration of justice, counsel referred the Panel to the decision of the Provincial Court in the case of *R v. Robinson*, [2004] B.C.J. No. 1829. Counsel highlighted the reasoning of His Honour Judge Fratkin in that case, where he noted that Mr. Robinson had " fallen from grace and had suffered significantly in the result." Counsel analogized the circumstances of Mr. Robinson's " fall" to those suffered by the Respondent in this matter.

[33] Counsel for the Respondent concluded by suggesting that an appropriate penalty in the

circumstances is a lengthy period of suspension, which, given the Respondent's age and health, would have the practical effect of preventing him from practising again.

[34] On the issue of costs, counsel argued that the costs proposed are out of all proportion to the magnitude of the misappropriation and noted that the indemnity issue is always difficult, and particularly so where a respondent is significantly ill and financially destitute.

The Authorities

[35] Much of the argument with respect to penalty in this hearing was directed to the question of whether there is any alternative to disbarment of a member of the Law Society when that member has been found guilty of professional misconduct by the misappropriation of client trust funds. Counsel directed the Panel's attention to a number of case authorities in support of their conflicting presentations on the subject.

[36] The Panel notes initially that we have accorded lesser weight to those cases provided to us that do not involve a misappropriation of funds. We considered *Lamontagne v. Law Society of Saskatchewan,* [1991] S.J. No. 165 (CA), where an appeal court reduced a period of suspension from two years to one (with a dissenting opinion). The case was concerned with a variety of allegations, including trust accounting violations and trust condition breaches. *Lamontagne* was offered as authority for the proposition that the Respondent's health condition should weigh heavily on the decision as to penalty.

[37] The usefulness of *Law Society of BC v. Nerland*, Discipline Digest 1995: No. 1 June, is somewhat limited as it describes a situation where, although there was a misappropriation of trust funds, the respondent was permitted to resign pursuant to an admission process, and the Panel was not permitted or required to make a determination about disbarment in the circumstances.

[38] Counsel for the Respondent referred the Panel to *Law Society of BC v. Andres-Auger,* [1994] L.S.D.D. No. 127. Ms. Andres-Auger was found to have misappropriated funds, although a determination was made that the member did not act dishonestly or fraudulently. The misappropriation finding came from a determination that the respondent had demonstrated an unacceptable degree of inattention, even wilful neglect to dealing with retainers received by her and the billing (or not) for work that was the subject of the retainers. *Andres-Auger* is a decision where no dishonesty or fraudulent behaviour was found. The decision is truly unique due to the unusual circumstances of the member and should be confined to its facts.

[39] In *Law Society of BC v. MacDonald*, [1999] LSBC 20, the respondent was found to have mishandled client trust funds and, particularly, failed to eliminate a trust shortage. It was determined that his mishandling of these client funds did not result in any harm to the clients and, in addition, it was determined that the respondent had the consent of his clients to deal with the funds in the way that he did. This authority was offered in support of the proposition that Mr. MacDonald was undergoing changes in his practice, experiencing family problems and was suffering from depression. The treatment he received (a reprimand and costs) was suggested as appropriate, comparable for the circumstances of this Respondent where the similarity relates to the depression issues. It should be noted that the Respondent did not have the permission of his clients to deal with their funds in the way that he did, and it cannot be said that these clients did not suffer negative consequences. It is also the case that the decision in *MacDonald* does not refer to the conduct of the respondent as " misappropriation" , but instead refers to breaches of Law Society accounting rules.

[40] Similarly in the case of *Law Society of BC v. Burton*, [2001] LSBC 01, the respondent deposited a $1,000 retainer directly to her personal account without first preparing an account. She did perform the legal services for which the retainer was provided, and, although alleged in the citation, the misappropriation

count was dismissed by the Hearing Panel. It was noted also that the respondent was suffering from serious depression and that she was a ceased member at the time of these discipline proceedings. She was reprimanded and ordered to pay her own costs.

[41] Both counsel referred the Panel to *Law Society of BC v. Gellert*, 2005 LSBC 15, where the misappropriation aspect of the case involved a bill rendered for illegitimate disbursements. Mr. Gellert was also charged with failing to remit taxes collected on behalf of clients, failing to serve clients in a conscientious, diligent and efficient manner, breaching undertakings and failing to respond to communications from another lawyer and from the Law Society. The Hearing Panel found professional misconduct, noted severe depression and ordered an 18 month suspension. The misappropriation in *Gellert* amounted to $182.40, and although it may be difficult to reconcile with the main stream of authorities, it appears that the Panel found it to be not unreasonable to consider the magnitude of the misappropriation when determining the propriety of a penalty.

[42] In *Law Society of BC v. Payne*, 1999 LSBC 44, Mr. Payne made a conditional admission that he had misappropriated over $30,000 in client trust funds. He offered by way of explanation the fact that he felt he was entitled to the funds, but he failed to direct his mind sufficiently to his trust obligations. Mr. Payne was suffering from depression at the time of these events, for which depression he was ultimately hospitalized. The *Payne* decision is of limited value as it is a conditional admission rather than a determination of a Panel with respect to a finding of professional misconduct.

[43] We were referred to *Law Society of BC v. Ranspot*, [1997] L.S.D.D. No. 52, where the respondent rendered accounts over time to the Legal Services Society for some $4,000 for services that had either not been performed or for which he was not entitled to bill. He also deposited two trust cheques to his general account and did not correct the resulting shortfall. There was psychiatric evidence offered with an explanation for this behaviour and it was suggested that the behaviour was aberrant, the result of depression and extreme psychological stress brought on by a marriage breakdown. The respondent was given an 18-month suspension and ordered to pay costs. The Hearing Panel considered disbarment as a penalty option but ultimately determined that the 18 month suspension would be adequate in all of the circumstances, particularly having regard to the *in extremis* condition of the Respondent at the time of the offences. We make a distinction between inappropriate billing practices and the direct misappropriation of client trust funds.

[44] In *Law Society of BC v. Reuben*, [1991] L.S.D.D. No. 10, the order of disbarment was overturned on review by the Benchers, but the usefulness of that outcome in our circumstances is limited by the fact that the misappropriation count against Mr. Rueben had been withdrawn and there was unusual psychiatric evidence offered that linked the respondent's behaviour to the fact that he was the child of Holocaust survivors.

[45] We have distinguished the *Law Society of BC v. Volrich*, Discipline Case Digest 89/4, from the case at bar on the basis that the Hearing Panel in that decision found behaviour that did not amount to misappropriation, and it did occur nearly 20 years ago.

[46] The Law Society referred the Panel to the cases of *Law Society of BC v. Hammond*, 2004 LSBC 32, where the Panel noted in disbarring Mr. Hammond, as follows:

> The moneys taken by this device amounted to a direct misappropriation of client's money and for those acts, there is but one penalty outcome, absent extraordinarily extenuating circumstances. We have noted above the absence of extenuating circumstances.

[47] In the case of *Law Society of BC v. Peters,* 1999 LSBC 10, the respondent was found guilty of

misappropriating $7,000 (being all of the money that she held in trust for the client at the time) and followed that behaviour with a series of notations in her bookkeeping records in an attempt to divert suspicion and to avoid detection. The Law Society urged upon this Panel language from the *Peters* decision as follows:

> As to the nature and gravity of Ms. Peters' conduct, there can be few forms of lawyer misconduct more worthy of censure than that of theft from the client. In the absence of significant mitigating factors, disbarment is the only suitable penalty for misappropriation.

[48] The Law Society referred the Panel to *Law Society of BC v. Bjorkman*, [1998] L.S.D.D. No. 12, where the respondent misappropriated $26,669.11 of client funds for his own personal use. He later misled the Law Society and the Court by falsely asserting that he had reached an agreement that allowed him to receive the funds. Mr. Bjorkman was disbarred.

[49] The Law Society referred the Panel to the Bencher Review of the *Law Society of BC v. Kierans* decision, which is cited as 2001 LSBC 6. The Benchers on review stated the following:

> Clearly, the public mandate of the Law Society requires that instances of misappropriation be dealt with by the penalty of disbarment in the absence of exceptional circumstances such as those evidenced in *Reuben* and *Ranspot*. There are no such circumstances here. Over the span of time represented by the Citation, Mr. Kierans intentionally, systematically and, without apparent regret or remorse, appropriated estate funds to which he had no right. His victims were unsophisticated in matters in which he was expert and he abused their trust. He is unrepentant. He has sought to justify his misconduct on the basis of a medical condition which he alleges clouded his judgment and impacted his memory at the material time. That allegation is not supported by the evidence, even on a balance of probabilities.

[50] A similarity between *Kierans* and the case before this Panel is the fact that this Panel was not persuaded that the medical evidence offered in support of the Respondent's illness provided an excuse for the misconduct that was found to have occurred.

[51] In *Ogilvie* (supra) , the respondent rendered fraudulent accounts and subsequently transferred over $7,000 from his trust account to his general account without providing any services for those transfers. Despite the fact that, since the disciplinary proceedings had begun, the respondent had suffered a debilitating stroke and was unlikely to return to practice, the Panel still felt that disbarment was required to maintain the public's confidence in the ability of the Law Society to regulate and supervise the conduct of its members.

[52] In *Law Society of BC v. Meugens*, [1997] L.S.D.D. No. 57, the respondent misappropriated $11,500 of client funds and improperly transferred a further $8,000 from trust. In an attempt to avoid a hearing, the respondent offered a letter of resignation and undertook to never apply for reinstatement. The Hearing Panel found that the resignation was insufficient and felt it necessary to disbar Mr. Meugens.

[53] The most recent authority on the subject before this Panel is *Law Society of BC v. McGuire*, 2006 LSBC 20. This is a decision that is based upon a very similar fact pattern where a lawyer was suffering from depression and used his trust account as a personal line of credit. *McGuire* is also similar to the case before us in that, following difficulties with the Canada Revenue Agency, Mr. McGuire operated a separate trust ledger within his trust account that was his " general" account. This is similar to the sub-ledger maintained by the Respondent within his primary trust account and through which he conducted his personal banking.

[54] The *McGuire* decision is analogous in that the respondent had no previous history of misconduct

with the Law Society and, like the Respondent in this case, produced an array of extremely laudatory letters of reference where each writer spoke of the high moral character of Mr. McGuire. The Panel in that case noted that the " public" to be protected was larger than the individual prospective clients of Mr. McGuire. It was the public at large that was entitled to be protected, and so the fact that individual clients of Mr. McGuire could likely be protected by conditions on his practice was trumped by the " larger" public interest, which demanded that Mr. McGuire be disbarred. It was so ordered.

Discussion

[55] The Respondent comes before the Panel on the penalty phase of the Hearing with an impressive array of letters of recommendation. It is difficult to imagine how the person described in the letters of reference and recommendation could be one and the same as the person who appeared before this Hearing Panel during the Facts and Verdict Hearing and whom we found to have committed the systematic misappropriations outlined in our earlier decision. Perhaps the explanation lies in an examination of the deterioration in the practice, both in terms of quality and quantity, of this member over the later years of his practice.

[56] His practice became increasingly uneconomic, in part likely as a result of a deteriorating health situation suffered by the Respondent. In our determination on the Facts and Verdict, we concluded that the Respondent was well aware of the extent to which he was utilizing his client trust funds to support the continuation of his practice and to pay his living expenses. We were clear in our determination that his many health issues did not prevent his understanding of the deteriorating economics of his practice and the fact that he was relying upon client trust funds to stay afloat.

[57] In circumstances such as these, it is our opinion that the protection of the public demands that this Respondent be disbarred and this decision is necessary not just because we must ensure that this Respondent is no longer able to practise and that we provide a safeguard to the public by this action, but also we must generally deter any other member of the Law Society who might think that deteriorating health will offer a defence to a misappropriation scheme such that disbarment will not necessarily follow in the result.

[58] The Respondent asks for an understanding of the " misappropriation with an explanation." It is the view of this Panel that there will almost never be an " explanation" for a misappropriation that will save a Respondent from the most severe penalty available to the Law Society. There is nothing in the " explanation" offered that takes these misappropriations to any different outcome. We note that we do not accept the characterization urged upon us that it was a single event of misconduct - in our view, and much of our findings on Facts and Verdict turned on this circumstance, the daily visits by the Respondent to the bank to verify the trust account balance indicate an ongoing and repeating awareness of the trust shortage and its changing dimension. With each new personal expenditure from an already overdrawn trust account, there was another misappropriation.

[59] We must not lose sight of the clients that suffered in this result. At least 20 clients were out of pocket for some time to the extent of 40 cents on the dollar of monies entrusted by them to the Respondent. Although counsel suggested that the delay in the pro rata distribution could not be blamed on the Respondent, it must be noted that the shambles of the bookkeeping records was a contributing factor. Only four of the victims sought the relief offered by the Special Compensation Fund and we cannot know why there were not more of them involved in that process. We can safely assume that each of them will have some misgivings the next time it is suggested that they deposit funds in trust with their lawyer. That is a consequence that must be addressed by the penalty decision of this Panel.

[60] We have considered the extensive letters of recommendation and the exemplary career of public service that the Respondent has to his credit. Both are impressive. Are they sufficient to offset the usual penalty outcome for a substantial misappropriation? We think not. This is a situation where, as noted in *Re Millrod* (supra), " disbarment ... attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career." We also note that the reasoning of Judge Fratkin in the *Robinson* decision, referred to in paragraph 32 above, is not particularly helpful as the " breach of trust" of Mr. Robinson was not the same as that of the Respondent. Mr. Robinson was a highly regarded public figure who enjoyed a reputation for hard work in support of his causes. His reputation has suffered, but the trustworthiness of the legal profession is not called into question as a result of his conviction and subsequent conditional discharge. The same cannot be said of the outcome of the actions of the Respondent.

[61] We have also had regard for the numerous other counts of misconduct that were alleged and acknowledged by the Respondent. The multiplicity of the " other" counts might well have argued for a disbarment, even absent the substantial misappropriation. The other counts certainly must be taken into consideration when assessing the appropriate penalty.

[62] We should be clear that our decision as to penalty has not been influenced by the fact that the Respondent did not acknowledge the misconduct, either during the hearing or thereafter. We would not have come to any different conclusion in the result if the Respondent had provided a full and complete acknowledgement of the impropriety of his actions in respect of his trust account deficiencies. The question of the extent to which the Respondent is remorseful is always difficult, for we have no doubt that he certainly regrets the way in which his career in the law has ended - it is not so clear that he accepts or understands the extent of the damage he has done by his actions to the reputation of the legal profession.

[63] We have carefully considered the submissions of both the Law Society and the Respondent. The Law Society makes a compelling argument that an overarching consideration for this Panel in circumstances such as these, where there has been a substantial misappropriation of clients' funds, is that public confidence in the legal profession demands that there be a disbarment in such circumstances, except in the most extraordinary case. There is nothing extraordinary about this case - it is, unfortunately, a regrettably repetitive scenario where a member suffers a financial setback, becomes depressed and resorts to the trust account for a solution to the problem.

[64] In the view of this Panel, the mitigating circumstances in this case, including the many positive letters of reference and the significant health issues that are described at length in our initial decision, are overwhelmed by our earlier findings that the misappropriations were calculated and wilful and were not the result of a poor-health-induced debilitative state. A careful review of all of the authorities described above indicates that, in all but a very few situations where client funds are misappropriated, disbarment must follow. This is as it should be, for it is the most egregious of all possible breaches of client trust.

Decision

[65] In the result of the foregoing, it is the Panel's decision that this Respondent must be disbarred and we order accordingly.

Costs

[66] The Law Society initially submitted a Bill of Costs in respect of these proceedings which totalled $256,000. A significant component of these costs was made up of the forensic report prepared by William

Kinsey, C.A., a forensic auditor retained by the Law Society to attempt a reconciliation of the Respondent's trust account records. As indicated in our decision on Facts and Verdict, Mr. Kinsey was, despite his extensive efforts, only able to speculate on a range of misappropriation between $42,396.11 and $56,626.21. The complete lack of reliable accounting records for the practice was offered as an explanation for the inability of Mr. Kinsey to properly reconstruct the historical trust history. The accounting mess that the Respondent left for the Law Society to investigate resulted in investigative costs that were extraordinarily high. This Panel is not in a position to assess how much accounting time was necessary to properly investigate the Respondent's obligations to his clients to whom the Law Society is ultimately accountable.

[67] The Law Society argued for a full indemnity for these costs, but at the end of the day, with no real explanation offered, agreed to accept an award of costs based on 60% of the actual costs, which would produce an obligation in the Respondent of $149,053.

[68] There was no particular rationale offered for the suggested reduction from the full indemnity position initially advanced.

[69] The Panel has no basis upon which to assess the wisdom of the request of the Law Society. For the Respondent, we are advised through counsel that he is destitute and that any award of costs in the circumstances would be of no significant moment as he has no ability to pay such an order in any event. It is likely too that the Panel's decision as to penalty will remove any possibility, however slight, that the Respondent could at some point repay any order for costs made in these circumstances.

[70] The Panel therefore orders, based entirely upon the fact that it is a request of the Law Society in the circumstances, that costs, as requested, in the amount of $149,053 be paid to the Law Society by the Respondent. The primary basis for an award of costs in these circumstances is to ensure that there is no basis for another Panel to be faced with the argument that no award of costs was made in these circumstances because of the impecunious nature of the Respondent. In our respectful opinion, that should not be the basis upon which costs can be waived. There will be publication of this decision in the normal course.