

2005 LSBC 13

Report issued: April 8, 2005

Citation issued: January 23, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 review concerning

Re: Lawyer 2

Respondent

**Decision of the Benchers
on Review**

Hearing date: December 15, 2004

Quorum:

Majority decision:

James Vilvang, Q.C.

Darrell O'Byrne, Q.C.

Gregory Rideout

Margaret Ostrowski, Q.C.

Dissent/Minority decision:

Ralston S. Alexander, Q.C., Chair

Patricia Schmit, Q.C.

Anne Wallace, Q.C.

Counsel for the Law Society: Todd R. Follett

Counsel for the Respondent: M. Kevin Woodall

Background

[1] A citation was issued against the Respondent on January 23, 2003.

[2] A hearing took place on January 8, 2004 to determine whether the Respondent had done one or more of the following:

- (a) professionally misconducted himself;
- (b) conducted himself in a manner unbecoming a member;
- (c) contravened the *Legal Profession Act* or a rule made under it;
- (d) incompetently carried out duties undertaken by him in his capacity as a member of the Society.

[3] On April 30, 2004, the Hearing Panel issued its decision concluding that the Respondent had not

professionally misconducted himself nor conducted himself in a manner unbecoming a member. The Panel held:

(a) In our view, the appropriate disposition of the citation is a determination that the Respondent has committed a breach of the *Trustee Act* while acting as a trustee by failing to pass accounts in accordance with his statutory obligations. We do not find this to be professional misconduct or conduct unbecoming a barrister or solicitor.

(b) We have been told that the Respondent is currently working with the Practice Standards Committee in relation to his estate practice. In our view, the finding that the Respondent was in breach of the *Trustee Act* is an adverse finding within the meaning of section 38(5) of the *Legal Profession Act* and, accordingly, pursuant to section 38(5)(f)(i) we direct the Respondent to complete a remedial program to the satisfaction of the Practice Standards Committee in relations to compliance with statutory time limitations and staff supervision.

Paras 24 & 25 from Reasons for Decision

[4] On June 8, 2004, counsel on behalf of the Law Society submitted the matter to the Benchers for review under s.47 of the *Legal Profession Act*. The issues to be considered were set out by counsel for the Law Society:

" 2. The issues to be considered on the review of the decision:

- a) The proper test for determining whether conduct unbecoming a member has been made out;
- b) Whether the evidence against the Respondent supports a finding of conduct unbecoming;
- c) The finding of the hearing panel that a breach of the *Trustee Act* is an adverse finding within section 38(5) of the *Legal Profession Act*; and
- d) The imposition of a penalty under section 38(5)(f)(i) by the hearing panel despite a dismissal of the counts contained in the citation schedule."

[5] The Review Panel heard the matter on December 15, 2004.

[6] The Review Panel concluded during the hearing that the Hearing Panel had not followed the requirements of Rule 4-35 of the Law Society Rules, by proceeding to impose a penalty without inviting the respondent and discipline counsel to make submissions as to penalty. It followed that the penalty imposed could not stand.

LEGAL ANALYSIS AND REASONING

[7] The test to be applied by the Benchers on this review is the " correctness: test.

LSBC v. Hordal , 2004 LSBC 36, paras. 8-15

Professional Misconduct

[8] With respect to the issue of whether the Respondent professionally misconducted himself we conclude that the working definition of " professional misconduct" referred to in paragraphs 10 and 11 of the Reasons

of the Hearing Panel is correct.

[10] Professional misconduct is not defined in the *Legal Profession Act*. The Benchers have adopted as a working distinction of the proposition that professional misconduct refers to conduct occurring in the course of a lawyer's practice while conduct unbecoming refers to conduct in the lawyer's private life (*The Law Society of British Columbia v. Watt* [2001] LSBC 16, at para 5.)

[11] This statement of principle is consistent with the contemporary view that:

Lawyers will generally be vulnerable to allegations of professional misconduct (rather than conduct unbecoming a barrister and solicitor) only in respect of acts performed in their professional capacity.

MacKenzie, *Lawyers and Ethics* (2nd ed 1999). p. 26-23

[9] The Hearing Panel concluded that since the Respondent's conduct as described in the citation took place in the course of his work as a trustee, not as a solicitor, it could not be characterized as professional misconduct.

[10] The Hearing Panel was urged by counsel for the Law Society to find that lawyers may be found to have committed professional misconduct when the conduct "can reasonably be regarded as an extension of their professional status or activities" The Hearing Panel concluded that it did not have to make a finding on that issue because they were not satisfied that a sufficient evidentiary foundation had been laid to support the factual premise behind that proposition.

[11] We see no reason to interfere with the findings of fact of the Hearing Panel.

Conduct Unbecoming

[12] Counsel for the Law Society argued that the Hearing Panel had "imported a requirement into conduct unbecoming that it generally consists of behaviour which is disgraceful or dishonourable." We cannot agree with that submission for the following reasons:

(a) In paragraph 19 the Hearing Panel refers to the *Stevens* case, 2001 LSBC at para 10:

Conduct unbecoming is that conduct which is not involved in a member's practice. It is any matter, conduct or thing which a Benchers' Panel considers:

(a) is contrary to the best interests of the legal profession; or

(b) harms the standing of the legal profession in the eyes of right-thinking members of the public.

It is conduct for which a member is worthy of censure, despite it not being related to the member's practice. The reputation of each member of the Law Society in the eyes of the public is of utmost importance to the standing of the profession generally. A member must conduct herself or himself in such a manner that the reputation of the profession as a whole is not damaged nor diminished by her or his conduct.

In our view this is a correct definition of conduct unbecoming.

(b) In paragraph 21, the Hearing panel holds:

It will generally be necessary for the conduct to be dishonourable or disgraceful or otherwise reflect adversely on the member or the profession or the administration of justice to amount to conduct unbecoming. **(underlining added)**.

The underlined words clearly show that the Hearing Panel applied the correct test, which is broader than "dishonourable or disgraceful" .

(c) In paragraph 22, the Hearing Panel held:

We do not consider the conduct to be disgraceful or dishonourable, or otherwise amount to conduct unbecoming a member. **(underlining added)**.

Again, the underlined words show the Hearing Panel applied the correct test.

[13] We also agree with the Hearing Panel that the correctness of the Law Society's proposition should be tested in a case where the evidence supports the factual premise.

[14] We conclude that the decision of the Hearing Panel up to and including paragraph 24 is correct.

[15] There remains the issue of the verdict of the Hearing Panel as expressed at Paragraph 25:

We have been told that the Respondent is currently working with the Practice Standards Committee in relation to his estate practice. In our view, the finding that the Respondent was in breach of the *Trustee Act* is an adverse finding within the meaning of section 38(5) of the *Legal Profession Act*, and, accordingly, pursuant to section 38(5)(f)(i) we direct the Respondent to complete a remedial program to the satisfaction of the Practice Standards Committee in relation to compliance with statutory time limitations and staff supervision.

[16] Section 38(4) of the *Legal Profession Act* provides:

After a hearing, a panel must do one of the following:

- (a) make a determination and take action according to this section,
- (b) determine that the respondent has committed one or more of the following:
 - (i) professional misconduct;
 - (ii) conduct unbecoming a lawyer;
 - (iii) a breach of this Act or the rules;
 - (iv) incompetent performance of duties undertaken in the capacity of a lawyer;
 - (v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or breach of this Act or the rules.

Clearly, the Hearing Panel concluded that the Respondent had not committed any of the acts described in s. 38(4). Accordingly, the Panel could either dismiss the citation under s.38(4)(a) or make " any other disposition" under s. 38(4)(c).

[17] The Hearing Panel did not invoke s.(38(4)(c) in its Reasons. Both counsel urged the Review Panel to

dismiss the counts if we determined that there was no professional misconduct or conduct unbecoming. Therefore there is no need for the Review Panel to attempt to determine whether the Hearing Panel would have had jurisdiction under s.38(4)(c) to make the decision it did in paragraph 25.

[18] Having determined that there was no professional misconduct or conduct unbecoming, we consider the matter at an end. The citation stands dismissed.

[19] Each party should bear its own costs.

**Dissent/Minority Decision of Ralston S. Alexander, Q.C.,
Patricia Schmit, Q.C. and Anne Wallace, Q.C.**

[20] This was a Hearing of a Review concerning [the Respondent], a member of the Law Society of British Columbia, pursuant to Section 47 of the *Legal Profession Act*.

[21] On January 23 rd, 2003, a Citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of The Law Society Rules by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. This Citation directed that a Panel enquire into the Respondent's conduct as follows:

1. While acting as trustee in the matter of the estate of L.M., you failed to pass accounts as required by the *Trustee Act* from 1990 through to, at least, 1997.
2. While acting as trustee in the estate of L.M., you failed to account to the beneficiary of the trust of A.M. when required to do so.
3. While acting as trustee in the estate of L.M., you charged fees to the estate for your services as trustee at the rate charged for your legal services rather than the rate payable for trustee services, although the will did not permit you to do so.
4. You failed to properly supervise your staff in their work on the trust for A.M. in the estate of L.M. contrary to Chapter 12, Ruling 1 of the *Professional Conduct Handbook*. In particular, you did not supervise your staff to ensure accounting matters concerning the estate were properly dealt with.

[22] On January 8 th, 2004, a Hearing Panel enquired into the member's conduct, and written reasons were issued by the Hearing Panel on April 30 th, 2004.

[23] The January 8 th, 2004 Hearing before the Panel proceeded by way of an Agreed Statement of Facts which included an Amended Report and Recommendations of Master J.W. Horn, a Master of the Supreme Court, with respect to a passing of accounts hearing conducted by him in the matter of the Estate which is the subject of this proceeding, and a judgment of Mr. Justice Halfyard, of the Supreme Court, essentially confirming the recommendations of Master Horne with respect to the accounts. The Report and Recommendations of Master Horn and the judgment of Mr. Justice Halfyard were treated by the Hearing Panel, with the agreement of counsel, on the basis that the findings of fact and determinations of law therein contained were to be evidence before the Hearing Panel.

[24] The Hearing Panel determined that the Respondent had committed a breach of the *Trustee Act* while

acting as a trustee by failing to pass accounts in accordance with the statutory obligation. The Hearing Panel did not find this conduct to be professional misconduct or conduct unbecoming a barrister or solicitor. The Panel then determined that their finding that the Respondent was in breach of the *Trustee Act* was an "adverse finding" within the meaning of Section 38 (5) of the *Legal Profession Act* and directed that the Respondent complete a remedial program to the satisfaction of the Practice Standards Committee of the Law Society.

[25] At a meeting of the Discipline Committee of the Law Society held on May 7 th, 2004, the Discipline Committee resolved to refer the matter of the decision of the Panel to the Benchers for a review pursuant to Section 47 of the *Legal Profession Act*. It was the view of the Discipline Committee that the Law Society should seek a determination on review that the Benchers should substitute a verdict of conduct unbecoming for the dismissals of the Citation on each of Counts 1 through 4 of the schedule to the Citation of the Respondent.

THE SCOPE OF REVIEW BY THE BENCHERS UNDER SECTION 47(3) OF THE LEGAL PROFESSION ACT

[26] Section 47 of the *Legal Profession Act* provides the power of review enjoyed by a Review Panel, with a discretion in that Review Panel to substitute its own decision for that of the Panel hearing the initial Citation. The relevant provisions of Section 47 provide as follows:

"(3) within 30 days after the decision of the Panel under Section 36 (4) (5) (6) or (7), the Discipline Committee may refer the matter to the Benchers for a review on the record.

(4) If, in the opinion of the Benchers, there are special circumstances, the Benchers may hear evidence that is not part of the record.

(5) After a hearing under this section, the Benchers may:

- a) confirm the decision of the Panel, or
- b) substitute a decision the Panel could have made under this Act or the Rules.

[27] Numerous decisions of the Benchers, including most recently *LSBC v. Timothy John Hordal*, [2004] LSBC 36, have determined that the test to be applied by the Benchers on review under Section 47 is "correctness". On the facts of this case, the application of the correctness test suggests that the Benchers on review are charged with responsibility for determining whether or not in the circumstances set out in the Agreed Statement of Facts, the Respondent was guilty of conduct unbecoming a member of the Law Society.

[28] The Hearing Panel determined that the conduct of the member did not amount to either professional misconduct or conduct unbecoming, and it is for the Benchers on review to determine whether this was the correct determination.

DETERMINATIONS OF SIGNIFICANT FACTS

[29] The facts in this matter are not in dispute. The Respondent was named Executor of the Will of L.M. who died on January 31 st, 1988. He was in that same Will constituted as the Trustee of a Trust for the benefit of the daughter of L.M., A.M. Probate of the Will was issued on February 26, 1988.

[30] Although required to do so within two years of the Grant of Probate by Section 99 of the *Trustee Act*,

the Respondent did not pass the estate accounts until A.M. issued a Petition requiring the Respondent to pass the Trustee accounts in November of 1997. This Petition was issued following an earlier notice delivered to the Respondent in December of 1996, requiring him to pass accounts as required by the *Trustee Act*. The hearing at which the accounts were considered took place over a period of time from August of 1998 through to November of 1998.

[31] The Report and Recommendations of Master Horn following his review of the accounts was extensive. His determinations and recommendations included:

(a) findings on several issues involving small amounts of money, including a determination that certain fees paid for income tax preparation were appropriate.

(b) confirmation that certain funds placed in a "Dividend Fund" which enjoyed a capital gain were funds that were properly treated by the trustee as an income receipt, rather than as a capital receipt.

(c) consideration of the impact that the Respondent's breach of certain obligations imposed under the *Trustee Act* should have on the overall level of remuneration to be paid for the trustee's services. He noted that no passing of accounts took place during a period from January 31 st, 1988, to some time early in 1998, when the accounts were finally prepared and presented for approval.

(d) ordering that the costs of the beneficiary of the Trust, A.M., incurred in launching the Petition proceeding to force the passing of accounts be paid by the Respondent personally. If the Trustee did not agree to the payment of the fees as presented then the Master would recommend an Order be made for an assessment of special costs of that proceeding on the grounds of misconduct.

(e) a finding that the accounts as first presented suffered from a defect that the Respondent had included legal fees which had been paid to him from the Trust which had to be removed because the Will establishing the Trust did not authorize the charging of legal fees for Trustee's work.

(f) a determination that the failure of the Respondent to produce certain documents in support of the accounts as presented caused the proceedings with respect to the passing of the accounts to be prolonged unnecessarily.

(g) a determination that the Respondent did not promptly draw his accounts and apply to have them passed and that he did not assist the beneficiaries of the Trust in determining whether his accounts were properly drawn, and a direction that any remuneration awarded should reflect these failures.

(h) a finding that the Respondent was in breach of Section 20 of the *Trustee Act* which required that all trust investments be maintained in the name of the Trustee. He noted that the Respondent had various assets of the Trust in the name of Companies controlled by him, but found that no harm arose from this breach of the *Trustee Act*.

(i) a finding that the Respondent had made investments which were not authorized by the *Trustee Act* but determined that the investments produced a good return despite the fact that the investments did not qualify as Trustee investments, and determined that the remuneration to be paid to the Trustee should not be diminished by reason of that breach of the *Trustee Act*.

(j) a determination that for a period of time, large sums of money were held by the Respondent in low interest or no interest bank accounts. He determined that there was no reason for this and noted that instead the funds should have been invested in short or long term guaranteed investment certificates or similar instruments. He determined "that these funds should have been invested in more appropriate instruments and not held as liquid funds for long periods of time and that this was mismanagement" .

[32] In his concluding observations on the appropriate level of remuneration for the Respondent for his services as Trustee, Master Horn noted:

"Apart from the breaches of the *Trustee Act* in the manner of investments and how they were held, [the Respondent] in my view displayed ordinary skill and ability which would be required of a trustee in these circumstances and took the trouble to seek out better investments when the interest rates on GICs declined rapidly.

The trust fund has been preserved, the interest and capital has been paid out. I am not persuaded that greater rates of interest would have been available in any authorized trust investments. The administration has been, on the whole, successful."

[33] Master Horn then determined that the appropriate remuneration to be paid to the Respondent as Trustee should be reduced from his requested sum of \$17,057.62 to \$12,777.47.

[34] In determining the costs that should be paid in respect of the proceedings to consider the accounts, Master Horn noted that the accounts were improperly prepared, being at least initially deficient. He noted that supporting documents were not provided and that the solicitors representing the parties did not have sufficient material provided to them to assist them in advising their clients on the propriety of the accounts as presented. He noted

"Almost three days of hearing have been taken up in investigating matters which have turned out to be of no great moment but which have absorbed an enormous amount of time. None of this should have been necessary."

[35] He directed that the fees incurred by the beneficiary's counsel in conducting the account be set off against the Trustee's remuneration as having been unnecessarily incurred in attempting to obtain a proper accounting. He directed that those fees should be assessed as special costs. He also directed that the costs of counsel for the beneficiaries in preparing written submissions should be allowed on a special cost basis, and that no fees or disbursements should be allowed to the Respondent for his attendance as Trustee during the hearing to pass the accounts.

[36] In a decision released on November 2, 1999, Mr. Justice Halfyard confirmed the decision of Master Horn with respect to the passing of the accounts.

[37] When considering the issue of costs of the Registrar's hearing, Mr. Justice Halfyard noted as follows:

"On the issue of costs, it is my opinion that the findings made by the Master on the issue of remuneration, both for and against the trustee, are also relevant to the issue of costs. First, it is clear that [the Respondent] was in breach of his statutory duty under s. 99(1) of the *Trustee Act*, in failing to pass his accounts within the first two years of the administration of the trust. This was a serious breach, having regard to the length of the delay and the fact that many of the disputes that arose between the parties had their origin in the delay. Then, [the Respondent] breached his fundamental duty as a trustee to account to the beneficiary of the trust, when requested to do so. It was also a breach of his duty, and improper, for [the Respondent] to pre-take compensation without authorization. This misconduct leaves me in no doubt that the trustee should not be entitled to any fees or disbursements with respect to any part of the proceedings for the passing of his accounts, which includes the proceedings before the Master and the proceedings before me, and I so order."

[38] Mr. Justice Halfyard, when considering whether special costs ought to be awarded against the Respondent personally, noted as follows:

"Special costs will not be awarded unless the conduct in question may properly be characterized as "reprehensible" .

In my opinion, the conduct of the trustee in failing to account to the beneficiary after being requested to do so, may be characterized as reprehensible. [The Respondent] made a valiant effort to explain some of the delay, but in my view, no adequate explanation was ever given. Referring to the last year or so of the delay, [the Respondent] said that he wanted to complete the passing of his accounts for the estate of L.M., before passing the accounts of the trust of A.M. I found this to be unsatisfactory."

[39] Mr. Justice Halfyard then directed that costs be awarded against the Respondent on a special costs basis.

DISCUSSION

[40] It is common ground as between the Law Society and counsel for the Respondent that the Panel exceeded its jurisdiction when it made their finding that the Respondent's breach of certain provisions of the *Trustee Act* was an "adverse determination" under Section 38 (5) of the *Legal Profession Act*. It was argued that if the Panel held that the Respondent did not commit one or more of:

- (a) professional misconduct;
- (b) conduct unbecoming a lawyer;
- (c) a breach of the Legal Profession Act or the Rules;
- (d) incompetent performance of duties undertaken in the capacity of a lawyer, or conduct for a non-member that would, if the Respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the Rules,

then the Panel should have dismissed the Citation. It was further noted that the Panel imposed a penalty upon the Respondent, after having made the "adverse determination", without conducting a hearing into penalty as is required by Rule 4-35 (1) (a) of the Law Society Rules.

[41] With those submissions, the Benchers on review agree. It appears that the Hearing Panel exceeded its jurisdiction by making a finding which is not permitted by Section 38 (4) of the *Legal Profession Act*.

[42] We note in passing that there is a sub-section (c) to Section 38(4) which provides:

"(c) make any other disposition of the citation that it considers proper" .

[43] The Benchers on review considered whether the disposition of the matter by the Hearing Panel was done within the ambit of that sub-section. The Panel did not say that that was the jurisdictional basis for their disposition. It is probable that the opportunity provided in the Rules for a Respondent to have a hearing on "Penalty" would restrict the application of Section 38(4) (c) to circumstances where no "Penalty" outcome is contemplated. We find that this subsection does not authorize the decision taken by the Hearing Panel.

[44] The definition of conduct unbecoming in Section 1 of the *Legal Profession Act* provides as follows:

"(1) In this Act: "Conducting unbecoming a lawyer" includes a matter, conduct or thing that is considered in the judgment of the Benchers or a panel, to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing of the legal profession; "

[45] In the decision of the *Law Society v Stevens*, 2001, L.S.B.C. 12, that panel determined, after considering the definition of conduct unbecoming in the Act, said

"It is conduct for which a member is worthy of censure, despite it not being related to the member's practice. The reputation of each member of the Law Society in the eyes of the public is of utmost importance to the standing of the profession generally. A member must conduct himself or herself in such a manner that the reputation of the profession as a whole is not damaged nor diminished by her or his conduct."

[46] It appears from a review of the decision of the Hearing Panel that it misdirected itself by finding that for conduct to be unbecoming, it must be "dishonorable or disgraceful" . There is in the view of these Benchers on review, a difference between conduct which is dishonorable or disgraceful on the one hand, and conduct worthy of censure on the other. It is in the view of these Benchers, sufficient for a finding of conduct unbecoming that the conduct be worthy of censure.

[47] Some confusion arose during the course of the hearing as to whether the decision on review of the Benchers in the matter of *Jed Maxwell Hops* [1999] LSBC 29 is relevant to the discussion on these issues. The confusion arose from the fact that the decision in *Hops* dealt with professional misconduct, not conduct unbecoming. *Hops* suggests that professional misconduct can be found even though the offending behavior is not "disgraceful and dishonourable" . We do not need to consider the extent to which the considerations which arose in *Hops* are relevant on a consideration of a citation alleging conduct unbecoming. That debate will be for a future panel of Benchers to determine.

[48] It is clear that in order to make a determination of conduct unbecoming a lawyer, it will be necessary for the Benchers to find conduct worthy of censure. On an examination of the facts, it is clear that at least some aspect of the Respondent's conduct in this matter is conduct worthy of censure.

[49] A careful review of the language of the Report of Master Horn and the Judgment of Mr. Justice Halfyard reveals the use of language which must lead to this finding. Master Horn refers to "misconduct", to numerous breaches of the Trustee Act, to "mismanagement", and to the fact that three days of hearings were required due to the behavior of the Respondent, to which he noted "none of this should have been necessary" . He directed several orders of "special costs" against the Respondent personally, a finding that by itself is indicative of significant misbehaviour. Justice Halfyard finds "reprehensible behavior", a "serious breach" of the Trustee Act, a breach of "a fundamental duty to account to a beneficiary" . He also noted that an "improper" pre-taking of compensation had occurred as a further breach of duty.

[50] If a member of the public were asked for an opinion on the behavior of a lawyer who, despite a statutory obligation to do so within two years of the Grant of Probate, did not, for a period of nearly 10 years, pass accounts for review by the beneficiaries of a trust, it is almost certain that those members of the public to whom that question was put would determine that the responsible lawyer, and perhaps the legal profession generally, was worthy of censure. A similar outcome would surely follow from the same question in respect of the variety of misbehaviours described by Master Horn and Justice Halfyard.

[51] The fact Master Horn determined that it was appropriate to order special costs to be payable by the Respondent personally is significant. Special costs orders are only made when the conduct in question is characterized as reprehensible. Master Horn clearly made that determination, and an order of special costs

was made against the Respondent.

[52] Mr. Justice Halfyard, when determining whether special costs should be ordered, came to the conclusion that the behavior of the Respondent in these circumstances was behavior that could be characterized as "reprehensible" .

[53] In all of these circumstances, it must follow that we find this behavior to be worthy of censure, and is therefore conduct unbecoming a lawyer. The decision of a Hearing Panel to the contrary is inexplicable. It is our determination with respect to counts 1 and 2 of the Citation, that the member is guilty of conduct unbecoming a lawyer.

[54] With respect to counts 3 and 4, it is similarly our view that the conduct of the Respondent in taking fees before he was entitled to do so, and his failure to supervise his employees throughout a lengthy administration of this estate which resulted in the considerable difficulties that were encountered by the beneficiaries and their counsel, is conduct that must surely both be contrary to the best interests of the public, and to harm the standing of the legal profession. In the face of that determination, we also find that with respect to counts 3 and 4 of the Citation, that the Respondent is guilty of conduct unbecoming a lawyer.

CONCLUSION

[55] Section 47 (5) of the *Legal Profession Act* provides that the Benchers may substitute a decision the Panel could have made under the Legal Profession Act or the Rules with respect to the matters which were before them. We have determined that the Panel could (and should) have made a decision that the Respondent was guilty of conduct unbecoming a lawyer and we direct that determination be substituted for the finding of the Hearing Panel in respect of these matters.

[56] We have also determined that the order referring the Respondent to a course of remedial study under the auspices of the Practice Standards Committee was an order made without jurisdiction. At the very least it was an order made to impose a penalty without providing the Respondent with an opportunity to be heard on the matter as is required by Law Society Rule 4-35(1)(a). We specifically direct that that portion of the order be vacated.

[57] We direct that there be no order as to costs in this matter.