

2005 LSBC 48

Report issued: November 10, 2005

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
Facts and Verdict**

Hearing date: August 2, 3, 4 and 5, 2005

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

Counsel for the Law Society: Maureen E. Baird, Jude Samson

Counsel for the Respondent: Christopher E. Hinkson, Q.C., S.L. Kovacs

Background

[1] By citation dated March 26, 2003, this Panel was directed to inquire into the conduct of the Respondent with respect to matters set out in a schedule to the citation, which schedule was subsequently amended. The amended schedule to the citation provided as follows:

1. You failed to serve your clients in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer, contrary to Chapter 3, Paragraph 3 of the *Professional Conduct Handbook*.
2. You failed:
 - a) to hold and remit funds collected in payment of the Provincial Sales Tax/Social Service Tax as required by statute;
3. You failed:
 - a) to hold and remit funds collected in payment of Goods and Services Tax as required by statute;
4. You breached Law Society accounting rules as set out in the Audit Reports dated November 12 th and November 20 th, 2002, and, more specifically, you:
 - a) failed to account to your clients for funds received on behalf of your clients, contrary to Rule 3-48;
 - b) failed to maintain sufficient funds in your trust account to meet trust obligations to your clients, contrary to Rule 3-55;

- c) failed to promptly report trust shortages to the Law Society, contrary to Rule 3-66;
- d) failed to maintain trust books, records and accounts, contrary to Rule 3-60;
- e) failed to maintain general books, records and accounts, contrary to Rule 3-61;
- f) failed to record general transactions within 30 days and trust account transactions within 7 days of the transaction, contrary to Rule 3-63; and
- g) failed to make withdrawals from trust in accordance with Rule 3-56.

5. You failed to render accounts or rendered accounts that did not contain a reasonably descriptive statement of services, contrary to Section 69 of the *Legal Profession Act*.

6. You failed to adequately supervise an employee, B.P., contrary to Chapter 12 of the *Professional Conduct Handbook*.

7. 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 being provided or an account being prepared and delivered to said clients.

8. Prior to the withdrawal of trust funds, you failed to prepare and deliver an account to several clients, contrary to Rule 3-57(2) of the Law Society Rules.

9. You failed to file a Form 47 for the period ending January 31, 2001, contrary to Rule 3-72 of the Law Society Rules.

10. You failed to pay the second installment of annual fees on July 3, 2001 when due and, contrary to Section 30(7) of the *Legal Profession Act*, you practised while uninsured until September 25, 2001 when you forwarded payment of the second installment to the Law Society.

[2] The citation and the amended schedule were entered as Exhibit 1 in the proceedings.

[3] The parties filed an Agreed Statement of Facts and Admissions as Exhibit 2 in the proceedings. The Agreed Statement of Facts is attached as Appendix 1 to this decision.

[4] The effect of the Agreed Statement of Facts and Admission is that counts 1 through 6 and 8 through 10 in the amended schedule to the citation are acknowledged as having been made out by the Law Society. The Respondent acknowledges that his behaviour with respect to those numbered counts amounts to professional misconduct.

[5] The Agreed Statement of Facts acknowledges in paragraph 43 that at the time the Respondent ceased practice a trust shortage existed in an amount between \$42,396.11 and \$56,626.21. This same trust shortage is described in paragraph 83 of the Agreed Statement of Facts.

[6] The sole question in dispute and before this Panel to decide was whether the behaviour of the Respondent amounted to "misappropriation" as described in paragraph 7 of the amended schedule to the citation or whether the trust shortages described above could be characterized in some way other than misappropriation due to circumstances extant in the life and times of the Respondent.

[7] The determination of that single question occupied the four days of the hearing.

Factual Overview

[8] For the period of time from sometime in 1998, when the Respondent was diagnosed with Type 2 diabetes, until he ceased practice late in 2001, the Respondent suffered a variety of health ailments which manifested themselves in a number of ways. In the fall of 2000 the Respondent was diagnosed as being clinically depressed and he was prescribed an anti-depressant medication in April of 2001. He sought psychiatric treatment for his depression in early 2002.

[9] For the purposes of the analysis surrounding the accounting for the Respondent's practice, it was demonstrated that he conducted the vast majority of his financial transactions through a single account at the [Bank], which in the fall of 2001 became the [Bank]. For ease of reference we will refer to the Bank as the [Bank] throughout even though for a small part of the material time it was the [Bank].

[10] It was through this account at the [Bank] that all trust transactions were conducted; the Respondent did not maintain a separate general account but instead he used the single trust account at the [Bank] for his general account purposes including for payment of personal and practice related debts and for payments to the Respondent on account of draws for living expenses.

[11] As noted above, the absence of a general account, and the co-mingling of personal and trust funds was acknowledged to be a breach of the Law Society Accounting Rules. The focus of the Panel on this bank account however was more directed at the fact of the trust shortages in this account which trust shortages, simply stated, resulted from the fact that the Respondent withdrew from this single "pooled" account funds for personal expenses or practice expenses to an extent of between \$42 and \$54 thousand dollars more than he had his own funds on deposit for that purpose. In other words, the Respondent used client funds to pay his practice and personal living expenses to an extent of somewhere between \$42,000 and \$54,000.

[12] The evidence (of both the Law Society and the Respondent) verified that virtually all of the banking done through the [Bank] account was done personally by the Respondent. The evidence further verified that at the material time, the Respondent attended at the [Bank] virtually every day (sometimes twice a day) and that he would almost always inquire as to the balance in the account during these personal attendances at the branch.

Medical Reports

[13] Exhibit 8 in the proceedings was a binder of medical reports - these reports were nearly two hundred pages of material.

[14] The Respondent provided a medical report prepared by Dr. Shabehram Lohrasbe dated May 8, 2005. Dr. Lohrasbe interviewed the Respondent on March 30, 2005 and conducted a variety of interviews and a review of existing psychiatric reports from the Respondent's earlier physician; he also interviewed several of the Respondent's friends and associates, including his then current conjugal partner and several of his long-time friends. Dr. Lohrasbe concludes that the principle psychiatric diagnosis of the Respondent is of Major Depression. He notes that the Respondent has likely suffered from a low grade of depression for most of his adult life.

[15] Dr. Lohrasbe notes that the Respondent's severe depression was likely first manifested in the early 1990's and that the Respondent declined steadily thereafter. Dr. Lohrasbe quoted a former partner of the Respondent in the following terms:

"I was increasingly concerned about his appearance and conduct . . . he was losing his ability to focus . . . he would say the same thing, over and over again, all day long . . . he became more and more despondent and hopeless . . . he was often confused . . . it was as though mental movement for him

was like going through peanut butter . . . early on he was belligerent to clients and staff . . . he became paranoid about his treatment at the firm . . he began to lose his sense of self . . . his personal hygiene went downwards, through the floor . . . he was filthy, smelled bad, would shave his face on one side . . . he dressed like he'd slept in his clothes . . . at one point he was pulling out his hair . . . there was a wide patch on one side of his temple . . . I'd tell him, you need medical help, and he'd say, "yeah, I know, but I'll try one more day and see". . . in my layman's opinion he had started to become nuts."

[16] Dr. Lohrasbe observed:

"Noticeable in the description [above] is the graphic account of the decline of personal hygiene. In an intelligent and previously successful professional, neglect of basic personal hygiene is a very clear indicator that the impact of his depression has advanced well into the realm of enormous personal dysfunction. The described problems with attention and concentration (inability to focus) and sluggish mental performance are classic features of the cognitive decline associated with depression, with the severity of such cognitive decline being a good barometer for the overall severity of the depression."

[17] Dr. Lohrasbe went on to say:

"All information available indicates that Mr. Harder was severely depressed during the years between February 1998 and November 2001, when he signed an agreement not to practice. It is my understanding that the actions and omissions that are the subject of the inquiry by the Law Society of B.C. involve financial transactions, including (as a very general description) failure to hold and remit funds appropriately, failure to otherwise manage trust accounts appropriately, and misappropriation of funds. I am not in a position to comment on Mr. Harder's mental state at the specific times of each of these actions or omissions, as he cannot provide an account of his thoughts, feelings and behaviors during those transactions. Mr. Harder can barely remember events in the general timeframe, and his memory for specifics and sequences is grossly impaired. Therefore, specific and concrete information about his mental state during each of the many relevant transaction is not available. However, the impact of severe depression on volitional behaviour generally is frequently an issue in forensic psychiatric practice, and I am comfortable offering the following general opinion."

[18] Dr. Lohrasbe then noted evidence of a significant decline in the Respondent's cognition and mentation. He described a decline in the cognitive ability (to think and to know) and in the Respondent's mentation, being that which allows an individual to "make sense" of the myriad streams of information which come through immediate experience. Mentation is the intellectual and cognitive capacity in action in the real world. He noted that the available information suggested that the Respondent's mentation (his ability to make sense) was grossly disordered during the relevant timeframe. Dr. Lohrasbe observed that fundamental to coherent thinking is attention, being the ability to arouse, focus, maintain, and appropriately shift conscious awareness voluntarily. He notes that an impact of depression on cognition and mentation begins with its undermining of attention which is a basic building block of many mental functions. He noted that the ability of the Respondent to focus attention did happen, and on a sustained basis. He noted then that as the depression increased, "executive functioning" was compromised. Executive functioning is used to describe a variety of related cognitive processes such as the ability to generate options, to initiate solutions, to plan and sequence tasks, to make decisions, to self monitor thoughts and emotions, and to respond reflexively to the demands of a changing environment. He noted that the Respondent's executive functioning was clearly malfunctioning at the relevant time.

[19] Dr. Lohrasbe noted as follows:

"Executive functioning is related to the ability to formulate intent. Intention generally implies awareness

of goal-directed actions, and forming a particular intent can be viewed as focusing on a specific purpose. Intent-formation is frequently and severely disrupted among the mentally disordered, including individuals such as Mr. Harder who are significantly depressed . . . Frequently, as I believe to be the case with Mr. Harder, the focusing process itself and goal formation are impaired with severe depression. In my opinion, he was significantly compromised in his ability to formulate the intent to carry out deliberately dishonest actions at the relevant time.

Mr. Harder's insight and his judgment were clearly impaired. Both entail processes of appraisal or assessment of one's own state of mind, as well as one's motivations and actions, and one's relationship with others. Insight denotes looking in, while judgment reflects looking out. Mr. Harder was grossly impaired in insight and judgment across a broad area of his functioning, not just financial transactions.

These overlapping and interdependent aspects of mental functioning – attention, memory, cognition, mentation, executive functioning, insight, judgment, intent formation – were all impaired in Mr. Harder at the relevant time, as a result of Major Depression. To varying degrees, they are all necessary and relevant to coherent goal directed behaviour, including the financial transactions that are the subject of this inquiry."

[20] Dr. Lohrasbe provided a summary of his conclusions with respect to the Respondent. It is his opinion that the Respondent:

- "i) was suffering from the psychiatric disorder of Major Depression during the timeframe relevant to the inquiry by the Law Society;
- ii) his symptoms, and their impact on his functioning was severe;
- iii) a broad range of mental functions relevant to financial management were grossly impaired;
- iv) his actions and omissions were likely directly related to his mental disorder;
- v) his depression severely diminished his ability to formulate the intention to carry out organized activity, including dishonest actions;
- vi) he has partially recovered from severe depression; and
- vii) with a more complete recovery I anticipate that he can soon return to his law practice.

[21] Dr. Roy O'Shaughnessy provided an opinion to the Law Society in response to a report provided by Dr. Lohrasbe. In the response to the report, Dr. O'Shaughnessy noted firstly that he had not personally examined the Respondent and that he did not have any specific opinion relating to the Respondent's mental state at the time of the alleged inappropriate conduct. Instead Dr. O'Shaughnessy provided a critique of the information provided [by Dr. Lohrasbe] and as well he provided general guidelines for regarding how to proceed in doing the type of evaluation required in a case of this type.

[22] After providing an overview of the history of the Respondent's depression, as described in the report of Dr. Lohrasbe, Dr. O'Shaughnessy noted:

"Dr. Lohrasbe went on to note that Major Depression would have had an impact on Mr. Harder's practice. Dr. Lohrasbe reconstructed the history to suggest that this would have started sometime in the early 1990's. Dr. Lohrasbe then went on to make a rather unusual comment to suggest that if he had seen Mr. Harder in the 1990's that he would have involuntarily committed him to a hospital for psychiatric treatment. As noted below, this would be certainly unusual bearing in mind that this man [the Respondent] was still practising law in what appears to have been a competent fashion, at least in

part.

Dr. Lohrasbe opines that Mr. Harder was likely severely depressed between February 1998 and November 2001 at which time the alleged infractions occurred. Dr. Lohrasbe went on to note that he was not in a position to comment on Mr. Harder's mental state at the specific times of the alleged infractions over this time frame as he had difficulties in providing an account of his thoughts, feelings, and behaviours during those times. Nonetheless, he went on to offer an opinion that his depression did affect his volition and in fact opined that he did not have the requisite intent to carry out organized activity including dishonest actions. He also opined that his broad range of mental functions relevant to financial management were grossly impaired and this his symptoms and their impact on his functioning were severe."

[23] Dr. O'Shaughnessy then described an approach that is recommended by the American Academy of Psychiatry and Law as the appropriate basis upon which to conduct a psychiatric evaluation in cases such as this. In part, the process involves the following considerations:

"Unlike doing an evaluation for mental state at the time of a specific occurrence, this situation involves doing an evaluation of a person's thoughts, behaviour, and actions over a prolonged period of time. Whereas most individuals being evaluated for mental state at the time of offence are involved with only one occurrence, there are allegations that Mr. Harder has had multiple occurrences over a prolonged period of time. The latter is more difficult to evaluate in part but much easier in other areas, as noted below. Obviously, the behaviour is more difficult to evaluate based on what Dr. Lohrasbe indicated previously, i.e. that Mr. Harder has difficulty in recalling the specific events over multiple occurrences and accordingly it is hard to go through his thought processes on each individual item. It is, however, in many ways much easier as we are able to examine his behaviour, thoughts, and conduct in other areas contemporaneous with the alleged improprieties. Specifically, during this period of time Mr. Harder was in the practice of law. I have little doubt that his practice was doing very poorly and no doubt this in turn was related to his Mood Disorder at the time. By the same token, it is also clear that he was in fact able to appear in front of the B.C. Supreme Court as well as immigration boards. His behaviour and in particular his capacity to focus and to intend actions in this period of time can be easily assessed as there is a written record of his appearances. Dr. Lohrasbe appropriately notes that depression not only affected Mr. Harder's behaviour financially but also in every other domain of his life. The latter would have not only been restricted to dishonest actions but honest actions as well. If one were to accept Dr. Lohrasbe's opinion that his executive functioning and his capacity for goal-directed actions and for forming intent would have been grossly impaired in his business, one would have assumed such behaviour would have been noted in his non-business behaviour, e.g. his attendance at trial etc. One would be hard-pressed to believe his attendance at trial was not goal-directed, focused, and attentive nor would one think that he had gross impairment of judgment to the point where he would be unable to intend on logical consequences of his actions. In parallel, one assumes that when he was representing his clients in the Court that he would know he was doing so and that he would have the capacity to deal with complicated behaviours involved in immigration cases or financial transactions as noted in the cases you provided."

[24] Dr. O'Shaughnessy went on to observe:

"If indeed all the financial problems were simply seen as a product of sloppy accounting and lack of vigilance and attention to his bookkeeping, then I would concur that the depression played a significant role in his behaviour. On the other hand, however, if the trier of fact accepts the statements of his accountant that he was repeatedly informed that he was inappropriately taking money, one would take

a very different view of the extent of his mental illness and how it impacted his behaviour and judgment. Further, if there is any evidence that he was trying to balance accounts, rationalize or hide his behaviour, or evidencing more complicated financial transactions, one would certainly not conclude that his behaviour was significantly impacted by any depression."

[25] Dr. O'Shaughnessy concluded as follows:

"In summary, there are significant discrepancies in the information available that need to be determined by the triers of fact before any psychiatric opinion regarding Mr. Harder's mental competency and responsibility can be determined. Further, the forensic assessment of Mr. Harder neglected to address critical issues pertaining to the specific behaviours and financial transactions that would be seen as part of the practice guidelines of doing this type of evaluation. Further, there are significant discrepancies in the description of Mr. Harder's mental state by Dr. Lohrasbe during this time frame versus Mr. Harder's apparent behaviours in the Courts and Immigration panels that cannot be easily reconciled. If indeed he was so grossly impaired in his judgment and capacity to attend, concentrate, and intend goal-directed behaviour regarding his financial transactions, that he would be similarly impaired in all other professional activities including his legal practice. Correspondingly, if in fact he did not demonstrate the degree of impairment in the non-financial aspects, one would not conclude he would have been impaired in his capacity to know that the use of trust funds was improper or be wilfully blind to its impropriety. While Dr. Lohrasbe did not specifically mention whether or not Mr. Harder met the test for the insanity defence, i.e. incapable of appreciating the nature of the act of that it was wrong, I am assuming from his report that he did not reach such a conclusion. Further, one would be hard-pressed to imagine he would have met the requirements of this insanity test during the period of time he was actually practising law."

The Witnesses:

R.D.

[26] Ms. D. was the employee of the Respondent's office who had primary responsibility for maintaining the trust account ledgers. Ms. D. had no formal trust accounting training and only a limited amount of trust accounting experience. Although there was some confusion as to the date when she commenced her employment with the Respondent, it was clear that she was working in the office at all times relevant to the matters before this Panel and that she was working in the office on a part time basis at the time the Respondent ceased practicing.

[27] Ms. D. testified that upon the commencement of her employment the trust account ledgers were approximately two months "behind", and that during the full time of her employment with the Respondent she was always struggling to get caught up. Ms. D. testified that she was not provided with any training when she began and that there was no transition assistance available to her to help her to understand the existing trust accounting systems of the practice when she began her trust accounting work with the Respondent.

[28] Ms. D. described the Respondent's banking practices with the [Bank] Account and advised that due to problems with Revenue Canada, the Respondent maintained no general account. The Respondent transacted his "general account" banking activity through a ledger in the trust account which Ms. D. identified as Account 3591.

[29] Ms. D. described the existence of a "blue ledger" book which was maintained primarily by the

Respondent, and was kept in his office. The blue ledger was a manual record of the trust account activity of the Respondent's practice and was maintained by Ms. D. on a daily basis to the extent that she was provided with information by the Respondent as to deposits and withdrawals from the trust account. Ms. D. testified that she was almost always provided with deposit information by the Respondent on a daily basis but that he did not always provide her with information on withdrawals from the trust account.

[30] In addition to the blue ledger, Ms. D. prepared a Trust Account Balance tracking methodology using a system of her own devising on her computer. Ms. D. testified that due to the inaccuracy of the information with which she was provided, the trust account records rarely gave an accurate picture of the state of the trust account balances. Ms. D. was confident however that the "Account Balance Report" prepared by her on a daily basis was indeed an accurate report of the trust liabilities owned by the practice to clients.

[31] Ms. D. testified that from time to time she brought to the Respondent's attention information that the trust account was "short" due to the fact that there were insufficient funds on deposit to meet the liabilities of which Ms. D. was aware. Ms. D. testified that she was aware that there were significant errors in ledger 3591, the Respondent's "personal" account and that those errors were the result of the fact that she was not provided with information about deposits and withdrawals in respect of that account.

[32] Ms. D. testified that her difficulty in providing a trust account reconciliation was caused in large measure by the inaccuracy of the information she had with respect to account 3591. Ms. D. testified that she recalled telling the Respondent that the trust account was \$17,000.00 "short". He told her that she must have made a mistake and that that could not be the case. She testified that after she brought her awareness of the initial trust shortage to his attention the Respondent would ask her from time to time as to the magnitude of the trust shortage.

[33] Ms. D. testified about events which took place on November 6, 2000. On that day Ms. D. was directed by the Respondent to prepare a cheque drawn on the trust account at the [Bank], (on the G. Estate), for deposit to the pooled trust account at the [Bank]. She testified that the Respondent advised her that a trust cheque was going to "bounce" and that it was necessary to deposit the funds to the [Bank] Account from the trust account maintained at the [Bank] in order to cover the cheques needed for a real estate transaction that was closing on that day.

[34] Ms. D. testified that the Respondent went to the bank every day. Ms. D. testified that the Respondent was aware on a daily basis of the amounts of money that were owing by the firm to the clients of the firm. It was evident to her that the Respondent had a very good grasp of the state of the trust account at all times.

[35] Ms. D. gave evidence that when the Panel was reviewing the reports that were available from the law firm, that not all of her work product and reports were available to the Panel. Her evidence was that she had prepared other documents and other reports that were not included in the material that was provided to the Panel or to Ms. D. for examination while she testified. She was not aware of the location of the "missing" records.

[36] It was Ms. D.'s evidence that she was responsible only for the trust account and that she did not have responsibility for dealing with the general account matters as those were handled by the Respondent. Ms. D. testified about the fact of a "Facs" record box which was maintained in her general area of the office into which box was placed bills and receipts with respect to the law practice of the Respondent. Ms. D. described that the general account part of the practice and particularly the maintenance of the contents of the Facs box of records as being "not her job".

[37] Ms. D. testified that the Respondent did not make enough money to pay his bills, that he was indebted to a number of trade creditors, including his landlord (which required a re-location of the office - an event

organized by Ms. D.).

[38] Ms. D. testified that the payment of her salary was dealt with on an "as available" basis and that she did not receive a regular pay cheque from the Respondent. She described a circumstance when the Respondent would ask her how much she needed to get through the weekend and he would give her that money, often in cash. When the Respondent's practice closed it was Ms. D.'s evidence that approximately \$1,500.00 was owing to her on account of unpaid wages.

Bill Kinsey

[39] Mr. Kinsey is a forensic accountant who conducted an audit of the Respondent's practice. Mr. Kinsey presented two reports at the Hearing. The first report contains Mr. Kinsey's report with respect to the activity in the [Bank] Trust Account while the second report deals with various accounting ramifications of the immigration files conducted by the member and by B.P. By agreement between counsel, Mr. Kinsey's reports were accepted as evidence of the truth of the contents subject to either parties ability to argue about inferences that were to be drawn from the reports. Mr. Kinsey's reports are essentially self-explanatory and no significant issue was raised with respect to the matters contained therein. It is upon the basis of Mr. Kinsey's reports that the conclusions of fact with respect to the range of the trust shortage in the Respondent's account were provided.

Dale Harder (Respondent)

[40] The Respondent gave evidence at the hearing. He described a troubled childhood and teenage period in his life where he excelled in athletics, particularly hockey. He described a period of time when his practice was financially successful although that is no longer the case. He said that he has no assets at this time, and that he is receiving no disability income.

[41] The Respondent's evidence was that he relied entirely upon R.D. to do the financial accounting for the law firm. His evidence was that he was not aware that he had spent more money from account 3591 than he had on deposit. His evidence was that he would not have done that had he been aware of the shortage. He described the fact that his mental processes were very clouded at this period of time and that he was not thinking clearly. His evidence was that Ms. D. told him that account 3591 was always "fine". His evidence was to the effect that he relied entirely upon Ms. D. to provide him with reliable information with respect to the trust account balance.

M. D.

[42] Mr. D. gave evidence with respect to his relationship with the Respondent. He testified that he and the Respondent have been engaged together in a business relationship, with Mr. D. acting as the CEO of a business venture belonging to the Respondent. Mr. D. testified that theirs had been a relationship fraught with difficulties - Mr. D. testified that he had been fired by the Respondent on three separate occasions.

[43] Mr. D. confirmed that he did not have any particular credentials to qualify him as an accountant, but that he had worked in that field for some years. He was mostly a businessman with a number of differing engagements. He attended at the offices of the Respondent from time to time to assist with immigration matters being conducted in the office. He has some experience with those matters. In general terms, Mr. D.'s evidence did not significantly impact upon matters before the Panel.

B.C.

[44] Ms. C. worked for the Respondent doing some conveyancing and litigation file work. She worked from 1977 to 1979 and then again from May to September of 2001 when the practice was closed. She described her duties as receptionist, secretary, and gofer. Ms. C. transported the Facs box of receipts and bills described earlier to the home of J.S., a former bookkeeper for the Respondent.

[45] She described the Respondent as being in very bad shape during the last months of his practice. She also observed at this time that Ms. D. was not in regular attendance at the office. That she was instead working half days two or three times a week. She testified that the circumstances around the termination of the practice had indications for her that the Respondent was on the verge of a nervous breakdown. Ms. C. confirmed that she finally quit because the Respondent was not properly paying her wages. She described circumstances toward the end of the practice when the Respondent would give her post-dated cheques on account of her salary and say that she should not cash those cheques at this time but instead wait a few days. When she would ask him for payment he would say "come back tomorrow" .

J. S.

[46] Ms. S. gave evidence that she was a self-employed bookkeeper. She had many years experience as a bookkeeper and started working for the Respondent in September of 1999. She worked for several months from September, 1999 through January of 2000. She confirmed that she had never worked for the Respondent at the same time as R.D. She described that she had been employed to set up a trust account and she confirmed that a general account did not exist. Ms. S. described the circumstances of her leaving the employment of the Respondent due to the fact he was not paying her properly for the work that she was doing. She testified that she was mostly paid in cash. She confirmed that the practice was in considerable difficulty with Revenue Canada with respect to remittances for GST. She was of the opinion that the practice was in jeopardy of being closed down by Government auditors.

[47] She described her experiences with the Respondent and noted him to be very erratic, moody and of shifting moods. He was prone to yelling at the staff when things were not going as he thought they ought to go.

Burden of Proof

[48] Counsel for both the Law Society and the Respondent provided submissions on the appropriate burden of proof to be met in these circumstances. Counsel agreed that the burden of proof upon the Law Society is somewhat less than that which would be required in a criminal standard, namely beyond a reasonable doubt. It is also true that the burden is well past the balance of probabilities that would prevail in a civil case.

[49] The jurisprudence on this subject makes it abundantly clear that the standard of proof will vary according to the gravity of the consequences. Where a professional's reputation is at stake and the consequences of an adverse finding are significant or severe, the burden of proof to be met must be substantially higher than in those circumstances where no such adverse consequences are anticipated.

[50] The Panel notes the words of Mr. Justice Taylor in *J.C. v. The College of Physicians and Surgeons of British Columbia* where Mr. Justice Taylor spoke on the burden of proof as follows:

"In the present case, the Disciplinary Committee considered the required standard at the outset of its report. It says the onus of proof proving the facts against the Doctor rests with the College. To

discharge that burden a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence. The case for the College must be proven by a fair and reasonable preponderance of credible evidence. This is essentially the view adopted by McLaughlin J. as she then was in the decision of this court in *Jory v. The College of Physicians and Surgeons*."

[51] Mr. Justice Taylor goes on to say

"While the cases provide no clear rule, the most helpful terms used in various judicial pronouncements on this subject seems to me to be the word "convincing" . To be convinced means more than merely persuaded. I think the test to be applied in the present case is whether on the evidence before us, the Committee could properly have been convinced that the patient had told the truth in making her accusations of sexual misconduct against the Doctor."

[52] The decision of Madam Justice McLachlin in *Jory v College of Physicians and Surgeons of B.C.*, [1985] B.C.G. No. 230, Vancouver Registry A850601 is instructive on this subject where the following appears:

" The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence.....The evidence must be sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community:

[53] The Panel adopts this characterization of the standard of proof for the purposes of these deliberations.

Discussion

[54] As noted earlier, this Hearing was entirely about whether or not Count 7 to the Schedule to the Citation had been made out. More particularly, did the Respondent misappropriate the funds which all parties acknowledged were used by him to the extent of somewhere between \$42,000.00 and \$56,000.00.

[55] A definition of misappropriation is found in the case of *The Law Society of British Columbia vs. Andres-Auger* [1994] L.S.D.D. No. 127. "Misappropriation" or "wrongfully converting money" at least requires proof of the appropriation being wrongful, and means more than merely receiving money to which you are not entitled. There must be some mental element amounting to wrongdoing. This need not be the equivalent of criminal conduct such as dishonestly or fraud. Incompetence or some degree of carelessness may be all that is necessary.

[56] A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 N.J. 209 @ 221 [S.C. 1989] where the Court stated "Misappropriation is any unauthorized use by the lawyer of client's 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" . [. . .] as we stated in *Re Noonan* [. . .], knowing misappropriation consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking" [. . .]. 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.

[57] It is clear that the Respondent made an unauthorized use of client's funds on deposit. The evidence of Mr. Kinsey on the subject was uncontroverted and the magnitude of the client's funds that are missing and

which have not been repaid is described above. There was abundant evidence before us of the dramatically deteriorating health of the Respondent at the relevant periods of time and we are asked to find, as a result of these health problems, that the Respondent did not know what was going on with his trust account and that he was misled by his bookkeeper R.D.

[58] We note that it is the Panel's view that the Respondent did indeed suffer from a significant and ongoing depression which had a dramatic impact on both his method of practice and his ability to do so. His story is a sympathetic one in that his untreated health problems clearly led to a variety of unhappy outcomes. We are however faced with a problem of determining whether the health issues as described both in the viva voce evidence and in the medical reports provide an excuse for the wrongful taking of the client funds. It is the view of the Panel that the medical reports are inconclusive on the key issue before the Panel.

[59] The explanation of the consequences of the health issues provided by Dr. Lohrasbe is troubling in some respects. He suggests that the Respondent is so impaired by his ailments that he is unable to form any meaningful intentions, including the intent to commit a dishonest act. This lack of ability to form an intent however is ascribed to a man who is, at the same time, engaged in the daily practice of law, including attendances several times per week in court on trial matters. The inconsistency in the two outcomes is noted by Dr. O'Shaughnessy and although he did not ever interview the Respondent, the problems with the conclusions of Dr. Lohrasbe are clear to him. Those problems are similarly clear to this Panel.

[60] We are simply not able to accept that the same man who is going to court regularly, who is going to the bank on a daily basis to deposit and withdraw funds, who is asking staff to hold on to pay cheques for a day or so, is at once unable to form meaningful intentions and undertake significant choices. We are indebted to Dr. O'Shaughnessy for the clarity of the approach that he suggests should be adopted for analyzing situations such as those of the Respondent.

[61] While it is not entirely clear that we are obliged to do so, we have considered whether or not the Respondent was aware of the nature and extent of his encroachment upon his client's funds at the material times. It is the view of this Panel that there are two compelling factual circumstances surrounding the practice of this Respondent that make it impossible to find that he was not aware of the fact that he was using client funds to meet his personal and practice financial obligations.

[62] The first circumstance is the Respondent's almost compulsive preoccupation with the daily balance in this trust account. There is abundant evidence of the fact that the Respondent was at all times, even while suffering the most difficult of physical symptoms from his health issues, preoccupied to a significant and ongoing extent with the daily balance in his trust account. There is no rational explanation for this preoccupation save and except the belief that the preoccupation was the direct result of the Respondent's apprehension that the trust account was overdrawn and that he was using client funds to finance personal expenses.

[63] The further evidence of this knowledge in the Respondent lies in an examination of his strategy of delay in making payments on account of salary obligations to employees - the delivery of post-dated cheques with the request that the same be held for several days before presentment, all point to a circumstance where the Respondent was very much on top of the financial obligations that are attendant upon running a trust account in a law firm.

[64] We should note on this point, that but for the fact that the Respondent was co-mingling his own funds with client trust funds, itself a prohibited activity, the matter of the balance standing to the credit of the law firm in the trust account would be of no interest to the Respondent at all. This, because barring some error in the preparation of the records, the trust account will always have in it an amount equal to the aggregate of the trust liabilities owed by the firm to its clients.

[65] The Panel was asked to accept that the Respondent was unaware of what was going on with his trust account activity while at the same time hearing myriad evidence of the Respondent's preoccupation with that same trust account. The two explanations cannot stand together as one must clearly be mutually exclusive of the other. It is the view of this Panel that the Respondent was very much aware of what was going on with his trust account at all material times and knew that he was using client funds to finance his own personal and law firm expenses. In any circumstances of this hearing where evidence presented to us would contradict this conclusion, that evidence was rejected by the Panel.

[66] The second salient event upon which the Panel placed great weight when determining the state of mind of the Respondent with respect to the activities in his trust account, is the fact that on November 6, 2000 the Respondent transferred funds from an unrelated trust account to the [Bank] Trust Account with a view to ensuring that a trust cheque on a real estate transaction did not "bounce" . The evidence of Ms. D. on this important subject was not contradicted in any material way by any other evidence presented to us and the factual evidence in the Kinsey Reports with exhibited cancelled cheques establishes the truth of these events.

[67] Can it be seriously suggested that the Respondent was not aware of the trust shortages when he specifically arranged for the transfer of funds from another un-related trust account to the trust account in which he is co-mingling his own financial activity, so as to ensure that on a particular day a trust cheque will clear the bank and so that the public (or the Law Society) do not become aware that a trust shortage exists?

[68] The directions given by the Respondent to Ms. D. to create a trust cheque to cover the anticipated shortfall served to demonstrate the wisdom of the vigilance that he had consistently brought to bear with the daily verification of the outstanding trust balances. The events of November 6 th, 2000 were the payoff received by the Respondent for he was able to forestall the discovery of the trust shortage for a further period of time by having sufficient funds transferred to this trust account to eliminate a pending bounced cheque.

[69] We note the Respondent's attempt to visit the responsibility for these events upon the shoulders of his inexperienced and untrained bookkeeper R.D. We think it is an unfortunate characterization of Ms. D.'s responsibilities and as indicated herein, we do not find the Respondent's explanations to be credible where they conflict to those of Ms. D. It is indeed regrettable that the Respondent found it necessary to identify Ms. D. as the cause of his difficulties when indeed the Respondent was the sole author of his misfortunes and ought to have taken responsibility for the same.

Conclusion

[70] It is the finding of this Panel that the Respondent knowingly misappropriated funds held by him on account of client trust obligations as described in count 7 of the Citation and that by doing so he professionally misconducted himself.

[71] For the record, we confirm that we have made a finding of professional misconduct in respect of all counts of the amended Citation including all of the counts in the Citation where professional misconduct was acknowledged and conceded by the Respondent at the outset.

Agreed Statement of Facts and Admissions

Service

1. Mr. Harder agrees that the amended Citation and notice of hearing were served on him and that he waived the requirements for service under Law Society Rule 4-15.

Procedure on this Hearing

2. Mr. Harder has voluntarily agreed to proceed by way of this Agreed Statement of Facts and Admissions ("Agreed Statement") .

3. The headings within this Agreed Statement reflect the organization and contents of the enumerated sections in the amended Citation, but do not form part of this Agreed Statement and do not constitute facts or admissions.

4. Mr. Harder has elected to have this matter heard by a three member panel.

5. Mr. Harder understands that this hearing panel can either accept or reject any or all of the Agreed Facts and Admission in its sole discretion.

General Background

6. Mr. Harder was born on April 23, 1943 and called to the bar of British Columbia on June 29, 1972. He practised in Kelowna from 1973 onwards and as a sole practitioner starting in December 1993.

7. In both 1993 and 1998, Mr. Harder advised the Law Society that he was having financial difficulties and was considering bankruptcy. In 1998 and 1999, Mr. Harder applied to the Discipline Committee of the Law Society for a waiver of the penalty for filing his Accountant's Report late.

8. In February 1998 and August 2000, the Law Society received complaints from Mr. Harder's clients who were dissatisfied with the service Mr. Harder was providing. Although Mr. Harder was referred to the Practice Standards Committee, the file was eventually closed with a senior practitioner being asked to meet with Mr. Harder (no report back being required).

9. On September 26, 2002, the Law Society opened an unpaid creditor complaint file.

10. From early November 2000 to June 2001, Mr. Harder worked in association with Dr. B.P., who operated as [company]. Dr. P. worked primarily, if not exclusively, for clients who sought to have their Workers Compensation Board Claims assessed and possibly appealed (the "WCB clients") .

11. On February 1, 2001, the Discipline Committee considered another request from Mr. Harder to waive penalties for filing his Accountant's Report late.

12. On February 7, 2001, based on the contents of Mr. Harder's 2000 Accounting Report and late filings of Accountant's Reports, the Executive Director of the Law Society ordered an audit of Mr. Harder's practice pursuant to Rule 3-79. That audit commenced on April 3, 2001 and was conducted in part by Roseanne Terhart and in part by Bill Kinsey. Mr. Kinsey completed the audit on or around November 20, 2002.

13. The Law Society received more client complaints after February 7, 2001.

14. On November 1, 2001, Mr. Harder was referred to the Practice Standards Committee and a practice

review was ordered.

15. On November 16, 2001, Mr. Harder was compelled to provide the Law Society with an undertaking not to engage in the practice of law until the aforementioned audit was complete or until relieved of the undertaking by the Discipline Committee. At the same time, with Mr. Harder's consent, custodian of his practice was appointed.

16. On December 21, 2001, Mr. Harder filed for bankruptcy. Mr. Harder was discharged from bankruptcy on December 22, 2002.

17. On October 10, 2002, Mr. Harder provided the Law Society with an undertaking not to engage in the practice of law until February 28, 2003 or until relieved of his undertaking by the Discipline Committee.

18. Mr. Harder ceased membership in the Law Society on January 1, 2003 for non-payment of fees.

19. On January 9, 2003, the Chair of the Discipline Committee of the Law Society directed the issuance of a citation to Mr. Harder.

20. In 1998, Mr. Harder was formally diagnosed with Type II Diabetes Mellitus and hypertriglyceridaemia. Mr. Harder did not attend to his Diabetes immediately at the time of his diagnosis. Mr. Harder has also since been diagnosed with chronic major depression, which Dr. Lohrasbe says preceded 2000. Mr. Harder was first prescribed anti-depressant medication in or about April 30, 2001. He began to seek psychiatric treatment in or about early 2002. Mr. Harder has also since been diagnosed with secondary hypogonadism with low testosterone levels. Mr. Harder's previous treating physician has stated that these conditions would have contributed to general malaise and would explain some of the very significant fatigue and lethargy, and would have contributed to mood changes as a result of fluctuating blood sugar levels. Mr. Harder's treating physician also indicated that the low testosterone levels would have affected mood, enthusiasm, general drive and ability.

Mr. Harder's Practice

21. Mr. Harder maintained an active practice up and until November 16, 2001. He had a general practice, with immigration and real estate work representing a significant portion thereof.

22. Mr. Harder's trust accounts were pooled accounts. His principal account was at [Bank] (Account No. 4902-9-01), although it was later taken over by the [Bank] (Account No. 7135536)(the "[Bank] Account") .

23. Due to financial difficulties, Mr. Harder was unable to maintain a general account and therefore used the [Bank] Account for business and personal transactions as well.

24. An account at the [Bank] bearing no. 09043-032121662 (the "662 Account") was used exclusively with respect to the WCB clients.

25. Mr. Harder had four other bank accounts in which he kept client funds.

26. The balance of Account 3591 could be determined by subtracting the total of Mr. Harder's trust liabilities from the amount on deposit in the [Bank] Account.

The Audit

27. Bill Kinsey conducted a forensic audit of Mr. Harder's records. The report of Mr. Kinsey's findings is divided into two parts: Part I deals with non-WCB clients and Part II deals with WCB clients (collectively, the

"Audit Report") .

Allegations in the Citation

A. Failing to serve the clients in a manner which would be expected of a competent lawyer, contrary to Chapter 3, paragraph 3 of the *Professional Conduct Handbook*

28. Mr. Harder did not maintain the office systems required to provide quality service to the public or to adequately protect his client's interests. Examples, in addition to those described herein, include:

- a) poor management of personnel and supervision of employees;
- b) poor billing practices, including duplicate billing and failing to describe the services rendered;
- c) failing to maintain adequate and up-to-date accounting system
- d) failing to maintain time records;
- e) poor knowledge of client files, particularly those controlled by Mr. P.;
- f) failing to respond to clients in a timely manner; and
- g) failing to pay government remittances.

29. The WCB files were managed primarily by Dr. P. Mr. Harder had very little, if any, knowledge about these files.

B. Failing to hold and remit Provincial Sales Tax

30. Mr. Harder has failed to hold and remit some of the provincial sales tax that he has collected from his clients. As of May 7, 2001, Mr. Harder owed \$19,331.10 to the Government of British Columbia.

C. Failing to hold and remit Goods and Services Tax

31. For all periods ending on or after March 31, 1994, Mr. Harder failed to hold and remit some or all of the federal goods and services tax that he had collected from his clients. As of December 7, 2001, Mr. Harder owed some \$143,494.71 to the Government of Canada.

D. Breach of Law Society Accounting Rules

32. Mr. Harder has committed the accounting rule infractions summarized in the Audit Report. In the Audit Report, Mr. Kinsey did not cross-reference said infractions to particular files saying that there were too common.

33. In Part I of the Audit Report, Mr. Kinsey concluded as follows:

General account records were not prepared for many months, perhaps years. Trust records were prepared but not reconciled or otherwise corrected for at least a year and a half. Not all trust deposits and withdrawals were recorded.

34. In Part II of the Audit Report, Mr. Kinsey concluded as follows:

[Mr. Harder's] WCB trust accounting records are not fully informative and do not cover the entire period.

Appendix C, my analysis of the relevant Bank account #662, combines the cashbook and client ledger sheet functions. Its weakness – caused by a lack of information – is that not all transactions are identifiable with client accounts. [Emphasis in original]

D.1 Failing to account to clients for funds received on their behalf, contrary to Rule 3-48

35. There are approximately 18 clients that are owed funds from Mr. Harder's trust account. The amount owed to any one of them is between \$8.74 and \$85,818.42. In total, for the purposes of this Agreed Statement only, the parties agree that the amount owed to these clients is between \$129,733.45 and \$143,963.55.

36. While there are monies available in Mr. Harder's trust accounts, they are insufficient to meet the liabilities described herein.

37. Mr. Harder occasionally failed to issue a receipt when he received client funds. In addition, he withdrew fees from trust without rendering an account or without delivering it to his clients.

38. On at least one occasion, Mr. Harder issued an invoice claiming disbursement costs that had not yet been incurred.

39. The Kinsey report states that on occasion, Mr. Harder failed to account to a particular client for monies he held in trust after he had completed the work for that client. At the time Mr. Harder ceased practicing, this was true for approximately 8 clients, in amounts between \$8.74 and \$1,571.03, and for periods of up to 15 months.

D.2 Failing to maintain sufficient funds in Mr. Harder's trust account to meet trust obligations to his clients, contrary to Rule 3-55

40. In Part I of the Audit Report Mr. Kinsey concluded that: "Trust shortages have existed since April 2001" .

41. Mr. Kinsey was unable to conclusively determine trust fund shortages for a variety of reasons, including:

- a) an approximate \$10,000 disagreement about which of several billings are valid (G. Estate complaint);
- b) a \$5,100 uncertainty of whether or not a fee was earned (R.B. complaint);
- c) missing accountings for trust funds;
- d) missing banking documents and other records;
- e) client funds apparently paid directly to [company] or P. and not recorded in Mr. Harder's books;
- f) assessment reports prepared and provided to clients, albeit sometimes late; and
- g) work done in preparation for launching a WCB appeal – before reaching a stage where the client can be shown to have benefited.

42. Reasons for the trust shortage include but are not limited to:

- a) general account receipts and payments dealt with through the trust account because no general bank account was maintained;
- b) missing bank documents, other lacking adequate explanations;
- c) trust money never deposited;
- d) insufficiency of client accountings or other explanations to indicate whether trust funds were properly

dealt with;

- e) failure to reconcile trust bank accounts for many months;
- f) trust balance problems not corrected;
- g) conflicting Purchaser's and Vendor's Statements of Adjustment;
- h) unexplained cash withdrawals; and
- i) trust withdrawals not identified with specific client accounts.

43. At the time Mr. Harder ceased practicing, the minimum trust shortage was between \$42,396.11 and \$56,626.21.

D.3 Failure to promptly report trust shortages to the Law Society, contrary to Rule 3-66

44. With reference to the trust shortages described herein, such shortages were not reported to the Law Society, contrary to Law Society Rule 3-66.

D.4 Failure to maintain trust books, records and accounts, contrary to Rule 3-60

45. Mr. Harder failed to maintain trust books, records and accounts contrary to Law Society Rule 3-60. Trust records were prepared but not reconciled or otherwise corrected for at least a year and a half. Not all trust deposits and withdrawals were recorded. In Part I of the Audit Report, Mr. Kinsey noted:

- a) missing deposit slips, and bank debit and credit memos/vouchers;
- b) withdrawals from trust other than by trust cheque which were not recorded in the books or otherwise identified with specific client accounts;
- c) two trust cheques apparently written for the same purpose;
- d) payments for the Land Titles Office and other government bodies made with personal money orders;
- e) trust records were prepared but not reconciled or otherwise corrected for at least a year and a half;
- f) monthly listings of trust balances disclosed "old" balances and overdrawn ones – but were not dealt with; and
- g) transfers between client accounts show on ledger cards but not on any transfer journal or similar record.

46. With respect to the WCB clients, the trust accounting records are not fully informative and do not cover the entire period assessed by Mr. Kinsey. Due to a lack of information, not all trust transactions can be associated with a client account.

47. With respect to the 662 Account, used for the WCB clients, all deposit slips and cheques have not been retained. Cheque stubs do not reveal the client accounts involved.

D.5 Failure to maintain general books, records and accounts, contrary to Rule 3-61

48. Mr. Harder did not maintain a general account for some time, nor did he maintain a separate set of records to record general account transactions.

49. Mr. Harder's records were not fully informative in that they did not always identify:

- a) the amount, date of receipt and the source of all general funds received; and
- b) the cheque or voucher number, the amount, date and name of each recipient of each disbursement.

50. Mr. Harder did not maintain the accounts receivable ledger described in Law Society Rule 3-61, or any other suitable alternative.

D.6 Failure to record general transactions within 30 days and trust account transactions within 7 days of the transaction, contrary to Rule 3-63

51. Mr. Harder sometimes made withdrawals and wrote cheques (including post-dated cheques). These transactions would not be recorded until some time after the transaction occurred.

52. Mr. Harder also received funds that were never recorded in an account whatsoever. For example, Mr. Harder received funds from clients, yet the receipt of these funds is not recorded in any of Mr. Harder's records.

53. On numerous occasions, Mr. Harder failed to record general transactions within 30 days and trust account transactions within seven days of the transaction.

54. With respect to some complaints, funds were received on clients' behalves, yet the receipt of these funds is not recorded in any of Mr. Harder's records.

D.7 Withdrawal of funds from trust by means other than a cheque marked trust and without sufficient funds to support the withdrawal

55. On numerous occasions since April 2001, Mr. Harder has made withdrawals from trust accounts other than by trust cheque: Audit Report, Part I. For example, Mr. Harder frequently withdrew funds from the Laurentian Account while visiting the bank.

56. When Mr. Harder took fees from trust, the following frequently occurred:

- a) funds were transferred within the Laurentian Account by using ledger entries only (i.e. no cheque, transfer journal or similar record);
- b) fees were taken before rendering an account or before delivering the account to the client; and
- c) cheques relating to Mr. Harder's fees were either payable to Mr. Harder and endorsed over to, or simply paid directly to, creditors, staff and clients.

57. With respect to some 16 clients in particular, Mr. Harder paid out more than was available to the credit of the particular client on whose behalf the payment was being made. The amount by which any particular client's account was overdrawn is between \$0.90 and \$3,910.91. With respect to the sum of these clients, Mr. Harder paid \$9,334.58 more than was available in trust.

58. Mr. Harder made payments from trust while his trust accounting records were not current.

59. See also section D.2 above regarding trust shortages.

E. Failure to render accounts or rendered accounts that did not contain a reasonably descriptive statement of services, contrary to Section 69 of the *Legal Profession Act*

60. Mr. Harder frequently rendered accounts without reasonably descriptive statements of services or

without any statement at all.

61. In many instances, prior to setting out the fee amount, Mr. Harder wrote [Audit Report, Part I]:

" TO OUR ACCOUNT HEREIN:

To our account: etc."

62. From early November 2000 onwards and with one exception, Mr. Harder issued no statements of account with respect to the WCB clients. For example:

a) concerning the L.B. Complaint, Mr. Harder's office paid out all trust funds received from L.B. himself and ALR without ever invoicing the client, though Mr. Harder submits that he had never met L.B. and only became aware of him after the Law Society commenced its investigation;

b) Mr. Harder never prepared or provided a statement of account to a client, D.T., although D.T. provided several hundred dollars to Mr. Harder (the precise amount being somewhat difficult to assess from the records);

c) concerning the P.W. Complaint, Mr. Harder failed to prepare a statement of account prior to withdrawing funds from his trust account (or at any other time) and failed to record any time spent on this file.

F. Failure to adequately supervise Bryan Pritchard, contrary to Chapter 12 of the *Professional Conduct Handbook*

63. On November 2, 2000, the Law Society of British Columbia obtained an order prohibiting Dr. Pritchard from engaging in the unauthorized practice of law. The Law Society's concern involved Dr. Pritchard's representation of individuals in WCB-related matters.

64. On or about November 4, 2000, Mr. Harder and Dr. Pritchard entered into an agreement whereby the two would work on the WCB files in association with one another. Their agreement provided that Dr. Pritchard would work in a paralegal type capacity whereas Mr. Harder was the supervising lawyer. Under the arrangement, Dr. Pritchard was to receive 80% of the profits from the WCB files, while Mr. Harder was to receive only 20% for his supervisory role, with Dr. Pritchard bringing each file to his attention.

65. On or about November 8, 2000, Dr. Pritchard sent a letter to the WCB clients advising them of the court ruling and of his new position as a paralegal supervisor with the law firm of Dale Bruce Harder. In his letter, Dr. Pritchard said that he would be able to maintain the every day management of his clients' claims but under the direct supervision and control of Mr. Harder. Dr. Pritchard then went on to say that the WCB clients would now have two representatives acting on their behalf instead of one but that there would be no increase in fees as quoted.

66. The fees charged and services promised to the WCB clients followed a regular pattern. Clients normally sought to have WCB decisions assessed and possibly appealed. New clients paid \$570.00 for a preliminary assessment of their WCB decisions (\$500.00 in fees and \$70.00 in taxes). If they chose to appeal the WCB decision, a further \$1,140.00 was requested (\$1,000.00 in fees and \$140 in taxes).

67. On January 24, 2001, the following advertisement appeared in the Kelowna Capital News (although Mr. Harder denies having any knowledge of it):

WCB Problems? Are you being pushed around? Need a fighter in your

corner? Call for an appointment

with our para-legal supervisor Dr. Bryan W. Pritchard LL.B, B.A., LL.M,
M.Ed., PhD., Dip./Trust Adm.,

A.C.I.S., P. Adm. All files handled with care and consideration. DALE
BRUCE HARDER LAW FIRM

Kelowna, 763-7700, 1-800-860-8581

68. By letter dated February 13, 2001 (received by Mr. Harder on February 19, 2001), the Law Society of British Columbia expressed concern that Dr. Pritchard was working out of Mr. Harder's office on matters requiring professional skill and judgment that only a lawyer can provide pursuant to Chapter 12, Ruling 2 of the *Professional Conduct Handbook*.

69. At all relevant times, Mr. Harder was aware that Dr. Pritchard was not licensed to practice law. Mr. Harder was aware of his obligations to supervise Dr. Pritchard.

70. There were approximately 23 WCB clients.

71. Although not part of the initial agreement between Dr. Pritchard and Mr. Harder, while under Mr. Harder's supervision, Dr. Pritchard did in fact:

- a) have conduct of files without any direct supervision;
- b) maintain client files in a location other than Mr. Harder's offices;
- c) meet solely with clients;
- d) take instructions from clients on substantive matters;
- e) provide legal advice to clients;
- f) accept funds and issue receipts from ALR; and
- g) disburse retainer funds without ever sending a bill to clients.

72. A complainant, Y.H., saw a report in the paper about the unauthorized practice order against Dr. Pritchard. Accordingly, she sought to have the money she had paid to him returned. After the unauthorized practice order had been issued, Dr. Pritchard issued receipts from ALR to Y.H. for her cash retainers. No retainer letter or statement of account was provided to Y.H. until after the Law Society advised Mr. Harder that one was required. Mr. Harder subsequently issued a statement of account to Y.H. Y.H. never spoke to Mr. Harder; all of her dealings were with Dr. Pritchard.

73. By letter dated March 19, 2001, the Law Society advised Mr. Harder of its concerns and of the Y.H. complaint. In his response dated April 17, 2001, Mr. Harder replied saying: "No accounts were prepared for any of the WCB clients. Due to the "newness" of the WCB accounts, this was unfortunately overlooked." When further information was requested by the Law Society, Mr. Harder responded by fax dated August 15, 2001 and said: "I apologize for the delay in answering your letter of June 5, 2001, as Mr. Brian [sic.] Pritchard was in possession of [Y.H.]'s file" .

74. Concerning the M.B. Complaint, Mrs. B. delivered \$500.00 cash to the receptionist at Mr. Harder's office. An ALR receipt dated November 16, 2000 was issued; however, M.B. did not receive a statement of account from Mr. Harder, and Mr. Harder has no record of having received the funds.

75. In a letter to the Law Society dated January 14, 2003 regarding the L.B. complaint, Mr. Harder wrote:

I wish to say that I was never aware of [L.B.'s] file nor did I ever approve of him to come within my duty of care . . . I do recall [L.B.'s] phone call, but I could not advise him on this WCB file as I knew nothing.

76. Nevertheless, L.B.'s draft assessment report was attached to a letter from Mr. Harder dated February 15, 2001. Neither the draft assessment report nor the letter were signed, although the draft assessment report is marked "rough draft" in what is clearly Dr. Pritchard's handwriting.

77. Mr. Harder and Dr. Pritchard's relationship ended around the end of June 2001, with Dr. Pritchard suddenly abandoning the WCB files.

78. In total, at least 12 WCB clients have complained to the Law Society about Mr. Harder.

79. Mr. Harder has voluntarily taken measures to compensate the WCB clients inconvenienced by his lack of supervision of Dr. Pritchard. Since he has ceased practising, Mr. Harder has provided partial reimbursement of some of the WCB clients that Dr. Pritchard had solicited but that Mr. Harder had never met nor been aware of. The total amount of this restitution is approximately \$3,650.00.

80. Mr. Harder also offered to voluntarily compensate L.B. as restitution.

G. Use of funds received in trust by Mr. Harder in his capacity as a barrister and solicitor

81. As stated above, Mr. Harder paid personal business expenses from the Laurentian Account. He also had money on deposit at the Laurentian Account. From time-to-time, however, Mr. Harder's personal withdrawals from the Laurentian Account exceeded the amount available on deposit. In other words, Account 3591 was overdrawn.

82. Cheques for Mr. Harder's personal and business expenses were nevertheless honoured as there were sufficient client funds in the Laurentian Account to meet those obligations.

83. Although Account 3591's deficit fluctuated over time, when Mr. Harder ceased practicing, there was a minimum trust shortage of between \$42,396.11 and \$56,626.11.

84. On numerous occasions between April 2000 and November 2001, Mr. Harder used client funds by making withdrawals from the Laurentian Account to pay business and personal expenses and causing Account 3591 to be in a deficit situation. These withdrawals were made without entitlement and without the consent, knowledge or authorization of Mr. Harder's clients.

85. In addition to the reimbursement of the above-noted WCB clients under heading G, Mr. Harder, by his own volition, further reimbursed one complainant, K.F., in the amount of \$550.00 in or around September, 2002.

H Failure to render and deliver an account prior to withdrawing funds from trust, contrary to Rule 3-57(2)

86. All monies were removed from the 662 account, used for the WCB clients, yet no billings were issued to them by Mr. Harder, with the exception of one client. This represents some 22 clients who never received an invoice from Mr. Harder.

87. Concerning Mr. Harder's clients, the M. Estate and L.W., Mr. Harder withdrew fees that exceeded the amount he had invoiced to his clients.

88. With respect to Mr. Harder's client, G.J., Mr. Harder withdrew fees worth \$3,065.00 from trust between June 13 and August 1, 2001. The related invoice, however, which shows the amount due as being paid from trust, is dated August 7, 2001.

89. No account was rendered or delivered to a client prior to the withdrawals described in section G.

I. Failure to file Form 47 for the period ending January 31, 2001, contrary to Law Society Rule 3-72

90. Mr. Harder's Accountant's Report (Form 47) for the year ending January 31, 2001 was due by April 30, 2001. When Mr. Harder failed to file his Form 47 on time, the Law Society sent several follow-up letters.

91. Mr. Harder has never filed a Form 47 for the period ending January 31, 2001.

J. Failure to pay the second instalment of annual fees on or before July 3, 2001 and practising while uninsured, contrary to Section 30(7) of the *Legal Profession Act*

92. The second instalment of Mr. Harder's annual fees was due on July 3, 2001. By letter dated July 17, 2001, the Law Society's Member Information Group demanded immediate payment of Mr. Harder's fees.

93. Because Mr. Harder had not paid such fees, meaning that he lacked insurance coverage, the Law Society demanded that Mr. Harder immediately cease the practise of law and surrender both his practice certificate and any proof of professional liability. Mr. Harder responded by fax dated September 24, 2001 and the second instalment of his annual fees was received on September 25, 2001.

94. Mr. Harder practised without insurance from July 1 until September 25, 2001.

Admissions

95. Mr. Harder failed to serve his clients in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer, contrary to Chapter 3, paragraph 3 of the *Professional Conduct Handbook*.

96. Mr. Harder failed to hold and remit the Provincial Sales Tax (Social Service Tax) and Goods and Services Tax as required by provincial and federal laws.

97. Mr. Harder violated the accounting rules described in the Audit Report.

98. Mr. Harder failed to render accounts or rendered accounts that did not contain a reasonably descriptive statement of services, contrary to Section 69 of the *Legal Profession Act*.

99. Mr. Harder failed to adequately supervise Bryan Pritchard, contrary to Chapter 12 of the *Professional Conduct Handbook*.

100. On numerous occasions between April 2000 and November 2001, Mr. Harder used client funds by making withdrawals from the Laurentian Account to pay business and personal expenses and causing Account 3591 to be in a deficit situation. Some of these withdrawals were made without entitlement and without the consent, knowledge or authorization of Mr. Harder's clients.

101. Mr. Harder withdrew trust funds prior to rendering or delivering accounts to some of his clients, contrary to Law Society Rule 3-57(2).

102. Mr. Harder failed to pay the second instalment of annual fees on July 3, 2001 when due and, contrary to Section 30(7) of the *Legal Profession Act*, practised while uninsured until September 25, 2001.

103. Mr. Harder agrees that the conduct set out in the citation and described herein constitutes one or more of:

- a) professional misconduct;
- b) conduct unbecoming a member of the Law Society;
- c) contraventions of the *Legal Profession Act* or rules made under it; and
- d) incompetently carrying out duties undertaken by him in his capacity as a member of the Law Society.