THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING

THE CONDUCT OF **DENNIS ROTH**

A MEMBER OF THE LAW SOCIETY OF ALBERTA

INTRODUCTION

1. On December 10, 11, and 12, 2007, a Hearing Committee of the Law Society of Alberta (”LSA”) convened at the Law Society offices in Edmonton, Alberta to inquire into the conduct of Dennis Roth (“the Member”). The Committee was comprised of Shirley Jackson, Q.C. Chair, Brian Beresh, Q.C., and Roy Nickerson. The Law Society of Alberta was represented by Michael Penny. The Member was present throughout the hearing and was represented by Laura Stevens, Q.C.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 through 4 consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, established the jurisdiction of the Committee.

3. There was no objection by the Member’s counsel or counsel for the LSA regarding the composition of the Hearing Committee.

4. The Certificate of Exercise of Discretion and an Affidavit of Service were entered as Exhibit 5.

5. The position of the parties was that the Hearing should proceed in public and the Hearing Committee directed that it proceed in public. A brief portion of the proceedings was held in private but the matters dealt with in camera did not relate to the merits of the hearing.

CITATIONS

6. Pursuant to Section 56 of the *Legal Profession Act* and the rules of Law Society of Alberta, the Conduct Committee cited the Member for hearing as follows:

> Citation 1: IT IS ALLEGED that you invested your own funds in a venture in which your client had also invested, and that such, conduct is conduct deserving of sanction.
>
> Citation 2: IT IS ALLEGED that you unilaterally altered share certificates, without appropriate or any instructions, and that such conduct is conduct deserving of sanction.
>
> Citation 3: IT IS ALLEGED that you continued, without obtaining the appropriate or any consent, to represent one client, after having represented that client and another, and having been discharged by the other, and that such conduct is conduct deserving of sanction.
>
> Citation 4: IT IS ALLEGED that you invested your own funds in a venture in which your client had also invested, and that such conduct is conduct deserving of sanction.
>
> Citation 5: IT IS ALLEGED that you unilaterally altered share certificates, without appropriate or any instructions, and that such conduct is conduct deserving of sanction.
>
> Citation 6: IT IS ALLEGED that you continued, without obtaining the appropriate or any consent, to represent one client, after having represented that client and another, and having been discharged by the other, and that such conduct is conduct deserving of sanction.

7. At the conclusion of the hearing of the evidence, counsel for the Law Society requested that we "roll" counts 4, 5, and 6 into counts 1, 2, and 3 respectively as they were duplicitous. His application was granted. Counsel then addressed the citations as 1, 2, and 3 and they will be dealt with in that fashion in these reasons.

8. The Hearing Committee, at the request of counsel for the Law Society of Alberta and with the consent of counsel for Mr. Roth, amended the new citation 1 as follows:

1. IT IS ALLEGED that you invested your own funds in a venture in which your client had also invested without disclosing your investment to your client and that such conduct is conduct deserving of sanction.

CONDUCT HEARING COMMITTEE COMPOSITION

9. This three member Hearing Committee heard opening arguments from the parties and all of the evidence presented by both parties. At the conclusion of the hearing of the evidence Mr. Nickerson withdrew from the Hearing Committee with the consent of counsel for LSA and counsel for the Member. The events giving rise to that withdrawal were unforeseen and no one is to be faulted in the circumstances.

10. Section 66 (3) of the *Legal Profession Act* permits a Conduct Hearing to proceed with only two members. With the consent of both counsel for the LSA and counsel for the Member, we continued and completed the hearing.

HISTORICAL RELATIONSHIP BETWEEN THE MEMBER AND CLIENT

11. It will be helpful to the better understanding of our decision to review the historical relationship between the Member and the client, the First Nation.

12. The Member was admitted to the Law Society of Alberta in 1976 and practices in the area of Aboriginal Law, oil and gas law, and corporate law.

13. The First Nation is located northeast of Edmonton, Alberta. The First Nation consists of individuals resident at W and also individuals resident approximately 15 kilometers away at X (also known as Y).

14. The Member commenced acting for the First Nation in 1981-82 providing a variety of legal services. He became aware that the First Nation consisted of individuals resident at W and also individuals resident at X. Despite the single Band list imposed by the Federal government, each community (W and X) elected its own Chief and Councilors who individually governed their respective areas in

relation to “local” matters but who worked collaboratively in a number of other areas including natural resources.

15. In the 1980s, a company called K… was incorporated to assist the First Nation in realizing profits from oil and gas exploration on Band land. The Member incorporated K… with the result being that there was an agreement that profits from the oil and gas exploration would be split equally between the W residents and the X residents and that a return on royalties would be spilt according to a determined population difference with 72% going to W and 28% to X.

16. It was determined by the client in consultation with the Member that sufficient expertise did not reside in the new company and as a result the Member negotiated a joint venture agreement between K… and an exploration company, A…. That joint venture proceeded from 1990 onwards with A… being replaced by T….

17. The joint venture was very successful financially with the result being that K… in 2003 was valued at 18 million dollars.

18. Two of A…’s principals, D.C. and G.F., both geologists, were involved in the A…/K… joint venture and as a result of their efforts received praise and adoration from Band officials and the Member.

19. In the spring of 2003, concerns were raised about the successful nature of K… and the possible tax implications that might arise once the company had earnings exceeding 10 million dollars.

20. Throughout the time from incorporation to the spring of 2003, the Member continued to act as corporate counsel for K…. He was never officially the Chief Executive Officer, although, to some of the witnesses who testified before us, he appeared to be the de facto CEO while no one else filled that position.

21. M.S., a business consultant and also a resident of X was appointed interim CEO on October 26, 2003. He remained in that position until November 2004 when he was replaced by T.H.. Mr. S. never became a Director of K….

22. Mr. S. prepared business plans for the Band, attended K… Board of Directors meetings and prepared applications for funding from the Department of Indian Affairs for K… on a contingency fee of 5% of all funds received

23. In 1986 Members of one Indian Band and Members of another Indian Band (as separate plaintiffs) commenced an action in Federal Court against Her Majesty The Queen in what was referred to as the "gas cost allowance" litigation. If successful, the Plaintiffs will receive a refund of monies allegedly improperly and/or illegally taken by the Federal Government as a natural resource royalty. Millions of dollars are at stake.

24. Since commencement of the action until the end of 2004, the Member was counsel for both sets of plaintiffs. The Plaintiffs approach to the lawsuit and pursuit of it have been the same. It appears accepted that, if settled or successfully prosecuted, the division of the proceeds of the suit may be the subject of some dispute between the two sets of plaintiffs. That prospect has neither hindered nor delayed the action to date. Although the Member is no longer counsel for the other group of plaintiffs a Member of his office, Mr. Secord remains as counsel.

25. While acting as counsel for the client, the Member appears to have taken instructions from Chief and Council.

EVIDENCE

26. Exhibits 1 through 5 (the jurisdiction exhibits) were entered by counsel for the LSA with consent of the counsel of the Member.

27. Exhibits 6 through 28 were entered by consent of both parties once jurisdiction was accepted by the Hearing Committee. In addition, exhibits 29 through 31 were entered through various witnesses called by counsel for the LSA. All of those exhibits were entered with the consent or without objection by counsel for the Member.

28. In addition, the Hearing Committee heard the *viva voce* evidence of John McGee, F.M., C.Q., M.S. and the Member, Dennis Roth.

29. The Hearing Committee inquired of both counsel as to the use of some of the admitted exhibits, particularly those which were affidavits or statutory declarations where the witness was not called and subject to cross-examination. Unfortunately, the position taken by counsel was that the Hearing Committee could "use the exhibits as it sees appropriate." We therefore rely upon those exhibits which we find to be credible and trustworthy except where there has been *viva voce* evidence given on a point which contradicts the statements made in the sworn documents which were not subjected to cross-examination. For example, we were provided with the Affidavit of the Chief which contradicted the Member on one issue as to the recollection of a certain conversation. We note that in that regard, the Member was never confronted with the Chief's Affidavit and the Chief was not called as a witness. In that instance, we prefer the *viva voce* evidence presented which was subject to general cross-examination.

30. As a general statement, it was obvious that the witnesses were having some difficulty recalling events from many years ago. Fortunately, in relation to the issues before us, there was not a lot of divergence in the evidence presented.

31. The shareholding arrangement in K… was that each of the Chiefs of W and X held the company's shares equally in trust for their respective Band Members. The evidence established that the practice was to endorse Share Certificates with the elected Chief's name followed by the words "In trust for the Members of [the First Nation] Resident on", concluding with either W or X.

32. With the election of a new Chief, a transfer occurred and new Share Certificates were issued with only the Chief's name being altered. The Share Certificates were not always reissued promptly after the election of a new Chief.

33. In about 2002, the former Chief lost the election as Chief of another First Nation to Mr. T.H.. The new Share Certificates were not promptly issued in Mr. H.'s name.

34. On February 13 2003, former Chief executed a share transfer to T.H.. That document in part provided as follows: "I, [former Chief], in trust for Members of the First Nation Resident on W Reserve, hereby sell, assign a transfer, to T.H., in trust for Members of another First Nation who are Resident on the X

Reserve…".

35. According to the Member, T.H. instructed him to draw the Share Certificates as follows "This certifies that T.H., in trust for Members of another First Nation who are Resident on the X Reserve…". The Member complied. An undated Band Council resolution form proposing this change was tendered in evidence as part of exhibit 31. It is signed by only T.H. and three other Council Members. The other signatures were never identified at the hearing.

36. In March 2003, the idea of getting into the service rig industry arose around the W Band Council table. D.C. was involved in that discussion and the board of directors of K… decided to pursue the idea. Mr. C. was left with the task of completing a proposal and subsequently performing the necessary due diligence. The Member was aware of this interest and discussions.

37. In August 2003, M.S. was engaged to prepare a business plan for the new service rig company. Exhibit 12, Tab 2.

38. The Member's services were retained to incorporate T…Limited for this joint venture about June 26, 2003, and the shareholders were the C…. and K… who each initially invested $250,000. The C… is an Alberta corporation located in Calgary and at the relevant time it's shareholders and directors were D.C., J.N. and G.F.. Mr. C. and Mr. F. were both geologists while Mr. N. was a businessman experienced in oil & gas. All three men resided in Calgary. They were also principals in A… and were not employed by or part of K….

39. In the summer of 2003 the Member continued to work on the organization of the T…Limited venture including discussions with Z who's Chief was the Chief. It is not clear whether or not the Member was representing Z's interests in the T…Limited venture at the time.

40. On July 28, 2003, the Member invested, via S… the sum of $40,000 through the C… in the T…Limited project. S… is an Alberta corporation located in Edmonton and was incorporated on January 24, 2000 as [numbered company]. On June 6, 2000 it changed it's name to S…. The shareholders and directors of S… were the Member and his wife C.N..

41. The Member did not provide notice to anyone at the First Nation of his intention to invest nor was the client's consent every sought or obtained. The client was never referred to another lawyer for independent legal advice about the Member's investment in the joint venture.

42. In January 2004 John McGee, a lawyer in Edmonton was hired by M.S. to review the documents of T…Limited and K…. John McGee determined that K… provided a $900,000 guarantee to T…Limited's Bank and loaned T….Limited a further $250,000 which was placed as a term deposit with the Bank for the performance of the loan obligations. He reported to K… that this appeared to be a disparity in financial obligations between K… and the C…. He was hired to "sort out" the relationship between T…Limited and the C….

43. Mr. McGee discovered that one of the investors in the C… was S…. After a corporate search, he determined that the shareholders of this company that had loaned $40,000 was the Member and his wife.

44. John McGee brought these facts to the attention of the First Nation, K…, the Member and the LSA.

DECISION AND ANALYSIS

Conflict of Interest – Citation #3

45. The Hearing Committee was asked by both counsel for the LSA and the Member to restrict our consideration of citation #3 to whether or not the Member was in a conflict in relation to the "gas cost allowance" litigation involving Her Majesty The Queen. Evidence was tendered through cross-examination of the Member that he continues to represent the X Council on various local issues but does not represent them in relation to any difficulties they may have with the W Council. We were asked to disregard this latter involvement and restrict our consideration to the "gas cost allowance" lawsuit.

Position of the Parties

46. Counsel for the LSA took the position that a potential for conflict existed in that the W group and the X group have not come to an agreement as to how the proceeds of the litigation will be divided if the litigation is successful. He candidly admitted that no evidence existed suggesting an actual difference in the position of the two groups in the action against the defendant. He suggested that the Hearing Committee consider the Supreme Court of Canada's decisions in *MacDonald Estate v. Martin*[1991] *3 S.C.R.* 1235, *Regina v. Neil* 2002, SCC 70, *3464920 Canada Inc. v. Strother* 2007, SCC 24 and emphasized that the member had a duty of loyalty to the W group.

47. Counsel for the Member contended that no conflict existed and that any potential conflict was too remote and therefore not deserving of sanction. She further emphasized that it was in both parties' interests that the Member continue, given his involvement in the commencement of the litigation and his long standing involvement and expertise in presenting the case to date. She suggested an oblique motive on behalf of the W group in trying to have the Member removed as counsel for the plaintiff X. She further argued that implicit in that allegation is that the consent by one party for counsel to continue to represent another party cannot be consent unreasonably withheld.

Decision

48. We have considered the Supreme Court of Canada's guidance in the *MacDonald, Neil and Strother* decisions. We have also had the benefit of considering the interlocutory decision by Federal Court Justice Hugessen on an application by the W group to disqualify the Member's law firm from continuing to act for the X group on the grounds of a conflict of interest.

49. Justice Hugessen refused to disqualify the Member or his firm even though he acknowledged that there was a potential for conflict in relation to future issues. Specifically he held:

> "But none of those issues, in my view, is likely to put Ackroyd (the Member's firm) in a position where it could or would be tempted to use of confidential information it has received jointly from these two plaintiffs. Such information was made equally available to the X group and the latter under no obligation of confidentiality toward W group. X group may use such information as it sees fit and this would be the case whether it is represented by Ackroyd or someone

else."

50. He went on to consider the Member's obligation to X and stated at paragraph:

> "The cost and inconvenience of finding and retaining new counsel and the time to bring such new counsel up to speed would constitute an unjust imposition on an entirely innocent bystander".

51. While the considerations of a professional regulatory body differ from those considered by Justice Hugessen, his decision is helpful and does offer a judicial opinion which the Member confirmed in his evidence was wanted by him and his firm. The Member did request and receive an opinion with respect to this issue from another Member of the legal profession in Alberta which was similar.

52. Although Justice Hugessen was critical of the Law Society of Alberta's Rule 2, we feel it unnecessary to comment on that criticism for the purposes of the decision herein.

53. Having considered all of the evidence and the representations of counsel, we are unable to find any evidence of actual conflict by the Member or his firm in their past or continued representation of the X group. The interests of W and X in the litigation are identical. Their status, right to claim, and the calculation of the quantum appear to be identical. Counsel for the LSA could not point to any division or divergence of position of those parties in the actual lawsuit.

54. Whether or not there is a potential for conflict, other than a potential for conflict that might arise in any case, the division of proceeds is one which is too remote in this instance (particularly given that the lawsuit was commenced in 1986) for us to consider sufficient to trigger Rule 2 of our Code of Professional Conduct.

55. If we are wrong in our analysis of the remoteness of that potential conflict, we would still hold that there is insufficient evidence of conduct unbecoming to trigger a finding of guilt.

56. Finally, we have considered whether or not the involvement of the Member's firm might interfere with settlement discussions which can take place at any time during litigation. We heard no evidence

of there having been any settlement discussions (even in a general way). Nor was there any evidence that settlement discussions have been or might be delayed or affected by the continuation of the Member's firm in their representation of the X group.

57. Finally, we agree with Justice Hugesson's observation that in the event that an actual conflict arises in the future, the W group retain their right to pursue again the conflict issue before the Federal Court.

58. In the result, we dismiss Citation 3.

Citation #2 – Altered Share Certificate

Position of the Parties

59. Counsel for the LSA argued that the specific wording on a Share Certificate, dated February 13, 2003, entitling T.H. to hold shares in K… on behalf of members of X had been altered by removing the name "the First Nation" and replacing it with the name "another First Nation". He argued that as a Director's Resolution, pertaining to the change, had not been properly signed that implicitly T.H. did not have sufficient authority to instruct the Member to alter the Share Certificate. He suggested that the W representatives would have to have agreed to the alteration.

60. Counsel for the Member suggested that based upon the evidence of the Member he simply acted on instructions from T.H. who he believed had sufficient authority, and that in any event, the change was "symbolic" and of no legal force or effect.

Decision

61. The Hearing Committee has considered this matter thoroughly and we have taken into account the historical relationship between the two groups, the history of the Member's involvement with these parties, and the circumstances in which the Share Certificate was issued.

62. The evidence established that the Share Certificates were held jointly by each of the Chiefs of W and X in trust for members of their respective groups and that upon an election of a new Chief a new Share

Certificate was issued in the newly elected Chief's name. Former Chief had been defeated in approximately 2002. At that time, T.H. was elected as the Chief. It appears from the evidence that a new Share Certificate was not issued in Mr. H.'s name until February 2003.

63. Acting on T.H.'s authority, the Member drew the Share Certificate as instructed with the one change. It appears from a Share transfer document found in Exhibit 23, Tab 4 that former Chief executed a transfer to T.H. including the altered description of "another First Nation". Former Chief appears to have endorsed a share transfer document placed before us dated February 13, 2003, transferring the shares from his name in trust to T.H., "In trust for Members of another First Nation who are resident on the X Reserve number 1 to 8"

64. Whether or not this change was only symbolic or whether it was intended to form an evidentiary basis for some subsequent application for autonomous status by X, it is not for us to decide. The Member acted upon instructions and accordingly, we are not prepared to find that he acted unilaterally or that such conduct is deserving of sanction. Accordingly, Count #2 is dismissed.

Count #1 – Investment of Personal Monies

65. We now turn to Count #1, which all parties agreed was the most serious allegation against the Member. Counsel for the LSA sought an amendment to the citation, which was not opposed by counsel for the Member and was granted by the Hearing Committee. Accordingly, the citation was amended as follows:

> "It is alleged that you invested your own funds in a venture in which your client had also invested <u>without disclosing your investment to your client</u> and that such conduct is conduct deserving of sanction."

Position of the Parties

66. Counsel for the LSA urged upon the Hearing Committee that the Member had not sought permission or consent of his client to invest the sum of $40,000 with the C…, which monies were known by him to form a part of the investment capital tendered by the C… in the T…Limited joint venture. He

suggested that not only had the Member not sought consent, but that also he had not disclosed or admitted his investment for a substantial period of time and that when it was discovered by the W group, it immediately and directly affected his relationship with the W group. He suggested that the Member's investment in the circumstances was actually an investment in a group opposite in interest to that of his client. The Member did not hide the investment, but he had invested it in a company name and only a search for the directors of the company revealed it was the Member and his wife. Counsel for the LSA argued that the Member's investment may have affected the manner in which he structured the financing for the T…Limited operation and the investment may have placed the C… in a more favorable position than the First Nation.

67. Counsel for the Member fairly acknowledged that the Member ought to have disclosed his investment and that this did not create an actual conflict but certainly gave rise to a potential one. She argued that his investment did not affect the client's interests and that in fact the Member was attempting to try to "make the deal better". She further argued that given his busy work schedule, and his subsequent illness, that he was unable to raise this with his client's prior or post investment. She further argued that in any event, the conduct was not conduct deserving of sanction.

Decision

68. In considering this allegation, we are mindful of all of the rules contained within chapter 6 of the LSA Code of Professional Conduct.

69. We have thoroughly considered Rule 9, Chapter 6, which provides "A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects" [Emphasis added]

70. A clear reading of this rule restricts those circumstances in which a lawyer may engage in business transactions with a client. Some have argued that lawyers should never be involved in business transactions with clients. Despite that position, a limited window of opportunity exists for such involvement but the pre-requisites include a) the client's knowledge of the investment b) the client's ability to consider the short and long term effect of such an investment c) that the client actually, and

with full knowledge, consents to the transaction, d) that the client receives independent legal advice and e) the transaction be fair and reasonable to the client in all respects.

71. We are further instructed by the commentary which follows Rule 9. The authors of that commentary state:

> "The wisest course for a lawyer is to never engage in a business transaction with a client. A blanket prohibition would, however, fail to acknowledge the realities of lawyer/client relationships and the fact that a particular business transaction may appear to both parties to be mutually advantageous."

72. The commentary to Rule 9 states the relevant considerations as follows:

> "Relevant factors include whether the lawyer knew of the transaction in advance and gave explicit or implicit approval; whether the lawyer stood to gain a direct or indirect benefit; whether and to what extent the lawyer has control over the client and the related person or affiliated entity, and the nature of the relationship between the lawyer and the related person or affiliated entity, as well as the presence or absence of the factors noted in Rule 9."

73. We find, and neither counsel suggested the opposite, that the member's investment through S… to the C… was both a "business transaction" and "with his Client" (given that it was to be used in the T…Limited venture) as contemplated by Rule 9.

74. We further conclude, as was conceded by the member, that his client the First Nation (both the W group and the X group) were unaware of his intention or desire to invest in the T…Limited venture. M.S. testified that he had a discussion with the Member about the potential for Mr. S. to invest. The Member denied the conversation ever occurred. The Hearing Committee finds that we do not need to resolve this conflict in order to determine whether Rule 9 was breached.

75. It is admitted by the Member that he did not ever seek the consent of his client, the First Nation, and, in fact, never informed any members of the client group even though he had the opportunity to do so

when he attended board meetings on August 19, 2003, and August 28, 2003. The Member's investment through the C… occurred on July 28, 2003.

76. The Member suffered health difficulties on September 10, 2003, and was absent from work for three weeks. He could not have been expected to have advised his client during that time period.

77. It appears that he returned to work in early October 2003, and was terminated as counsel for the W group sometime thereafter.

78. The Member not only failed to advise his clients of the investment but was not forthcoming or frank in his correspondence to Mr. McGee in October 2004. The Member's pleas of remorse about this investment before us were certainly not echoed in his letters of October 13, 2004 (Exhibit 6 Tab 35), October 25, 2004 (Exhibit 6 Tab 38) or his letter of October 29, 2004 (Exhibit 6 Tab 40). His explanation to Mr. McGee in his October 29, 2004, letter suggested that his investment came as a direct result of a "request" by the Chief and a "demand of the Western Canadian Bank". At the hearing, the Member suggested that the Chief's comment was simply a statement and that his investment was not made in response to any demand by any bank. It was suggested that M.S. was present during the discussions between the Chief and the Member.

79. It should be noted that M.S. had no recollection of any comments by the Chief along the lines suggested by the Member. An Affidavit by the Chief was filed as Exhibit 23 Tab 3. In it, the Chief maintains that he never made any statements similar to those attributed to him by the Member. The Member maintained before us that he had a clear recollection of the comment and that he "ruminated" on it before making the investment. We note that the Member was not confronted with the Chief Affidavit in cross-examination.

80. The Hearing Committee finds that we do not have to resolve this evidentiary dispute as it is not relevant to our inquiry. It may be relevant in mitigation of sanction should that issue arise. What is significant is that the Member not only failed to inform his client of the investment but also failed to inform the Chief who may also have been his client at the relevant time. Even if the Member had informed the Chief this would not be sufficient notice or obtaining consent from the First Nation.

81. The intent of Rule 9 is to ensure that a lawyer's objectivity is not impaired by a personal investment (be that directly or indirectly), to avoid the conflict between personal and professional obligations and interests, and finally, to prevent the lawyer from using his/her knowledge of the law and/or experience to take advantage of or generally disadvantage the client.

82. It is noteworthy that chapter 7 of the Law Society of British Columbia which deals with "Conflicts of interests between lawyer and client" provides in its preamble the following:

> "Generally speaking, a lawyer make act as legal advisor or as business associate, but not both."

83. Rules 1 and 3 of the British Columbia Law Society Handbook provide the following:

> **Direct or indirect financial interest**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>   a. The lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>   b. Anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgment.
>
> **Transaction with a client**
>
> 3. A lawyer must not purchase anything from or sell anything to a client of the lawyer's firm unless the transaction is clearly severable from any legal work performed by the lawyer or by another lawyer in the firm for the client, and either:
>   a. The transaction is of a routine nature to and in the ordinary course of business of the client, or
>   b. The client is independently represented in all aspects of the transaction.

84. The Law Society of Upper Canada Rules in this regard provide as follows:

Investment by Client where Lawyer has an Interest

(2) Subject to subrule (2.1), where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer:

a. Shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later,

b. Shall recommend independent legal representation and shall require that the client receive independent legal advice, and

c. Where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

85. The Law Society, in disciplinary proceedings dealing with personal investments, shifts the burden to the lawyer to show good faith and that adequate disclosure was made and that the client's consent was obtained. The commentary following LSA Rule 9, Chapter 6, provides as follows:

> "Before engaging in such a transaction, a lawyer must carefully consider the fiduciary obligations of the lawyer and the likely presumption of undue influence should the client later become dissatisfied. The lawyer will have the onus of proving that the transaction was fair and reasonable from the client's perspective. Subsequent discrepancies between the client's version of events and the lawyer's may be resolved in a favour of the client. These factors will override any apparent benefits of the transaction if a client is clearly in an unequal bargaining position due to age, financial position, lack of education or experience, or other similar circumstances."

86. Some guidance as to the restrictions on a professional may also gleaned by looking at the prohibitions in place within other professions. The Combined Rules of Professional Conduct and Related Guidelines for the Institute of Chartered Accountants of Alberta provides under the heading "Specific Prohibitions" (sub-heading "Financial Interests) the following:

> "A registrant (accountant) shall not participate on the engagement team for an assurance client if the registrant, or the immediate family of the registrant, holds a direct financial interest or a material indirect financial interest in the client. (See Rule 204.4 (1)(a))"

87. In this instance, the Member ought to have foreseen the conflict caused by his investment through the C… in his client's venture. He stood to gain directly from his investment and by his frank admission before us "doubled his investment". Following his investment, he continued to exert control over the client and the client's legal affairs. He obtained neither the explicit or implicit approval of his client nor did he provide notice of his investment to his client.

88. Considering the circumstances in their totality, we are satisfied that the Citation 1 as amended is made out and find the conduct of the Member is conduct deserving of sanction.

89. We direct that arrangements be made, with the consent of both counsel, for the fixation of a date to address the issue of sanction on this citation.

SANCTIONS

90. On April 28, 2009 Counsel for the Law Society of Alberta, Michael Penny and Counsel for Laura Stevens appeared for Mr. Roth.

91. Counsel for the Law Society of Alberta and for Mr. Roth submitted Joint Submissions on Sanction which were entered as Exhibit 32 of the proceedings on April 28, 2009. Supplemental Submissions on Sanction were entered as Exhibit 33 of the proceedings.

92. Letters were submitted by both counsel and were entered as Exhibits 34 to 38 of the proceedings and are ordered to be private and not released to the public.

93. The record of Mr. Roth was entered as Exhibit 39 and the Statement of Estimated costs was entered as Exhibit 40

94. The Hearing Committee agreed with the joint submission that the appropriate sanction for the finding of conduct unbecoming on Citation 1 was a fine of $7,500 to be paid within 90 days of April 28, 2009 and a reprimand. The Costs that are to be paid by Mr. Roth is $2,400. also to be paid 90 days from April 28, 2009

95. A reprimand was given by Brian Beresh, Q.C..

96. The Hearing Committee agrees that there are no grounds for referral to the Attorney-General.

97. The Hearing Committee agrees that the names of clients be redacted from the transcripts, exhibits, and the Hearing and Sanction Reports, before being made available to the public.

"Dated this 15th day of May, 2009"

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Shirley Jackson, Q.C. – Chair

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Brian Beresh, Q.C.