IN THE MATTER OF THE LEGAL PROFESSION ACT

AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF **ROBERT P. LEE,** A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

On November 10 to 13, 2008, January 26 to 29, 2009, and February 9 to 13, 2009, a Hearing Committee composed of Bradley G. Nemetz, Q.C. (Chair), Neena Ahluwalia, Q.C., and Larry McConnell, Q.C. convened at the Law Society offices in Edmonton to inquire into the conduct of Robert Peter Lee. The member appeared for himself and Mr. Lindsay MacDonald, Q.C. appeared for the Law Society.

INTRODUCTION

1. Mr. Lee practices civil litigation in Edmonton. His practice, to a large extent, involves acting for individuals who have grievances with the Government of Alberta, primarily those who have been involved with child welfare.

2. The charges, all brought by complainants who worked directly or indirectly for the Provincial Government, illustrate his practice. The first citation involves alleged inappropriate behaviour during a discovery of a former government employee. Mr. Lee was acting for a woman suing the government for damages sustained as a result of alleged sexual abuse in a foster home. The second citation involves Mr. Lee attempting to speak with a youth held in secure custody. The third involves letters to a government lawyer alleging improper non-disclosure of documents and asserting that a government lawyer made up arguments to excuse non-production of producible documents. This litigation also involves sexual abuse of a child in foster care. The fourth citation alleges misrepresentation to the Criminal Injuries Review Board on an application by a rape victim. The fifth involves Mr. Lee's office seeking information directly from the government concerning its practice respecting lawsuits for children in care. The sixth and seventh citations involve allegations of failing to be courteous to lawyers representing the

government and making inappropriate comments in a case where Mr. Lee was acting for an alleged victim of sexual assault during a government-sponsored retreat.

3. The member's defence on these charges includes asserting that the behaviour was appropriate, asserting truth, justification, provocation and, in some instances that while the behaviour was inappropriate, it does not rise to the level of conduct deserving of sanction.

4. After over two weeks of testimony the Hearing Committee has determined that Mr. Lee's conduct with respect to citations 1, 6 and 7, even given the difficulties he encountered representing his clients against the government, constitutes conduct that falls below the level that is expected from a member of the Law Society into the bounds of behaviour that is deserving, and in need of, sanction. It dismisses citations 2, 3, 4 and 5.

THE CITATIONS

5. The citations, the particulars of which are set out in Schedule "A" to this decision, are as follows:

1. IT IS ALLEGED that in the examination of Mr. B. on September 10, 2002, you made inappropriate comments, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

   Held: Guilty

2. IT IS ALLEGED that in attending at YYC on May 5, 2003 you misled or attempted to mislead staff concerning your relationship to the young person with whom you were allowed access, and thereby breached the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Not Guilty

3. IT IS ALLEGED that in your correspondence to Mr. Kinash of January 21, 2002 and February 27, 2002, you made inappropriate comments, and thereby breached the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Not Guilty

4. IT IS ALLEGED that in your appearance before the Criminal Injuries Review Board on May 16, 2003, you misled or attempted to mislead the Board, and in your subsequent letter of September 9, 2003 to the Board, you made inappropriate threats based on actions taken by the Board that you had previously invited, and thereby breached the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Not Guilty

5. IT IS ALLEGED that you directly or indirectly communicated with a party or representative of a party in the context of a law suit knowing that the party was represented by counsel, and without first obtaining permission or consent of that counsel, contrary to Chapter 4, Rule 6 of the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Not Guilty

6. IT IS ALLEGED that you failed to be courteous when you shouted at the complainant during a meeting on or about June 2003, contrary to Chapter 1, Rule 6 of the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Guilty

7. IT IS ALLEGED that you in correspondence dated December 3, 2002 and June 12, 2003, made remarks concerning another lawyer that were not fair, accurate and courteous, contrary to Chapter 3, Rule 2 of the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

   Held: Guilty

JURISDICTION

6. Jurisdiction was established by entering as exhibits the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Further, the member accepted the jurisdiction and composition of the panel.

PRIVATE HEARING

7. Most of the hearing was held in public. Certain evidence was held in private to protect solicitor/client privilege or the identity of victims.

OTHER PRELIMINARY MATTERS

8. One set of procedural matters arose concerning the member's case. Mr. Lee issued a series of Notices to Attend to government employees and government lawyers. Lawyers retained by the government or the witnesses applied to have those notices quashed.

9. For example, Mr. Lee is a Justice of the Peace. He wanted to call as witnesses certain court staff who had observed him, his demeanour, and his concern and consideration for those with whom he dealt. Initially he sought letters. The witnesses' superiors in the Clerk's office became involved and cautioned them against giving letters, mentioning their oaths of office. Mr. Duckett was hired by the government and applied to set aside the Notices to Attend. Mr. Lee asked for an adjournment to provide him with an opportunity to prepare for the application. Mr. Duckett asked that during the adjournment Mr. Lee be directed not to speak to the clerks concerning the case and their possible evidence.

10. The Panel expressed concern with this unusual step and noted that Mr. Duckett advised that he had not in fact spoken with all of the clerks whose Notices to Attend he was seeking to quashed, but was rather taking instructions from their superiors.

11. When the Committee re-convened Mr. Duckett advised that the government was withdrawing its application to have the Notices to Attend quashed and would leave the relevance and the admissibility of the evidence of the clerks to the Hearing Committee.

12. Mr. Graham McLellan was retained by Mrs. L.U., an employee of the branch of the government that deals with compensating victims of crime, and questioned the relevancy and admissibility of her evidence. Ms. U. is a defendant in a law suit brought by one of Mr. Lee's clients against her, the Crimes Compensation Board and the Victims of Crimes Financial Benefits Program and certain members of the Board.

13. A similar matter arose with respect to a Notice to Attend served by Mr. Lee on Mr. James Weir. Mr. Weir was represented by Mr. Nielsen.

14. After considerable discussion and submissions concerning the scope of the evidence to be given by Ms. U. and Mr. Weir, the member withdrew those Notices to Attend.

15. The last procedural issue with respect to witnesses related to a Notice to Attend served upon Ms. S. and Ms. J.S., employees of the Alberta Government who dealt with Children's Services. Ms. Loparco appeared and applied to have standing with respect to their evidence. The Panel denied standing but held that she could be present and raise any concerns she had with any particular line of questioning first with Law Society counsel and potentially with the Hearing Committee. The Hearing Committee ruled that it was inappropriate to give standing to individuals or entities who felt that their interests might be affected by the outcome of the disciplinary proceeding. Disciplinary proceedings are not akin to, nor should they be transformed into, royal commissions or inquiries. In the end the matter proceeded with the Law Society counsel being the only counsel dealing with the scope and admissibility of the evidence.

EVIDENCE

16. We will begin with a brief overview, followed by a discussion of the evidence specifically related to the various citations. Thereafter we will review the general evidence led by the member concerning his situation, his intention, and his general justification or explanation for his behaviour.

17. Mr. Lee was born in 1965 and called to the Bar in 1990. He married in 1994 and separated in 2001. The matters involved in these citations occurred in 2002, 2003 and in 2006, the latter being the year of the letter to the government to obtain information on current policies regarding suits for children in custody.

18. While Mr. Lee began in practice with others, at the time of the events giving rise to these citations he was basically practicing alone, taking hard cases for people who would have difficulty obtaining representation. His principal adversary was the government.

CITATION 3

THE FOUR SISTERS' CASES

19. The earliest behaviour covered by the citations involves a January 21, 2002 letter from Mr. Lee to Mr. Kinash of Bryan & Company. The offending language from this letter was particularized by the Law Society as follows:

> If the affiant tries to hide documents which are later disclosed, your client will either look like they are once again trying to hide document or are not bright enough to know what documents are relevant. Either way, the outcome is very bad for your client.
>
> In the Court of Appeal your client is arguing that the documents are not relevant for whatever reason that Mr. Lewis has made up.

The contents of a February 27th letter to Mr. Kinash is also the subject of this citation and the particularized offending language reads:

> However, as I will be commencing an action for the surveillance, I will be forced to sue all of the people responsible for the surveillance. It would appear to me that the named Defendants will be the Government, J.S., Iris Evans, Bill Olthuis, Doug Lewis, Mike Kinash, Bryan & Company, D…, the private investigator, Dr. Daylen and anyone else involved in the decision making process. The heads of damages will include general and punitive damages.
>
> Being forced to name you, your law firm, Mr. Olthuis and Mr. Lewis will obviously complicate matters. It will allow me to discover you and to receive your file and instructions from your clients as they relate to the surveillance.

20. These matters arose during the course of litigation, the history and subject matter of which is informative concerning the interaction between the member and the government.

21. These cases involve four sisters were sexually assaulted by their parents in the 1980's. Aspects of abuse came to the attention of Child Welfare[1] in the 1980's but no claims on their behalf were advanced, nor, it appears, were steps taken to protect the girls.

22. Eventually the RCMP became involved, the mother and father were charged and convicted of various offenses. The father was sentenced to 12 years in jail. These events give rise to a number of proceedings. In 1996 the first sister commenced proceedings against her parents, the Alberta Government and the school district. In 1997 a second sister commenced proceedings against the same parties but added the Deputy Minister of Social Services of Alberta to the claim. In 1998 the last two sisters commenced actions against their parents, the Government of Alberta, and the school district.

23. In its defence the government denied that it had knowledge of sexual abuse at the relevant time. One of the sisters asserted that she had told a Child Welfare employee about some of the improper behaviour on the part of her father. The government's Affidavit of Records did not contain a highly damaging note of this plaintiff's disclosure to Child Welfare that, after 7:30 at night, the father had the family draw the drapes and strip naked and that "as a form of greeting and affection" he fondled the plaintiff's breasts. The government third-partied the RCMP who produced this highly pertinent and relevant record, having previously seized and copied the government's file for the criminal investigation. Ms. J.S. was the government employee who had charge of locating witnesses and documents and was often the officer for discovery purposes.

24. In a mini-trial the government's lawyers filed a brief, dated March 2, 2000, in which they asserted, in part,

> Both of these records indicate that R. did advise of some problems in the home (strictness) and also of the practice of nudity. The Contact Note confirms same and there is an indication that R. did not approve of the practice but there is no indication that she suggested that it had any sexual connotations. That conforms with the indication by B. in the Intake Investigation Report that there were no sexual overtones

[1] We refer to various government departments that deal with children as "Child Welfare" regardless of their specific name at any given time.

> involved with the practice of nudity and that R. did not have concerns about her siblings' safety. The Note does indicate that R. suggested that her stepfather had "fondled her breasts as a form of greeting and affection" but there is no suggestion that R. herself considered this as a form of sexual abuse. Indeed, she portrayed it as "more or less accepted in the family" and said that such "… actions have not been carried further" (i.e. to any form of abuse). Furthermore, it is to be noted that in the Contact Note R. specifically indicated that she had been previously "sexually abused by her grandfather". This means that R. was quite capable of understanding and communicating specifically an allegation of sexual abuse if she wanted to. There is no indication that she portrayed any of the conduct in the home as sexual abuse. [emphasis added]

25. A member of the Law Society of Alberta, Ms. Cathy Deborah Stewart (7 years Mr. Lee's senior at the Bar), was called by Mr. Lee and testified concerning the four sisters' cases and, in particular, the government's brief in the mini-trial. She had been approached by Mr. Lee to give him advice concerning the mini-trial, the justice of the mini-trial being Justice Sulyma with whom Ms. J.S. had practiced. Mr. Lee wanted to know how Justice Sulyma might react to the case and, in particular, the government's position that it had no knowledge of sexual abuse. Ms. J.S. testified before us that:

> I remember that one of the arguments that was made – which was essentially that an individual who went to Child Welfare and made complaints about certain behaviour – which was, in my mind, quite extreme behaviour. The government's argument was that the Child Welfare worker could not have responded to that as being child abuse because the complainant did not use the term "abuse" or "molestation" but described the behaviour.
>
> And I thought that was a specious argument and quite intellectually dishonest because, in my opinion, the very job of the Child Welfare worker would be to assess described behaviours and then react if those behaviours, you know, were contrary to what they felt was proper.

26. The Law Society objected to this evidence on the basis of relevancy. We ruled that it related to Mr. Lee's defense that he had reasonable grounds to believe that the government in defending these cases made specious arguments. The fact that a senior lawyer had told him that she also felt that the government's submissions were "specious" and "intellectually dishonest" supported his belief that the government "made up" arguments that were without credibility. The Panel found that the reaction of a senior counsel communicated to Mr. Lee prior to his letter was

relevant to his reaction to government actions and to any alleged lack of temperance in the language that he used.

27. The mini-trial resulted in a recommendation by Justice Sulyma that that the government pay approximately $1,050,000 to one sister, $900,000 to each of two other sisters and nothing for the third sister. Settlement was eventually reached at approximately $600,000 to $800,000 for each of the three sisters and a $150,000 *ex-gratia* payment to the fourth.

28. Ms. Stewart was involved in the four sisters' case after the mini-trial as she was appointed *Next Friend* for one of the daughters who was fragile and unable to give proper instructions.

29. During this stage of her involvement, Ms. Stewart was also acting for clients against the government concerning sexual harassment. She told Mr. Lee about her experiences with the government and the government lawyers. She told him that the government was not producing relevant and material documents. While it is unclear when she had these discussions with Mr. Lee, they likely occurred around the time of the letters which are the subject of this citation. At that time she was next friend of the Plaintiff, R. She dealt with Mr. Lee concerning the victim's objection to the surveillance carried on by the government. Her experience with the government withholding what she considered to be relevant documents, which she shared with Mr. Lee, included:

> I discussed some more experiences I had on a file where I had documents that I felt were extremely relevant to a lawsuit where the government was the defendant, and I – my client produced them in her affidavit. They were not in the government's affidavit. And I spoke to counsel about that, and they refused to produce them and I actually had to make a Court application for them to amend their Affidavit of Documents and successfully made that application.

30. Subsequently, Ms. Stewart brought an application concerning these matters and a number of discovery objections by the government lawyers before Justice Acton who, in a decision rendered March of 2003, ordered production of documents concerning a pattern of sexual harassment by members of Alberta's Court and Prisoner Services department. The

documents were ordered produced and the government and counsel for the government's position were subject to strong negative comment by the judge. The justice used words such as "cherry picking" to describe some of the government's arguments and described another one of their arguments as "absurd". The Justice went on to say, "the Defendants are not permitted to withhold items which are relevant simply because the plaintiff does not have enough information to show that they are relevant. Our system of discovery makes it a party's responsibility to disclose materials in its possession that are relevant to the action". Another of the government's positions was characterized by the judge as a "red herring".

31. Mr. Lee's letter, which is the subject of this complaint, refers to the government hiding documents. This appeal was from an order of Justice Ritter in which he directed the government to produce a number of categories of documents. Those categories included documents on a report on shortcomings of the government's handling of Child Welfare, documents covering the government's economic considerations in not bringing lawsuits for children abused or injured while in government care or custody, documents concerning why the government did not sue for one of the plaintiffs when it was her guardian, and documents related to "any attempt by the Crown to shred documents, or otherwise hide or cover up Child Welfare negligence or liability, in this particular matter, or in relation to any general policy which would include this particular matter".

32. During the time when the events giving rise to this citation arose, Alberta Justice had a group of lawyers that worked together handling sexual abuse cases. It included Mr. Olthuis who handled the previously discussed mini-trial. After the mini-trial Mr. Lewis joined the group. Mr. Kinloch was also part of the group. They also retained Mr. Kinash at Bryan & Co. Ms. J.S. was the government employee who was in charge of Litigation Services for Child Welfare. She swore the Affidavit of Records and attended at the discoveries.

33. Mr. Lewis signed the Notice of Appeal of Mr. Justice Ritter's Order on February 9, 2001. The initial factum was filed by Mr. Kinloch. Mr. Lewis filed the Amended Factum in March of 2002, raising additional grounds. He then signed the Abandonment of Appeal on May 6, 2002.

34. Mr. Lewis described the working of this group of lawyers as "whether I filed a document or whether Mr. Olthuis filed it or Mr. Kinloch would have filed it, there is consultation amongst everyone and there are instructions coming back from Children's Services as to what steps are taken".

35. As to Mr. Lee's view of the *bona fides* of the arguments raised by the Crown it is interesting to note that in the appeal of Justice Ritter's order the Crown initially asserted that the policies of the government were not producible. The government's original factum put the issue as follows:

> The issue in this case is whether the Crown has to produce documents with respect to matters not pleaded (under the guise of being relevant to a claim for punitive damages) and with respect to non-actionable policy decisions.

We note the use of the word "guise" with its intended meaning of a concocted or disingenuous reason is being applied by the government to Mr. Lee's argument.

36. In his Reply Factum Mr. Lee noted that the policies ordered to be produced were explicitly pleaded by the government in its Statement of Defence and that in the Defence the government explicitly pleaded that it had adhered to those policies and that "adherence to the same constitutes fulfillment by this Defendant to any statutory or other it owed to the plaintiffs". The government's Defence further alleged that its actions were taken in good faith pursuant to policies at the time. Finally the Defence raised the issues of the policies and explicit response to the plaintiff's claim for punitive damages.

37. Mr. Lee, in his factum, also submitted:

4. Justice Ritter ordered that the Government produce documents related to the policies that were relevant to and related to the negligence by the Government to the Plaintiffs to allow the Plaintiffs to pursue their claim of punitive damages.

5. The Government Appeals Justice Ritter's Order on the basis that the policies are not in issue because they were not in the pleadings. This argument ignores the fact that the Government policies are plead in the Government's Statement of Defence.

6. In reply to the Statement of Claim, the Government raised the Defence of limitations and laches and acquiescence.

   Paragraph 18 … This Defendant states further that such "connection" was reasonably discoverable to the Plaintiffs at some point many years prior to June of 1998, in the course of the various counseling and treatment received by or available to the Plaintiffs subsequent to the apprehension and subsequent to them attaining the age of majority.

7. During the time that Ms. J's ordinary 2 year limitation period arose in January 1983, until it expired in January 1986, the Government was Ms. J's guardian.

8. The Government has not produced any documents relating to the issue of why they did not commence legal proceedings on behalf of Ms. J, as her legal guardian, during this 2 year limitation period nor did they produce any documents relating to what information the Government gave to Ms. J so that she could have "reasonably discovered" her law suit.

9. The Government Appeals from Justice Ritter's Order to produce documents relating to why the Government did not sue on behalf of Ms. J on the basis that the documents are not relevant. This argument ignores the fact that the reason for Ms. J failing to sue within the limitation period is plead in the Government's Statement of Defence.

38. The government's response to Mr. Lee's factum was to set up a new issue to avoid production of the very documents that the government relied upon in its Statement of Defence. The new issue is stated as follows:

> The issue in this case is whether the Crown has to produce documents with respect to matters which are not directly or indirectly, tied to the Plaintiff's injuries.

39. Mr. Lewis was intimately involved in the case and the appeal. While he did not sign the first factum, it was signed by another government staff lawyer in this collaborating group. Mr. Lewis signed and filed the Notice of Appeal, signed the Amended Factum, and eventually signed the Abandonment of Appeal. All of this was done in an effort to resist production of the very

documents the government plead in its Statement of Defence to be a complete answer to the Plaintiff's claim.

40. With this history, and before going on to relate the evidence with respect to the surveillance issue, it is useful to recall the words that the member used that have been particularized as constituting conduct deserving of sanction. The two paragraphs of his letter are set out below with the offending particulars highlighted.

> As the Amended Statement of Claim now alleges breaches of policy, I would anticipate that your client will be providing me with all of the documents that it has in it's possession and considers relevant regarding these new paragraphs in the Amended Statement of Claim. If your client attempts to limit the scope of the documents that it produces, then the affiant will be cross examined on her affidavit so that a full disclosure is obtained. <u>If the affiant tries to hide documents which are later disclosed, your client will either look like they are once again trying to hid documents are not bright enough to know what documents are relevant. Either way, the outcome is very bad for your client</u>.
>
> It would seem to me that the your client continues to have an obligation to produce its relevant documents regarding the policy issues, despite the Appeal to the Court of Appeal. <u>In the Court of Appeal, your client is arguing that the documents are not relevant for whatever reason that Mr. Lewis has made up</u>. However, if there are documents regarding policy that you consider relevant to the amended Statement of claim, then they must be produced forthwith. For example all of the policies and records regarding why the Government did not sue on behalf of June in 1984 or thereafter are clearly relevant. Therefore, I will want any documents that show the Government had a policy or practice to sue non-Governmental tort feasors on behalf of children in their care, but would never sue itself on behalf of children in their care.

<u>SURVEILLANCE</u>

41. Justice Ritter also dealt with an application to terminate the Defendant's surveillance of one of the sisters living in a small town in the interior of British Columbia. This plaintiff was fragile and this lead to Ms. D. Stewart's appointment as her next friend. The extent to which this plaintiff was fragile was before Justice Ritter. He appointed an expert to advise the court whether an independent medical examination would harm the plaintiff.

42. On February 12, 2002, Justice Ritter declined Mr. Lee's application to issue an injunction on the basis of the government's submission that no cause of action for the tortuous surveillance was pleaded. However, he made the following statement with respect to this issue:

> Finally, should the Plaintiff amend her Statement of Claim to include a cause of action relating to the surveillance I would be prepared to provide an injunction along the lines of that requested by the Plaintiff relative to the surveillance. The duration of that injunction would be until one month after receipt of the report from the expert and to expire in any event on the 1st of November, 2002 if it were not renewed prior to that date. The same result might be achieved by the Plaintiff filing a separate Claim rather amending her existing Claim.

43. Commenting upon the evidence before him concerning the plaintiff's condition and the effect of surveillance on her, the judge said:

> What is before me is a report that indicates a reasonable likelihood of severe psychological harm to the Plaintiff if the surveillance proceeds. That was not before any of the courts who dealt with those cases. What those individuals were attempting to avoid was the normal rigour associated with litigation. What the Plaintiff suffers from is far removed from that normal rigour.

44. Ms. Deborah Stewart testified that she asked Mr. Lee what he could do to prevent further surveillance. She believed and had evidence that surveillance adversely affected the claimant and that the claimant was worried that word would get out in the small town about her case and the abuse. Ms. Stewart stated:

> I asked him [Mr. Lee] if he could make an application for a Court order directing that the surveillance be terminated because of her concerns and my concerns for her wellbeing … I was actually afraid that she would harm or kill herself.

45. Ms. Stewart testified that this was not just her opinion, but that this opinion was shared by the client's psychologist.

46. After Justice Ritter delivered his decision Ms. Stewart and Mr. Lee discussed the possibility of a separate claim and who might need to be included as defendants. In that regard her evidence was that it was "Law School 101" that you would name all possible defendants who might have "directed or authorized" the surveillance including counsel, officers and employees.

47. Ms. Stewart realized that this would complicate the matter "beyond belief" but she was concerned that the government was set on surveillance and she believed that surveillance constituted a serious danger to the claimant.

48. In the end Ms. Stewart concluded that the plaintiff could not take the pressure of the lawsuit, surveillance, discovery, and settled the case for less than it was worth. She said that the settlement was less than Mr. Lee recommended, that it was not necessarily generous, but that the plaintiff could not withstand the pressure. She recalled discussing the unfairness of the situation with Mr. Lee. In that regard she testified that:

> I do remember discussing that – sort of my frustration with kind of the unfairness of it all, that it's not different from other plaintiff litigation but it was more extreme. Like, they beat you down until you can't take it any more so you go away and that I thought it was sort of unfair that they were part of what had made her unable to cope and her inability to cope was forcing her to settle, in my opinion.

49. With this history it is useful to recall the language the member used which is alleged to be conduct deserving of sanction. The language particularized in this aspect of the citation is as follows:

> However, as I will be commencing an action for the surveillance, I will be forced to sue all of the people responsible for the surveillance. It would appear to me that the named Defendants will be the Government, J.S., Iris Evans, Bill Olthuis, Doug Lewis, Mike Kinash, Bryan & Company, D…, the private investigator, Dr. Daylen and anyone else involved in the decision making process. The heads of damages will include general and punitive damages.
>
> Being forced to name you, your law firm, Mr. Olthuis and Mr. Lewis will obviously complicate matters. It will allow me to discover you and to receive your file and instructions from your clients as they relate to the surveillance.

CITATION 1

DISCOVERY, SEPTEMBER 10, 2002

50. The next behaviour covered by the citations involved Mr. Lee's conduct during the discovery of a former Child Welfare employee. The discovery occurred on September 10, 2002 and the government was represented by Ms. Bercov. Ms. J.S. was in attendance as the

representative/officer of the government. The witness was born in 1930, thus making him 72 years old. The events being inquired into occurred some 33 years earlier. The witness commenced by stating that he had no independent recollection of the case beyond what was contained in the file. Mr. Lee made the following (particularized) allegedly inappropriate comments:

> Your comments to Mr. B. … [citation omitted] "Well this man destroyed a woman's life, and if my emotions get a little bit too much of me, I apologize to Mr. B.".
>
> Your comments to Ms. Bercov … [citation omitted] "The reports are on the file Ms. Bercov. If you can't read the documents for yourself, then you have a problem".
>
> Your comments to Mr. B. and to Ms. Bercov …[citation omitted] wherein you imply that Ms. Bercov was coaching the witness, Mr. B., and pointing out paragraphs to him to help him answer questions.
>
> Your comments in response to a statement by Ms. Bercov … [citation omitted] where she said "And I would like to put on the record that I was not pointing paragraphs out to this witness, less (sic there be any doubt about that" and you responded as follows: [citation omitted] "Well that's because I didn't – we didn't allow you to get to that point".

51. Mr. Lee had not met Ms. Bercov before this case and his contact with her was limited to a discovery, on the previous day, of another employee involved in the placement.

Pursuant to s.74(4.1) of the *Legal Profession Act*, the Chair of Conduct accepted a joint submission by Mr. Lee and Mr. MacDonald, and directed that the portion of the Hearing Report as it relates to the portion of the hearing held in private will not be provided. Therefore paragraph #52 has been deleted.

52.

53. Before turning to what happened at the discovery and the subsequent Court applications, it is informative to provide a brief précis of the case. Mr. Lee's client was born in 1965 and when she was 4 her mother and stepfather reported that they were unable to take care of her and wanted to put her up for adoption. Child Welfare placed her with the mother's sister and husband who ran a foster home licensed for 6 foster children. They had 4 or 5 children of their own.

54. The mother complained about the placement. She grew up in the care of her sister and brother-in-law and reported that her brother-in-law made repeated sexual advances on her which she rebuffed. She also complained to Child Welfare that the foster home had too many children, that the parents cared only for the money that they received for foster care, and that they had little control over the children.

55. The main child care worker recommended the removal of the child from the home as soon as possible. Mr. B.'s superior also recommended the removal of the child from the home. In the end, Mr. B., as supervisor, and he says in consultation with others, decided to leave the child with the foster parents. The child had a difficult life and alleged that the foster father had sexually molested her. Eventually he went to jail on charges associated with molesting children. In these circumstances it is understandable how Mr. Lee's client and his client's mother were most upset by Mr. B.'s actions.

56. Mr. Lee's conduct complained of occurred early in the discovery. This was only the second day that Mr. Lee had been in discoveries with Ms. Bercov. We were given portions of transcripts of the discovery of the day before which indicated some objections being taken, sometimes with reasons being given and sometimes without reasons being given. The transcript of the proceedings on September 10, 2002 indicates a similar pattern of objections being taken, sometimes with reasons being given and sometimes not.

57. The first objection taken was at approximately page 6. Ms. Bercov objected to the way in which the question was put and gave her reasons. Mr. Lee's response to her objection was "the reports are on file, Ms. Bercov. If you can't read the documents yourself, then you have a problem". Ms. Bercov responded by saying "Mr. Lee – Mr. Lee, there is no cause for screaming at me and telling me I have a problem. I am objecting to your putting this question to the witness in this way".

58. We note that Mr. Lee did not protest that he was not raising his voice at this point. The next question Mr. Lee put comprised of two questions. Ms. Bercov asked that the questions be split.

59. The next question objected to is at page 10 when Mr. Lee asked the witness to comment on whether or another witness was telling the truth.

60. A few pages later Ms. Bercov again cautioned Mr. Lee about yelling and asked that he keep himself under control. Mr. Lee said that the tape would reflect his tone of voice. Both counsel then asked the reporter to keep the tape. Unfortunately it was not kept.

61. Recalling that the witness had no independent recollection of the events, at page 16 Mr. Lee asked the witness whether or not there were any notes of a certain type and Ms. Bercov answered that there were no notes on that point. Mr. Lee was content to have the witness accept Ms. Bercov's information.

62. Mr. Lee then asked:

> There is nothing in the running records to show any meetings or discussions that were had, that took place to explain why S. [name omitted] was not removed the [name omitted] home?

63. At this point Ms. Bercov suggested that they look at the documents. This in turn led to Mr. Lee asserting that she had coached the witness by pointing out particular documents. Ms. Bercov denied this and said that she was merely suggesting they look at the binder. Ms. Bercov then objected to Mr. Lee's conduct as abusing the witness and then admonished him concerning yelling at the witness and being angry with him. It was at this point that Mr. Lee stated "Well, this man destroyed a woman's life, and if my emotions get a little bit too much of me I apologize to Mr. B.".

64. Ms. Bercov responded "Mr. Lee, I find that very objectionable for you to say that this man destroyed her life. Would you, please, save your arguments for Court and ask him questions and he will answer those questions". Mr. Lee then accused Ms. Bercov of pointing out paragraphs to coach the witness and Ms. Bercov pointed out that she hadn't, to which Mr. Lee retorted that she only hadn't because "we didn't allow you to get to that point".

65. The balance of the examination went better, but was punctuated by a number of objections.

66. Both parties subsequently took the conduct of the examination to court. Mr. Lee wanted a ruling that Ms. Bercov's objections were improper and an order for the resumption of the discoveries. Ms. Bercov wanted an order prohibiting Mr. Lee from conducting any further examinations of her elderly witness. Both Ms. J.S., the government officer, and Mr. Lee's clients swore affidavits about the conduct of the discovery.

67. The application with respect to the objections taken at the discoveries was resolved by Mr. Justice C. P. Clark. He ruled that of the approximately 35 objections Ms. Bercov made, 31 were appropriate and only 4 were unfounded. Concerning the 4 unfounded objections, the judge ruled that Mr. Lee had to be content with written interrogatories and could not conduct any further examination of Mr. B. either orally or in writing. Further, the Court took the unusual step of ordering that the Plaintiff pay the government's costs of $5,132.75 forthwith.

68. Before us Ms. Bercov and Ms. J.S. testified that on Mr. B.'s discovery Mr. Lee raised his voice and slammed binders around on the table.

69. Mr. Lee agreed that he may have raised his voice. He suggested that his comment concerning the destroying of the woman's life should be taken by us either as a true statement or as an apology. He also asserted that in making his accusations against Mr. B. he was attempting to use guilt as a technique to attempt to get him to admit responsibility.

CITATION 2

YELLOWHEAD YOUTH CENTRE – MAY 5, 2003

70. The next incident arose on May 5, 2003 when Mr. Lee was asked by the mother of an aboriginal youth in secure custody at the Yellowhead Youth Centre [YYC] to see her son. The citation is that:

> … In attending at YYC on May 5, 2003 you misled or attempted to mislead staff concerning your relationship to the young person with whom you were allowed access, and thereby breached the Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

The particular is that:

> You initially identified yourself as a family friend.

71. A woman who operated a native group home approached Mr. Lee. One of her charges had been placed in the YYC which is an access restricted residential treatment centre for youths. She was unable to contact the youth. The youth's mother was concerned about her son. Mr. Lee met the woman and the mother and agreed to see the youth.

72. On May 5th Mr. Lee drove the mother to YYC. The mother had an appointment to meet her son. The mother left Mr. Lee in his car, visited her son, who indicated that he would like to have Mr. Lee as his lawyer, and signed a handwritten retainer to that effect. The mother then went out, met with Mr. Lee and the two of them then returned to the facility.

73. There is a divergence in the evidence as to exactly what happened when they arrived at the locked doors to the facility. One of the guards/youth workers let Mr. Lee and the mother through the first locked door. There was a representation made by Mr. Lee, whether volunteered or in answer to a question, that he was a family friend. Thereafter the guard/youth worker let Mr. Lee and the mother through the second locked door. Mr. Lee then told the guard/youth worker that he was a lawyer. The guard/youth worker then went and checked the list of those people the child care worker, Mr. W.S., had established and found that Mr. Lee did not appear on the list as

a lawyer authorized to see the youth. When confronted with this, Mr. Lee showed the signed retainer agreement. The youth care workers insisted that Mr. Lee leave. Mr. Lee indicated that their behaviour was inappropriate and that it could get them into trouble. Mr. Lee left the building. The gist of the charge is that Mr. Lee said that he was a friend in order to sneak into the facility under false pretences.

74. Mr. S. established the list of those people who were entitled to visit the youth while he was in secure custody. This was called a contact list. The only lawyer that Mr. S. had placed on the list was employed by The Legal Aid Society of Alberta working in the family law office, Ms. Patricia Hebert. Mr. S. was not at the facility on the day in question.

75. Mr. A.R. is a youth care worker. He was the guard at the door when Mr. Lee and the mother approached. His evidence is that the mother and Mr. Lee came to the door. He recognized the mother, just having let her in and out. He said that Mr. Lee introduced himself as a friend of the family. Mr. R. let them in. The Law Society counsel asked Mr. R. "was there any discussion at that point about Mr. Lee being a lawyer? To which he replied "right off the bat I let them in, and then he did identify himself as the mother's lawyer". Mr. R. then checked the contact list and found that Mr. Lee was not the lawyer approved by Mr. S.. Mr. R., along with Mr. D.P. (his superior) then requested that Mr. Lee leave. Mr. R.'s evidence on whether or not Mr. Lee's statement that he was a family friend was in response to a question to that effect was unclear. In cross-examination Mr. Lee asked him "It's pretty simple. I am just asking you if when the mother and I arrived, if you greeted the mother by name and asked me if I was a family friend and that I replied 'yes'." Mr. R. answered, "no". I believe -- I believe I would ask who you are and you identified as a family friend".

76. Mr. R. was uncertain as to whether, once he let Mr. Lee in, he asked if Mr. Lee was the mother's lawyer. His evidence indicated that when Mr. Lee was asked for his name, Mr. Lee gave his name and volunteered that he was the mother's lawyer. In this regard, Mr. R. on cross-

examination said "I think you probably identified yourself by name" and "I think you identified yourself by your name and that you were the mother's lawyer because I would have needed your name to go look at the contact list".

77. Mr. R. testified that there was a group of lawyers who were paid by the government who usually represented youths and that Mr. Lee was not one of those approved lawyers. When he was shown the handwritten retainer agreement he did not "recognize that form as a legal form".

78. Mr. P. also testified. His evidence was that Mr. R. came to see him about a gentleman who had come along with a youth's mother who had initially claimed to be a family friend but then turned out to be a lawyer. When he found that Mr. Lee was not on the contact list he told Mr. Lee that he did not have a right to be in the building and had to leave. He reported that Mr. Lee became animated and started accusing the workers of denying the youth his right to a lawyer. Mr. P. said that the youth had counsel appointed by the Legal Aid Society, that there were a set of roster lawyers and Mr. Lee was not on the roster.

79. Mr. Lee's evidence was that there were two doors to the facility. That at the first door the guard greeted the mother and asked if Mr. Lee was her friend. Mr. Lee said he considered his answer in terms of whether or not he was a "friend" of the family or "foe" of the family and said he was a friend.

80. When they were let in through the second door Mr. Lee provided his name and indicated that he was a lawyer and went to speak with the youth. Those in charge of the facility came back and asked Mr. Lee to leave as he wasn't the lawyer on the contact list authorized to speak with the youth. Following an exchange, in which Mr. Lee showed the workers the written retainer, Mr. Lee left at their insistence.

CITATION 4

CRIMINAL INJURIES REVIEW BOARD – MAY 16 AND SEPTEMBER 9, 2003

81. Mr. Lee acted for a woman who, when she was 16 years old, was a ballet student at the Banff Centre. She was walking from the Centre to town when she was picked up by 3 bikers who raped, beat her and left her for dead. The trauma from this incident left her unable to cope with life. When Mr. Lee acted for her, years later, when she was living in Vancouver on social assistance.

82. Mr. Lee brought an application to the Criminal Injuries Review Board (the "Board") to have it reconsider and review compensation she was receiving.

83. The citation and particulars are set out below.

> **IT IS ALLEGED** that in your appearance before the Criminal Injuries Review Board on May 16, 2003, you misled or attempted to mislead the Board, and in your subsequent letter of September 9, 2003 to the Board, you made inappropriate threats based on actions taken by the Board that you had previously invited, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.
>
> > Particulars are as follows:
> >
> > From the transcript of your appearance, Exhibit 26, page 3, lines 6 to 8: You stated, "….I do have information now from the BC Social Services indicating that any money that Ms. Z. receives is deducted."
> >
> > From the transcript of your appearance, Exhibit 36, page 3, lines 16 to 19: You stated "I've asked for a Statutory Declaration from my assistant Michelle Caldwell which describes the conversation and includes the faxed information that they sent to, (*sic*) and it clearly states that she will have all the money deducted of the $3,000 paid and over $3,000 gets deducted dollar for dollar."
> >
> > From the transcript of your appearance, Exhibit 36, page 39, lines 8 to 14: You stated "She is receiving money." The Chair then asked you: "She is receiving money, is any portion of what she receives in terms of periodic monthly payments going to result in a reduction of her social benefits in the province of British Columbia of whatever kind? And if there income levels, like you mentioned the sum of $3,000 and there's more than $3,000 per month, that's dollar for dollar?" You responded "It's not per month. It's a total."
> >
> > Particulars of the inappropriate threats you made in your letter of September 9, 2003 to the Board are as follows: You had previously invited the Board to contact the Ministry in British Columbia in your comments transcribed at page 38, lines 26 to 28 of Exhibit 36. Your statement was "I invite you, I asked my assistant to put their phone number in the body of her affidavit and I invite you to call them. I know actually the Board should not do that."

> You threatened the Board in your letter of September 9, 2003, Exhibit 38, Tab 3, where you said “This violation is going to be reported to FOIP”.

84. There are two elements to this citation: misleading the Board and inappropriately threatening proceedings.

85. The misrepresentation involves whether Mr. Lee's client was reporting her crime compensation payments of $973.50 per month to British Columbia Social Services. This sum was arrived at by the Alberta Board deducting social assistance from an amount they would otherwise have paid her. In preparing for the hearing, the client told Mr. Lee that she had not been reporting her crime compensation payment to British Columbia. Mr. Lee told her that she had to and that she should.

86. Mr. Lee was asking the Board to increase his client's monthly payments to $3,000.00 and that the Board's deduction for social assistance be removed, both prospectively and retrospectively.

87. Near the start of the hearing the following exchange occurred:

Lee: … The first issue is the very simple one. The Director made a deduction for social assistance from Ms. Z's benefits. This was not based on any reason, any law, no reasons were given to Ms. Z nor to me upon request and I do have information now from the BC Social Services indicating that any money that Ms. Z receives is deducted.

Board: Mr. Lee, just to, and I don't mean to interrupt you and we can perhaps deal with that as we get to it. In reviewing the materials, we noted your concern with respect to that particular issue. Do you have some documentation from the Human Resources Department of British Columbia that would confirm all that? And if not, it's, you don't have to follow it up.

Lee: I apologize though, we've been asking them for several months and yesterday my secretary was able to, my assistance was able to have them provide some information directly. I've asked for a Statutory Declaration from my assistant Michelle Caldwell, which describes the conversation and includes the faxed information that they sent to, and it clearly states that she will have all the money deducted of the $3,000 paid and over $3,000 gets deducted dollar for dollar.

88. The problem arises from Mr. Lee's reference, in the first portion of the exchange, to the fact that "any money that Ms. Z receives is deducted" while in the second portion he states "that she will have all the money deducted of the $3,000 paid and over $3,000 gets deducted dollar for dollar".

89. Mr. Lee knew that his client had not told British Columbia Social Services about the $973.50 she was receiving. He was told this just before the hearing. He told his client to tell Social Services and to explain that the $973.50 payment was arrived at by the Alberta Board by taking a gross amount payable and deducting social assistance. Mr. Lee intended that if the Board retroactively increased the award to $3,000 and eliminated the deduction his client would notify British Columbia Social Services and the money would then be deducted by Social Services. He also expected prospectively that, if the Board awarded $3,000 per month without netting off social assistance, his client would report the gross amount to British Columbia and that British Columbia would, as he stated to the Board, "have all the money deducted of the $3,000 paid …".

90. Mr. Lee stated that he was being careful as he knew that his client had not yet reported the Board's award to British Columbia Social Services and that she could be charged with welfare fraud for failing to report the payments. He had urged her to disclose the matter to British Columbia rather than have British Columbia find out about it from another source. In the end when British Columbia learned of the payments it did not charge her. We note that the client was not, when looked at as a whole, receiving more money than she was entitled to receive. The issue was whether Alberta should deduct social assistance benefits before making its payment or whether it should pay the total amount and let British Columbia deduct. In either case the client would receive the same amount.

91. The matter was complicated by the fact that two days before the hearing Mr. Lee had his secretary write to British Columbia seeking information on the inter-relationship between Alberta

and British Columbia Social Services. The letter asked what would happen if the client received an award from Alberta, thus not disclosing to British Columbia the fact that a net award had already been made. British Columbia responded by telephone and the day before the hearing Mr. Lee had his secretary swear an affidavit which set out what would happen to any award made by the Board. A copy of Mr. Lee's letter to British Columbia was attached to her affidavit; however, the first page of the letter was redacted as "privileged". The first page of the letter did not contain privileged information. The manner in which it was written would leave the reader with the impression that the client, whose name was disclosed, was applying to the Alberta Board to get compensation. It would not have left the reader with the conclusion that she was already receiving compensation. If the complete letter had been attached, the Board would have realized that the letter did not disclose to British Columbia the fact that Mr. Lee's client was already receiving Alberta compensation.

92. Also, during the hearing, there was an exchange between Mr. Lee and the Board, which is set out in the penultimate paragraph of the particulars. We listened to the recording and concluded that Mr. Lee had not invited the Board to contact British Columbia. The recording shows, by the pauses and intonation, that Mr. Lee was correcting himself and ended by telling the Board that it would be inappropriate for the Board to call British Columbia to obtain the private information and that Mr. Lee would get the information.

93. Mr. Lee did not get the information to the Board before the Board, on September 8, 2003, wrote to British Columbia. The letter disclosed that the applicant was receiving $973.50 and posed a series of questions concerning the interaction between the Board's current and possible future awards, and British Columbia social assistance. A copy of this letter was sent to Mr. Lee. Mr. Lee wrote to the Board the next day requesting that its letter to British Columbia be retracted, complaining about breach of his client's privacy rights, stating that there should be no further

breaches of those rights and indicating that a complaint would be made to FOIP concerning the breach.

94. On October 10, 2003 British Columbia responded to the Board, in part stating that the client's $973.50 a month was being deducted from her social assistance payments – thus confirming that by this date the client was reporting this sum and the deductions were being made. The client testified that she believed that she advised British Columbia about the payments shortly after the May hearing. She also testified that she had had a great deal of difficulty obtaining a lawyer to represent her, that there was a great deal of difficulty getting the Board to provide proper production of documents, and that documents were still being produced in the days leading up to the hearing. She also indicated that she had the appearance of a bag lady – that she was frustrated, angry, and that she treated Mr. Lee badly. She testified that Mr. Lee told her to report the payments to British Columbia, but she was reluctant to do so.

95. The final particular in this citation is threatening to report the Board to FOIP. In the letter Mr. Lee asserts that the client's privacy rights had been violated, that the decision to make a compensation award was a confidential decision, and that there was no place in their legislation which allowed them to disclose to any party the amount of compensation that a victim is receiving. He also states that his client expects that her privacy rights would not be violated again. He then states that he's going to report the violation to the appropriate authorities. Mr. Lee did not, in that letter or otherwise, indicate that he would only report the behaviour if the Board failed to give him something in return. He was not threatening to report the Board – he was stating as a fact that the violation was being reported to the authorities. It was so reported and, we understand, rejected.

CITATIONS 6 AND 7

LETTERS OF DECEMBER 2, 2002, JUNE 12, 2003 AND SHOUTING DURING JUNE 2003 MEETING

96. During 2002 and 2003 Mr. Lee represented a young lady who had been sexually assaulted at an aboriginal retreat organized by the government. She was a government employee and was requested by her employer to attend the retreat. Mr. McPhail was a senior lawyer practicing law at the firm of McLennan Ross and was acting for the government. Mr. Lee's client had made claims under her disability policy, had threatened several proceedings, and had made a complaint to the Alberta Human Rights Commission.

97. The two letters in question, from Mr. Lee to his client, were obtained by Mr. McPhail as a result of proceedings to strike the Statement of Claim issued on behalf of the client on the basis that a limitation period had intervened.

98. In the December 3, 2002 letter Mr. Lee explained to his client the purpose of a letter that he had written to Mr. McPhail following the first meeting between Mr. Lee, Mr. McPhail and client. The offending section reads:

> Please find enclosed a letter I sent to Mr. McPhail. The purpose of my letter is to try to prove that the dominant purpose of our meeting with Mr. McPhail was not related to any anticipated litigation. If I can prove that, then I will be able to gain access to the letters between the Government and Mr. McPhail. Mr. McPhail is not stupid, so he will probably know that I am trying to do this. But at a minimum, then we will expose him as a big fat liar.

99. One of the purposes of the meeting was to explore how the events occurred so as to take steps to prevent reoccurrence. The meeting also involved discussions of how the matter might be resolved. Mr. Lee was attempting to cast the meeting as not related to settlement in the belief that this would provide him access to correspondence between Mr. McPhail and the government.

100. In June of the following year Mr. Lee met again with Mr. McPhail and Mr. McPhail's client. Mr. Lee's clients' parents attended the meeting. Mr. Lee got angry and shouted at Mr. McPhail, asking him if he had a heart. Mr. Lee admitted shouting and admitted that he behaved unprofessionally at the meeting.

101. Mr. McPhail testified that during the meeting they were discussing various issues, including the victim's human rights complaint, her eligibility for disability benefits, and the possibility of a lump sum settlement. While discussing the lump sum settlement amounts Mr. Lee, according to Mr. McPhail, "blew up and started a personal attack on me. And I remember particularly one line. 'Have you no soul? Don't you understand what these people have been through and all this sort of stuff? But it turned into - I don't think there were swear words, but I think it was totally a personal attack on me for being heartless, soulless, cruel, uncaring and offensively so, et cetera, et cetera."

102. Mr. McPhail sat out the tirade, which he said lasted less than a minute, and ended the meeting by taking his client out of the boardroom and telling Mr. Lee that he could let himself and his clients out.

103. After the meeting Mr. Lee wrote a letter to his clients which was equally intemperate. It began with an admission about his behaviour. In his letter he referred to this aspect of the matter as follows:

> Your father and mother can update you on the meeting. We met for quite a while and then Mr. McPhail accused your parents of taking this personally or making it personal or words to that effect and I completely lost control of myself.
>
> I shouted at Mr. McPhail at the top of my lungs that they took it personally because you are a person, you are their daughter, you are a human being and doesn't Mr. McPhail understand that. I probably went on for 30 seconds. I apologize to your parents and to you. I hope that my conduct does not negatively affect your case. However, I will not allow anyone to disrespect my client, you, or your parents.

104. The letter goes on to discuss settlement strategies and recommends that she settle the case.

105. A section of the letter, under the heading "If No Settlement", addresses what to do if the government will not pay enough, and is set out below:

> If we can't settle, then we would go to War and that is what it would be. They do not play nice and we would not be able to play nice either. From your point of view, you want compensation, accountability and healing.
>
> To get accountability, you would try to get the police to lay criminal charges against R.S. for fraud. What R. did is the type of crime that most people and police are familiar with. It is the type of crime that a police officer is more comfortable in charging. Criminal Court is public and Criminal Court creates personal responsibility. I doubt that he would get jail, but if convicted, he might get fired and create huge embarrassment and public attention. If convicted, his traveling becomes restricted.
>
> We would also try to get the police to lay charges of criminal negligence. This is the heart of what you want; however, this is far more unusual. It is outside of a police officer's comfort zone to press this type of charge. If successful, you would get direct accountability for what was done to you by the Government. Those that were negligent would be held accountable by the Court and the public.
>
> Because this is more difficult for a police officer to do, I would suggest that I take your Human Rights Complaint and get your police statement and an additional statement from you if necessary and give it to a former Crown Prosecutor that I know and ask for his legal opinion if it is Criminal Negligence. If …
>
> As you know that all of your medical treatment notes will be given to the Government if you sue them, you can ensure that the notes give a clear message to anyone in the government that you want to send a message to. For example, if you want to try to make Hugh McPhail to feel dirty, you could say those thing (sic) to your counselor or doctor and ensure that she writes those things down. You could say something like, "Hugh McPhail is making my condition worse. After I think about what Hugh McPhail said at the meeting, I cried for 2 days. I don't think that Hugh McPhail has a soul. I hope that he burns in hell. I hope his daughters find out what he does and disown him in his old age".

106. When he read the letter, Mr. McPhail was shocked. He could not believe a member of the profession behaving in such a way.

107. Mr. Lee acknowledged that he lost control of himself at the meeting and shouted. He asserted that the "Have you no soul" was merely repeating a comment his client had made to him. He also asserted that in suggesting that if his client wanted to make Mr. McPhail "feel dirty", she could say something like "Hugh McPhail is making my condition worse. After I think about what Hugh McPhail said at the meeting, I cried for 2 days. I don't think that Hugh McPhail has a soul. I hope that he burns in hell. I hope his daughters find out what he does and disowns him in his old age", was merely reporting back to his client what she had told him.

CITATION 5

LETTERS TO ALBERTA GOVERNMENT - OCTOBER 25, 2006

108. In 2006 Mr. Lee sought information concerning the government's policy of suing for children in care. He learned that he might obtain such information by writing a letter to the British Columbia government.

109. He had his assistant (Ms. Hendricks), who was interested in the topic and getting her Master's Degree in counseling, write letters to British Columbia. Ms. Hendricks was considering doing a major paper on the issue. Mr. Lee asked Ms. Hendricks to write letters to the Director of Child Welfare, the Minister of Children and Family Development and the Deputy Minister of Children and Family Development for British Columbia to see if she could obtain the current policy of the government with respect to bringing actions for children in care.

110. Ms. Hendricks testified that she asked Mr. Lee if she could send the letters out over her own name, not using the firm name, so that she could use the letters and the responses in her proposed paper. Mr. Lee agreed. When she wrote the letters she gave Mr. Lee's business address for the response because she lived with other people and didn't want the letters coming to her home address.

111. The letters that she wrote contained two questions as follows:

> 1. In British Columbia, if a child who is in the care of the government has a potential lawsuit, is it the Pubic [sic] Trustee who would investigate and sue on behalf of the child if it is appropriate?
>
> 2. If so, would this also mean that the Public Trustee would sue the government if the child's potential claim as against the government, for example, a claim against a Child Welfare worker?

112. The responses were useful and Mr. Lee asked her to get the same information from Alberta. Ms. Hendricks wrote an identical letter on October 25, 2006 to Ms. Maria David-Evans, Deputy Minister of Children's Services in Alberta.

113. Ms. Bercov responded objecting to the letter. She stated that it was inappropriate for Mr. Lee's office to communicate directly with her client seeking information that is the subject of a "proposed class action". She cited Chapter 4, Rule 6, which she set out as follows:

> Rule 6: "If a lawyer is aware that a party is represented by counsel in a particular matter, the lawyer must not communicate with that party in connection with the matter except through or with the consent of its counsel."
>
> Commentary: "If an opposing party is an organization such as a corporation, association or government department, a lawyer is prohibited from communicating about the matter with directors and officers of the organization and management-level personnel having decision-making authority".

114. The "proposed class action" referred to an action filed on June 29, 2004 but not yet certified as a class action. The action was filed by a group of lawyers alleging that the Director of Child Welfare had a duty to commence tort actions for children in care and that when the Director had not done so and the children lost their right to sue, the government was responsible in damages for the failure to bring those actions.

115. Mr. Lee testified that he had other clients, not parties to the class, who were interested in this issue and that he was attempting to get the same type of information from Alberta that the government of British Columbia had given him. He felt that his request was appropriate. He also questioned why, if another lawyer who did not have carriage of an existing lawsuit to which the documents were relevant, could get the information, it was unethical for Mr. Lee to get the information in the same manner from the same source.

116. We note that the letter complained of requests current information not historical information and that the class action was limited to children who were injured while in care from 1966 to 1984, some 20 years earlier. It is difficult to understand how seeking information from the government about its current practices is relevant to the practices and procedures of the government some 20 years earlier.

GENERAL EVIDENCE

117. Before discussing the application of the evidence to the citations and determining whether the behaviour complained of is conduct deserving of sanction, we will review some of the other evidence.

118. In addition to the witnesses discussed above, the Law Society called Ms. Lillian Melnyk, a secretary who had worked at Alberta Justice with Mr. Lewis and Mr. Merryweather. She left Alberta Justice and was looking for employment. Mr. Lee met her for lunch. By reputation she knew that Mr. Lee was very passionate about representing sexual assault victims.

119. She testified that when Mr. Lewis' name came up Mr. Lee became agitated. She recalled that he told her that he felt that Mr. Lewis was quite unethical, that Mr. Lee's mission was to find out everything he could about Mr. Lewis and seek to have him disbarred. She believed that bankrupting Mr. Lewis might also have been mentioned.

120. When questioned by Mr. Lee she specifically denied that she had told Mr. Lee that Mr. Merryweather had intentionally withheld relevant documents from Affidavits of Records. She said she left the lunch shocked and bewildered by Mr. Lee's attitude.

121. Ms. Patricia Hiebert, an employee of the Legal Aid Society of Alberta working in the Family Law Office, was assigned to represent the youth in secure custody at YYC. She testified that as the youth was already a guardian of the government, the social worker was entitled, on proper evidence, to have the youth transferred to secure custody for a period of 10 days. Within that time the government had to apply to court to show cause why the youth should be retained longer in secure custody. She said that on April 11th the youth was secured under secure treatment certificate. On April 14th he applied for Legal Aid and she spoke with him on April 15th. The secure treatment order was granted on April 17th for a period of 21 days. It was supported by a report from a psychologist who indicated that the youth was suffering from a mental or behavioural disorder that he put himself and/or others at risk and that confinement in a secure

treatment facility was necessary to alleviate the risk. She said that she, on behalf of the youth, consented to the secure treatment order.

122. She received a call from the YYC indicating that Mr. Lee was consulting with the youth. She spoke with Mr. Lee about the procedure for reviewing the secure treatment order. She noted that an application to terminate the order would not be effective as it would require 5 days' notice and the order would be expiring before 5 days.

123. The member called witnesses to testify about his general reputation, character or their experience with him.

124. Mr. Todd Munday testified that he had been on the other side of a file with Mr. Lee and found him to have handled it well and indicated that the file resolved appropriately. Ms. N.T. was a clerk in the bail office and saw Mr. Lee in his role as a magistrate. She testified positively to his professionalism, courtesy, integrity and consideration for others. As well, a series of statutory declarations were entered by consent as Exhibit 127. These were from administrative assistants with the government who had observed Mr. Lee in his role as a magistrate and found him to be ethical, honest, and interested in wanting the legal system to be more accessible to poor people. They spoke to the fact that Mr. Lee put the interests of others above himself and was a caring person.

125. Ms. D.S. also testified. She was a long time government employee in the area of youth and family services. She was questioned about her perception that, historically, the government did not take civil action for children in custody, particularly where injuries to the children may have resulted from neglect on the part of government agencies or employees. She said that the government routinely obtained counsel for children used for criminal matters, for family or youth matters, and occasionally for injuries sustained in motor vehicle accidents. However, she was

unaware of the government taking action where the government was implicated in the harm caused to the child.

126. Much of her time on the stand was taken up attempting to interpret or gain her understanding of a written government policy with respect to obtaining counsel for use in custody and civil matters; however, the panel does not regard that evidence as useful to its determination.

127. Ms. C.H. testified. She had a long career in the public arena dealing with youth and family matters. She was Executive Director of the Sexual Assault Centre in Edmonton from 1991 to 1997. During a portion of that time Mr. Lee was on the board. Ms. H. became the Executive Director of the Alberta Association of Services for Children and Families (AASCF) which was an association made up of agencies that provided services to children and families in Alberta. That organization was funded principally by the Alberta government and was an umbrella for organizations that dealt with children.

128. She testified about the government's animosity towards Mr. Lee. Mr. Lee and Ms. Virginia May, Q.C. had commenced a class action against the government concerning children in care. Ms. H. and her group thought the action would be of interest to the association and scheduled Mr. Lee and Ms. May to speak at one of its meetings. She and others on her board, received telephone calls from the government suggesting that it was inappropriate for the organization to invite Mr. Lee and Ms. May to speak. As a result of the various contacts from the government the invitation to Mr. Lee and Ms. May was withdrawn. She advised Mr. Lee of the reason for the cancellation. These events occurred in the spring or summer of 2001, less than a year before the first of the events giving rise to these citations.

129. Ms. Muriel Venne also testified on behalf of Mr. Lee. She is a Métis woman who has devoted her life to representing and advocating the interests of aboriginal people. She chairs the Aboriginal Commission on Human Rights and Justice. She previously served as one of the

Commissions of the Alberta Human Rights Commission for which she received the 1998 Alberta Human Rights Award. She is President and founder of the Institution for Advancement of Aboriginal Works. She received recognition from the United Nations, and in 2005 she received the Order of Canada. In 2007 the Canadian Ambassador to the United Nations recognized her work for aboriginal children, women and families.

130. She stated that from the perspective of the native community, Mr. Lee is very well respected and viewed as a very outstanding person and lawyer. The reason for this is that it is difficult for her people to get representation in cases involving children. She stated that "Robert is a very special person because he is probably the only one of few who will take cases for our families and mothers". She noted that she had approached other people to assist, but they refused to take cases against the government because they were dependent upon government for funding. She stated that even aboriginal lawyers, in whom the community places a great deal of trust, cannot survive taking the kind of cases that Mr. Lee takes.

131. Amongst other things, she stated:

> And I have said, and both publicly and in newspapers, that I view Robert as one of the most courageous lawyers in the province – as the most courageous lawyer in this province because there are so many factors against achieving any kind of justice or achieving any kind of redress or anything for aboriginal women.

She concluded by saying:

> So I believe that, so I believe that because I have read the – and worked with him in the things he has done and I wanted to be here. I wanted to be here to tell, to tell you, as the Law Society, that every and everyone how much he means to us because we do refer cases. And I know just from my own experience how stressful that can be to deal with things that you have no control over …

Pursuant to s.74(4.1) of the *Legal Profession Act*, the Chair of Conduct accepted a joint submission by Mr. Lee and Mr. MacDonald, and directed that the portion of the Hearing Report as it relates to the portion of the hearing held in private will not be provided. Therefore paragraph #132 has been deleted.

132.

133. We will now turn to the general evidence that Mr. Lee gave which is not related to any specific citation.

134. Mr. Lee was born in 1965. He graduated from law school in 1989 and was called in 1990. While he articled at a large firm, he moved to Edmonton with a smaller firm for a year before starting his own firm with two other lawyers doing general practice, criminal, and real estate.

135. He became interested in sexual abuse cases as a result of proceedings where he felt that the victims had not received a fair shake. He went on the board of the sexual assault organization. In doing this work he acted for clients who told him about problems experienced by children in custody. This lead to his interest and focus in this area.

136. His activity in this area, beyond taking cases for victims against the government, included bringing applications to criminal injury compensation boards, and participating in two class actions, one involving the government not suing for children in custody, the other dealing with unlawful confinement of children.

137. He said this has been a stressful practice, fighting against the government that has unlimited resources for defence on behalf of people who have no funds. During the time in question his marriage broke down, he moved out of his house and had no contact with his wife. In fact, he found out later that his wife had a child by another man while not telling him or pursuing the divorce proceedings. He felt that she was not proceeding with the divorce because she anticipated that he might receive significant fees from one of the class actions and that she would then be able to participate in that payment. He also said that his wife questioned why he was pursuing these types of cases when he could make good money and be less stressed handling other types of cases. He felt that he had been effective in representing his clients, including achieving large recoveries, and causing policy changes to take place. He gave as an

example the normal practice of allowing perpetrators of sexual assault in schools to remain in the school and having the victim change schools if the victim's continued presence in the school caused her problems. This was changed to requiring the perpetrator to change schools.

138. He also testified to extensive studies concerning the failure of the Alberta Child Welfare system to adequately deal with and look after children in care. He also believes that his class action lawsuit lead to a change in the government policy regarding suits for children in custody and with respect to the manner in which claims are handled in the criminal injuries compensation process.

139. He spoke of his frustration about not being allowed on the list of lawyers who were authorized to represent children in custody at the expense of the government, their guardian, as well as his frustration when he learned that the government's effective steps to prevent his speaking to the AASCF conference.

140. He testified that he truly believed that government employees hid documents in the case involving the child placed in the foster home of her aunt and uncle. He pointed out that the only document missing from the file the government produced was the crucial document evidencing the mother's complaint. This was the only document that varied from the document in the RCMP file. He concluded that only a government employee could have removed, hid or failed to produce this document.

141. He testified about the difficulties that he had in dealing with the government, what he perceived to be the obstruction by the government and its employees in litigation, a tactic that he believed was designed to wear down claimants.

142. He testified about the difficulty that he had getting the Criminal Injuries Compensation Board to produce records with respect to the client who was subject to the gang rape.

PRINCIPLES

143. The principles that we apply to our consideration of the citations include:

(i) The Law Society has the burden of proof on a preponderance of fair and credible evidence on the facts. This includes the burden to prove, to the extent relevant, that the statements were untrue and that they could not be reasonably believed to be true.

(ii) Truth is a defence but not an absolute defence. The language, tone and volume used to express a truthful position may be sufficiently excessive or inappropriate to constitute conduct deserving of sanction notwithstanding the truth of what is being asserted.

(iii) Belief that something is true is a defence, subject to the above caveat concerning excessive language, so long as the belief is one that a reasonable person could hold.

(iv) Provocation, or events leading up to the comments, may mitigate against the comments such that comments made which would sanctionable if made unprovoked may not be sanctionable in the presence of provocation.

(v) The line between negligent or thoughtless statements and actions and statements attract sanction will be affected by such matters as premeditation, the ability to correct the statement or action, the time lapsed before the correction, and the harm done.

DISCUSSION – DECISION

CITATION 3

LETTERS REGARDING "MADE-UP" ARGUMENTS AND SURVEILLANCE

144. Citation 3 involves comments made in letters of January 21 and February 27, 2002 from Mr. Lee to a lawyer who was part of a group of lawyers that had charge of various aspects of the four sisters case. Mr. Lee had partial success at the Court of Queen's Bench, had amended his Statement of Claim, and was seeking production of further documents in the case. His experience in the case was that the government had failed to produce a key document only to find it produced in the RCMP's copy of the government's file. It was the only discrepancy between the RCMP's copy of the file and the government's copy of the file. It is clear to us that someone within the government either destroyed the document or suppressed it. It is too much of a coincidence to expect that such a key document just happened to be lost. In the letter the language that Mr. Lee used is:

> If the affiant tries to hide documents which are later disclosed, your client will either look like they are once again trying to hide document or are not bright enough to know what documents are relevant. Either way, the outcome is very bad for your client.

145. We find that he believed, and had reasonable grounds to believe, that someone in the government had hid or destroyed (destruction being another way of hiding) a key document and that while the language used is inelegant it does not constitute conduct deserving of sanction.

146. The second portion of the letter which is objected to states:

> In the Court of Appeal your client is arguing that the documents are not relevant for whatever reason that Mr. Lewis has made up.

147. We find that this statement does not rise to the level of conduct deserving of sanction. While again inelegant, it is the same as the government's own factum in the case which, more elegantly, accused Mr. Lee of advancing arguments under false pretences. The government chose to characterize, to the Court of Appeal, and not merely opposing counsel, Mr. Lee's arguments to be a "guise". It seems strange that the government now complains about the same

allegation when it is made against itself. Indeed, the government's audience for its critique of Mr. Lee's argument was much broader than Mr. Lee's audience for his accusation.

148. Further, we find that Mr. Lee firmly held the belief that the government was making up arguments which were not credible. We also find that he could reasonably hold this belief. Part of the factual background for Mr. Lee's belief is the position that the government lawyers took at the mini-trial. While Mr. Lewis was not involved in the file at that time, it did form part of Mr. Lee's understanding of positions the government was prepared to take in opposition to his claims. Further, on the appeal of the order requiring the government to produce its policies, the initial government factum, the government's amended factum and then its abandonment of the appeal all support Mr. Lee's belief. While Mr. Lee's singling out of Mr. Lewis was not strictly accurate (Mr. Lewis was not involved in the mini-trial, for example), Mr. Lewis was involved in the appeal and admitted that he was part of a group in Justice that was responsible for this file and made joint decisions with respect to it.

149. We find that there needs to be some scope for counsel to comment upon perceived obstruction of tactics and silly arguments put forward by opposing counsel without being subject to sanction from the Law Society. We do not take the government's accusation in its factum that Mr. Lee was presenting arguments that he didn't believe in ("guise") as behaviour that would attract sanction. It does, however, provide some evidence of the ambit of free and frank opinions that are often exchanged between counsel in litigation.

150. Turning to the final alleged offending portion of the correspondence, the surveillance portion of the February 27th letter, we find that Mr. Lee was attempting to have the government rescind its position on engaging in further surveillance of his client in circumstances where the government knew that there was medical evidence supportive of the view that the surveillance constituted a danger to Mr. Lee's client.

151. Mr. Lee consulted with another, more senior, lawyer who had been appointed Next Friend to the client due to the client's frailty. Initially they merely sought an order that the government cease the surveillance. The government chose to contest that application not merely on its merits but on the technicality that the order could not be made unless Mr. Lee had a separate cause of action outstanding against the government with respect to the surveillance. Mr. Lee, with Ms. Stewart, discussed bringing that action. Ms. Stewart testified that one would name all of those involved in the surveillance and that this was "Law 101". Whether all participants needed to be named is open to debate and is a matter of judgment. Given Mr. Lee's experience with the government losing or destroying a key document and being resistant to production of documents, many lawyers in his position would have contemplated naming as many participants as possible to secure as much relevant information as possible.

152. We find that the manner in which the government chose to resist Mr. Lee's application to cease surveillance led directly to Mr. Lee contemplating an action of surveillance against those participating in the matter. That Mr. Lee then explained the implications of the decision should not have been unexpected. The fact that Mr. Lee suggested that he would need to sue all of those possibly involved in the surveillance does not, in our view, rise to the level of conduct deserving of sanction. It was rather a consequence of the manner in which the government and the government lawyers chose to oppose Mr. Lee's application. The scope of the parties that could be subject to such an action appears to have surprised the government. However, it is not uncommon for plaintiffs to sue, for example, all of the doctors and all of the nurses involved in treating a patient along with the hospital so as to ensure that the patient will not lose the case for lack of evidence or on the basis of some technical non-inclusion of the responsible party. After all, Mr. Lee had been met with technical defences before.

CITATION 2

DISCOVERY – SEPTEMBER 10, 2002

153. Turning first to the statement made by Mr. Lee to the witness:

> Well this man destroyed a woman's life, and if my emotions get a little bit too much for me, I apologize to Mr. B..

we do not feel that this is an apology. This is a direct personal attack upon the witness by a lawyer who lost control of himself and it crosses the line into the realm of behaviour that harms the profession and is deserving of sanction.

154. Mr. Lee has difficult clients. This client was difficult. Mr. Lee feels strongly about the plight of his clients. He was frustrated litigating on their behalf against an adversary that has unlimited resources and time. At the time of these events his own personal life was in shambles. His emotions clearly were under poor control. We note that, to an extent, they remain so today as he, on several occasions before us, lost his composure, and required a recess. However, these extenuating circumstances did not and cannot justify a lawyer using language like this to a witness, not to mention an elderly witness being examined about matters that occurred over 30 years before and where the witness had no personal stake in a decision that he had to make. We also note that the decision that the witness had to make was a Hobson's choice between two less than desirable options.

155. We find that Mr. Lee raised his voice. We note that the objections that Ms. Bercov made were subsequently substantially sustained by the court. We note that the court refused to allow Mr. Lee to orally examine the witness further. We also note that Ms. Bercov began by stating reasons for her objections. She had stated reasons for her objections the day before. At a certain point she ceased to give reasons for her objections, but we note that the discovery was very tense and argumentative at that point and it is not unusual for counsel to chose not to engage in debate over objections in those circumstances.

156. With respect to Mr. Lee alleging that Ms. Bercov was "coaching" the witness, we find these comments to have been made without a factual basis and to be unprofessional and to support a conviction on this citation. Clearly Mr. Lee, during this discovery, lost the control expected of counsel. We find that the citation, as particularized, has been proven and that Mr. Lee's conduct in that regard is deserving of sanction.

CITATION 2

YELLOWHEAD YOUTH CENTRE – MAY 5, 2003

157. The issue here is whether, when Mr. Lee said he was a "friend", this statement was conduct deserving of sanction. We find that the Law Society has not proven that Mr. Lee volunteered this characterization. As said earlier, the gist of the charge is that Mr. Lee said that he was a friend in order to sneak into the facility under false pretences. Mr. Lee said that he answered a question of Mr. R., the child care worker on guard at the locked front doors of the facility. Mr. Lee said that, on the spur of the moment, he answered in the affirmative. Mr. R.'s evidence on whether Mr. Lee suggested he was a friend, or whether he was answering a question that Mr. R. was asking as to whether or not he was a friend, is unclear. Mr. R. used the word "believe" in answer to a question about whether Mr. Lee volunteered the characterization. Further, once through the second locked door, Mr. Lee identified himself as a lawyer. If he had intended to gain access under false pretences he would not have immediately told them who he was and that he was a lawyer.

158. Further, while asserting or describing himself as a friend was, in our view, a stretch of that definition, does not rise to the level of sanctionable conduct. It was made without premeditation, and was not made for a personal benefit. His actual purpose and full identify were revealed immediately thereafter. Further, even if Mr. Lee had described himself as a friend we do not think, in these circumstances, that it would be in the public interest to sanction him for seeking access to a client who was incarcerated. Sanctioning a lawyer in such circumstances would be contrary to the interests of justice and the rights of citizens to obtain counsel. We question the

appropriateness of government social workers having power over incarcerated youths to decide which lawyers the youths may consult. Rather, we believe that the error in this case lies with those who had the youth in custody in denying the youth the right to speak with Mr. Lee. To sanction Mr. Lee is contrary to the broader interests of access to justice and access to legal counsel.

CITATION 4
CRIMINAL INJURIES REVIEW BOARD – MAY 16 AND SEPTEMBER 9, 2003

159. The citation is that Mr. Lee attempted to mislead the Board regarding whether his client was reporting to British Columbia Social Services the money, which was already net of social assistance that was paid to her by the Board.

160. As we noted in the factual section of this decision, upon hearing the audio of the hearing it is clear that Mr. Lee told the Board that it was inappropriate for the Board to contact British Columbia Social Services.

161. Mr. Lee knew that his client had not been reporting this income to British Columbia as she was required. He told her that she should, but she was a difficult client and did not immediately follow his advice. At the hearing he did not want the Board to know of this fact. He felt that his client might well be liable for welfare fraud for not reporting. However, we know that Alberta was deducting the welfare payments so Mr. Lee's client was not, in fact, receiving more on a gross basis than she should have been entitled to. For British Columbia to have again deducted for social assistance would have constituted an inappropriate double deduction, when viewed from the perspective of the intended recipient of the benefits.

162. Before the Board Mr. Lee was, in part, attempting to correct the prior award. He expected that, if corrected, the new award would be reported to British Columbia and British Columbia would deduct the now gross amount that Alberta would be paying. This is the information that he gave the Board. This is what happened.

163. The difficulty is with the language he used before the Board when he stated:

> … I do have information now from British Columbia Social Services indicating that any money that Miss [Z] receives is deducted.

164. We also that the language is open to the interpretation that he was speaking about any award that came out of the hearing then in process. This was not an inquiry into what she had done in the past. When he spoke he did not say "is receiving". It was open to him to have intended, as he testified before us, to convey that any amount that she receives as a result of their award would be subject to deduction. This makes sense as he was asking that the amount be grossed up and arguing that Alberta's deduction was inappropriate and that the deduction should be made in British Columbia. It is of note that immediately after the offending language, and in answer to a question from the Board, Mr. Lee readdressed the issue in the future tense when he said "that she will have all of the money deduction of the $3,000 …".

165. In the circumstances we conclude that any loose language used earlier on this page has not been proven by the Law Society to have been intended by Mr. Lee to be an untrue statement about the current situation as opposed to a statement about what would happen to any increased award.

166. A second aspect to this citation involves the threat to report the Board to FOIP. It is not conduct deserving of sanction to advise another party that you intend to or are reporting them to a regulatory body. We are satisfied that Mr. Lee believed that the actions by the Board violated his client's privacy and violated the act. At first blush it appears to us that the information being provided by the Board to British Columbia Social Services is private and confidential information of the victim. We do not find it inappropriate for Mr. Lee to have concluded that there was a wrongful disclosure of his client's confidential information or that it was inappropriate to report the matter to the proper regulatory authority for determination. Mr. Lee was not threatening to report them unless they did something else. He was suggesting that they should not repeat the breach,

that they should do something to correct it, and he went on to advise them that he was going to report them to FOIP, not that he would do so only if they did not do something that he wanted them to do. Accordingly, citation number 4 is dismissed.

CITATIONS 6

LETTERS OF DECEMBER 2, 2002 AND JUNE 12, 2003 AND SHOUTING DURING MEETING OF JUNE 2003

167. We are satisfied that Mr. Lee shouted at Mr. McPhail in the June 2003 meeting and that his conduct in that regard is deserving of sanction. Such behaviour brings the profession into disrepute. It requires sanction to correct the behaviour and to send a message to the public and the profession that such behaviour will not be tolerated.

168. The same comments apply to correspondence to a client. A lawyer brings the profession into disrepute when he demeans another lawyer. Mr. Lee had no basis for suggesting that Mr. McPhail was a "big fat liar". Further, this type of inflammatory language, even if true, is unbecoming. It was also wholly inappropriate for him to suggest that his client press criminal charges. Litigation is not "war" and even war has limits and rules. Suggesting a method whereby a client could make another lawyer feel "dirty", shows a loss of control and professionalism that clearly rises to the level of conduct deserving of sanction. Accordingly, the Law Society has proven the member guilty on these two citations.

CITATION 7

LETTER TO ALBERTA GOVERNMENT – OCTOBER 25, 2006

169. We find that this citation has not been proven. We accept the evidence of Mr. Lee and Ms. Hendricks explaining why the letters did not go out on firm letterhead. While we understand the suspicion that the receipt of such letters, once the identity of the firm was known, would create in the minds of the government, nonetheless we do not find the letters to be inappropriate. Further, when we consider the outstanding litigation that existed at the time, the evidence before us suggests that the questions posed in the letter were not so obviously related to the litigation

such that they were obtained in contravention of the code. Ms. Bercov asserted that the material was relevant to a class action. That action deals with historical events and a group of claimants that are limited to a period some 20 years earlier. Mr. Lee's request was for current practices. It was not demonstrated that there was a connection between the current request and the class action.

CONCLUSION

170. The Panel concluded that there was no requirement to refer the matter to the Attorney General. As the hearing proceeded in public the exhibits and the transcript will be made available upon request and with the redaction of any client names.

171. Counsel and the member should schedule a continuation of the hearing to address sanction and costs.

Dated at Calgary, Alberta, this 1st day of May, 2009.

____
Bradley G. Nemetz, Q.C. (Chair)

____
Neena Ahluwalia, Q.C.

____
Larry McConnell, Q.C.

DECISION ON SANCTION

On August 31, 2009 the Hearing Committee reconvened to decide the appropriate sanction. After hearing evidence and argument the Hearing Committee directed the member be reprimanded, pay fines of $1,500 on each of the three citations on which his conduct was found to be deserving of sanction and pay set costs of the hearing, being $10,000. The Hearing Committee will be providing written reasons for its decisions. The reasons will be published when released.

Schedule "A" Particulars of the Citations

1. **IT IS ALLEGED** that in the examination of Mr. B. on September 10, 2002, you made inappropriate comments, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

   Particulars are:

   > Your comments to Mr. B., reproduced at Exhibit 6, Tab 1, Page 18, lines 8 to 10, "Well this man destroyed a woman's life, and if my emotions get a little bit too much of me, I apologize to Mr. B.."
   >
   > Your comments to Ms. Bercov, reproduced at Exhibit 6, Tab 1, page 6, lines 11 to 13: "The reports are on the file Ms. Bercov. If you can't read the documents for yourself, then you have a problem."
   >
   > Your comments to Mr. B. and to Ms. Bercov, reproduced at Exhibit 6, Tab , page 16, line 27 to page 19, line 11 wherein you imply that Ms. Bercov was coaching the witness, Mr. B., and pointing out paragraphs to him to help him answer questions.
   >
   > Your comments in response to a statement by Ms. Bercov at Exhibit 6, Tab 1, page 19, lines 12 to 14 where she said "And I would like to put on the record that I was not pointing paragraphs out to this witness, less (*sic* there be any doubt about that" and you responded as follows: (same page, lines 15 and 16) "Well that's because I didn't – we didn't allow you to get to that point".

2. **IT IS ALLEGED** that in attending at YYC on May 5, 2003 you misled or attempted to mislead staff concerning your relationship to the young person with whom you were allowed access, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

   Particulars are: you initially identified yourself as a family friend.

3. **IT IS ALLEGED** that in your correspondence to Mr. Kinash of January 21, 2002 and February 27, 2002, you made inappropriate comments, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

   Particulars are:

   > Exhibit 6, Tab H is a copy of your letter of January 21, 2002 to Mr. Michael Kinash of Bryan & Co. On page 2, you wrote:
   >
   > "If the affiant tries to hide documents which are later disclosed, your client will either look like they are once again trying to hide document or are not bright enough to know what documents are relevant. Either way, the outcome is very bad for your client."
   >
   > On the same page you also wrote:

> "In the Court of Appeal your client is arguing that the documents are not relevant for whatever reason that Mr. Lewis has made up."

4. **IT IS ALLEGED** that in your appearance before the Criminal Injuries Review Board on May 16, 2003, you misled or attempted to mislead the Board, and in your subsequent letter of September 9, 2003 to the Board, you made inappropriate threats based on actions taken by the Board that you had previously invited, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

   Particulars are as follows:

   > From the transcript of your appearance, Exhibit 26, page 3, lines 6 to 8: You stated, "….I do have information now from the BC Social Services indicating that any money that Ms. Z. receives is deducted."
   >
   > From the transcript of your appearance, Exhibit 36, page 3, lines 16 to 19: You stated "I've asked for a Statutory Declaration from my assistant Michelle Caldwell which describes the conversation and includes the faxed information that they sent to, (*sic*) and it clearly states that she will have all the money deducted of the $3,000 paid and over $3,000 gets deducted dollar for dollar."
   >
   > From the transcript of your appearance, Exhibit 36, page 39, lines 8 to 14: You stated "She is receiving money." The Chair then asked you: "She is receiving money, is any portion of what she receives in terms of periodic monthly payments going to result in a reduction of her social benefits in the province of British Columbia of whatever kind? And if there income levels, like you mentioned the sum of $3,000 and there's more than $3,000 per month, that's dollar for dollar?" You responded "It's not per month. It's a total."
   >
   > Particulars of the inappropriate threats you made in your letter of September 9, 2003 to the Board are as follows: You had previously invited the Board to contact the Ministry in British Columbia in your comments transcribed at page 38, lines 26 to 28 of Exhibit 36. Your statement was "I invite you, I asked my assistant to put their phone number in the body of her affidavit and I invite you to call them. I know actually the Board should not do that."
   >
   > You threatened the Board in your letter of September 9, 2003, Exhibit 38, Tab 3, where you said "This violation is going to be reported to FOIP".

5. **IT IS ALLEGED** that you directly or indirectly communicated with a party or representative of a party in the context of a law suit knowing that the party was represented by counsel, and without first obtaining permission or consent of that counsel, contrary to Chapter 4, Rule 6 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

6. **IT IS ALLEGED** that you failed to be courteous when you shouted at the complainant during a meeting on or about June 2003, contrary to Chapter 1, Rule 6 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

7. **IT IS ALLEGED** that you in correspondence dated December 3, 2002 and June 12, 2003, made remarks concerning another lawyer that were not fair, accurate and courteous, contrary to Chapter 3, Rule 2 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.