

**THE LAW SOCIETY OF ALBERTA**  
**IN THE MATTER OF THE *LEGAL PROFESSION ACT*,**  
**AND**  
**IN THE MATTER OF A HEARING REGARDING**  
**THE CONDUCT OF ROBERT BURGNER**  
**A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**Hearing Committee:**

Robert G. Harvie, QC  
Dr. Miriam Carey  
Adam O. Letourneau, QC

**Appearances:**

Counsel for Robert Burgener – Self Represented  
Counsel for the Law Society – Lois MacLean

**Hearing Dates:**

October 5, 6, 7, and November 16, 17, 18, 19, 20, 2015  
January 7, 8, 14, 15, and March 21, 22, 2016

**Hearing Location:**

Law Society of Alberta at 500, 919 11<sup>th</sup> Avenue SW, Calgary, Alberta

**HEARING COMMITTEE REPORT**

**Introduction and Summary of Result**

1. On October 5, 2015 a Hearing Committee of the Law Society of Alberta (LSA) convened at the LSA offices in Calgary to inquire into the conduct of the member, Robert Burgener. The Committee was comprised of Robert G. Harvie, Q.C., Chair, Dr. Miriam Carey and Adam O. Letourneau, Q.C.
2. The LSA was represented by Ms. Lois MacLean. The Member was present throughout the hearing and was self-represented.

3. At the commencement of the hearing, Committee member Adam Letourneau disclosed that he was part of a committee addressing an assurance fund application, which did not proceed to adjudication or further steps. The existence of an application had only been disclosed to him as part of that committee but he did not review any materials for that application. Mr. Burgener confirmed he had no objection to Mr. Letourneau remaining on the Hearing Committee, for apprehension of bias or any other reason. There was no objection.
4. The hearing proceeded, with witnesses being called by the LSA and on behalf of Mr. Burgener.
5. The hearing concerned sixteen citations made against Robert Burgener. After hearing all evidence and argument presented by the LSA and by Robert Burgener, the Committee found Robert Burgener guilty of fourteen of the sixteen citations against him, and determined that his conduct was “conduct deserving of sanction” in accordance with section 49 of the *Legal Profession Act*, RSA 2000 c L-8 (Act).
6. Having found Mr. Burgener guilty of fourteen citations, the Committee considered representations on sanctions. After considering the arguments of the LSA and of Mr. Burgener, the Committee directed that Robert Burgener be disbarred, that costs be directed against him, and that a referral be made to the Attorney General for the Province of Alberta for consideration of possible criminal proceedings.

### **Jurisdiction and Preliminary Matters**

7. Prior to the hearing, the parties agreed to enter the following exhibits relevant to the determination of jurisdiction of the Hearing Committee: the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, the Certificate of Status of the Member and the Certificate of Exercise of Discretion. These documents were entered into evidence by consent, marked as Exhibits 1 to 5 respectively.
8. There was no application to have the hearing held in private and the entire hearing was conducted in public. It was noted, however, that there is an Order of the Court of Queen's Bench of Alberta in action number 070●-●●●●●, directing that details of those proceedings were to be sealed or partially sealed. The Hearing Committee directed that all evidence relating to action number 070●-●●●●● shall be redacted from the transcripts and any exhibits relating to that action shall not be made available to the public to ensure compliance with the Order.

### **Citations**

9. The citations arise from complaints brought by JM, a former client of Robert Burgener. The following citations were issued by the LSA:

1. It is alleged that you improperly disclosed confidential information of former

clients and that such conduct is deserving of sanction.

2. It is alleged that you acted when in a conflict of interest and that such conduct is deserving of sanction.
3. It is alleged that you offered a bribe and that such conduct is deserving of sanction.
4. It is alleged that you signed false documents and that such conduct is deserving of sanction.
5. It is alleged that you installed a surreptitious surveillance camera and recorded conversations without first obtaining the consent of the party being recorded and that such conduct is deserving of sanction.
6. It is alleged that you threatened and attempted to extort money from a client and that such conduct is deserving of sanction.
7. It is alleged that you failed to account for trust funds and that such conduct is deserving of sanction.
8. It is alleged that you failed to properly identify on each statement of account the amount attributable to fees and the nature and proper amount of any disbursements and that such conduct is deserving of sanction.
9. It is alleged that you failed to provide a retainer agreement to your client and that such conduct is deserving of sanction.
10. It is alleged that you failed to recommend that your client seek independent legal advice before you entered into a business venture with your client and that such conduct is deserving of sanction.
11. It is alleged that you failed to protect or act in the best interests of a client by failing to observe a Requirement to Pay issued by the Minister of Finance and that such conduct is deserving of sanction.
12. It is alleged that you signed letters containing false information and that such conduct is deserving of sanction.
13. It is alleged that you assisted a client in an improper purpose and that such conduct is deserving of sanction.
14. It is alleged that you failed to report the issuance of one or more Writs of Enforcement as required by the Rules of the Law Society and that such conduct is deserving of sanction.
15. It is alleged that you failed to properly supervise your staff and that such conduct is deserving of sanction.
16. It is alleged that you failed to serve your lender clients and that such conduct is deserving of sanction.

## **Evidence**

10. As noted above, Exhibits 1 to 5 (the jurisdictional exhibits) were entered into evidence by consent.
11. There were 8 witnesses called on behalf of the LSA, those being:
  - JM – complainant
  - ALM – former client of Mr. Burgener
  - DD – investigator with the LSA
  - BJP – former spouse of JM and former client of Mr. Burgener
  - LLP – forensic document examiner and handwriting expert
  - RD – lawyer and former employee of Mr. Burgener
  - QS – former client of Mr. Burgener
  - KW – manager of conduct with the LSA
12. Mr. Burgener gave evidence on his own behalf, and called three witness, including:
  - MT – a former client of Mr. Burgener
  - RP – a former client of Mr. Burgener
  - VLM – former complaint analyst with the Calgary Real Estate Counsel
13. Through the course of proceedings, additional exhibits were entered by agreement, relating to the circumstances of the citations and the evidence given by the witnesses. Those Exhibits were numbered 6 to 124.
14. Early in these proceedings, a video was tendered into evidence by the LSA through the complainant, JM. At the time it was tendered, counsel for the LSA brought to our attention a submission made in the context of a related ALIA (Alberta Lawyers Insurance Association) hearing by JM's counsel, that the video should not be admitted into evidence in the context of that hearing. Ms. MacLean brought this to our attention in the interest of full disclosure, and in the interest of JM who was not independently represented in these proceedings.
15. There was no application before this Committee opposing its entry, and having considered that the content was relevant and was not prejudicial to JM in the context of these proceedings, the video was admitted into evidence and marked as Exhibit 116.

## **The Complaint by JM**

16. According to the member's evidence, the relationship between Robert Burgener and the principal complainant, JM, commenced in Edmonton sometime in early 1980 while the two of them were obtaining training in skydiving. It appears the two men were initially friends, but as JM began to engage in skydiving as a business, Mr. Burgener became JM's lawyer. Mr. Burgener's legal work included a broad assortment of services, from corporate and commercial assistance to litigation,

generally relating to the skydiving business, but also related to personal legal services required by JM. The two of them had a close business and personal relationship, and in fact Mr. Burgener was the best man at JM's wedding.

17. JM then decided to sell his skydiving business and to commence practice as a real estate agent, mortgage lender and real estate developer in the City of Calgary.
18. After some discussion and at JM's invitation or offer, Mr. Burgener agreed to move his practice from the City of Edmonton to the City of Calgary, where he established a shared office with JM. The conditions of their business relationship were not, however, reduced to writing and appear to have been ambiguous throughout the course of their business relationship thereafter.
19. Mr. Burgener and JM enjoyed a mutually beneficial working arrangement. Mr. Burgener continued to engage in legal work for JM and obtained other clients through JM's introduction. In turn, JM had legal counsel readily available to him. Mr. Burgener provided legal services in a barter arrangement, in exchange for office space, equipment and some furnishings.
20. This new arrangement appears to the panel to have been the beginning of the end of their business and personal relationship, and ultimately gave rise to these proceedings.
21. Robert Burgener stated that he was JM's legal counsel and that JM relied upon him for assistance in incorporating companies, acquiring property, negotiating leases, and drafting releases, waivers, and contracts. The member stated that he assisted JM with "Everything, absolutely everything."
22. It is significant that, both before and after the move to Calgary, there was a solicitor-client relationship between JM and Robert Burgener, and that Mr. Burgener advised JM in his commercial and business affairs.
23. Upon moving to Calgary, Mr. Burgener made little or no effort to clarify the nature of the business relationship with his client after establishing shared premises in Calgary. Even at the date of this hearing, over 10 years later, there still appears to be no clear understanding between JM and Mr. Burgener regarding the terms of their "barter" relationship.
24. Robert Burgener admitted that, at no time during the course of his relationship with JM, was their legal arrangement ever reduced to a written retainer agreement.
25. Following the establishment of their new business arrangement, JM became more established in his work as a realtor and became increasingly involved in real estate purchase and sale, both on his own behalf and with others (primarily, but not limited to, family members). As these transactions took place, Mr. Burgener invariably provided legal advice and assistance to JM, and also to the associated parties on many occasions.

26. JM and Mr. Burgener also became business partners in other endeavors. A mortgage investment corporation was created (MIC) by Mr. Burgener at JM's behest, in which Mr. Burgener was a director and shareholder, together with SB and JM's aunt. Again, there is no evidence of any retainer agreement or contract delineating Mr. Burgener's obligations a lawyer or his interests as a business associate.
27. In 2005, JM, in association with his wife, BJP, entered into an agreement to purchase condominium units. At the time, BJP was a paralegal in another law office. Mr. Burgener performed the legal work required to complete the purchase and attend to the financing.
28. In support of BJP's application for financing, Mr. Burgener issued a letter dated January 20, 2006 (Exhibit 79.10.4) to the mortgage lender, TD Investment Services, stating that BJP was employed by Mr. Burgener, earning \$70,000.00 per year.
29. In addition to the January letter, Mr. Burgener provided a letter dated April 5, 2006 to TD Canada Trust, stating that he employed BJP and that she earned a gross income of \$94,000.00 annually (Exhibit 79.26.3).
30. It is clear that BJP was never employed by Robert Burgener.
31. The transaction was completed, the property was later sold, and the mortgage was eventually paid out.
32. Later in 2006, Mr. Burgener introduced JM to RC. RC was involved in a business and litigation matter relating to a commercial property in a hamlet in northern Alberta. Mr. Burgener had been representing RC regarding the collection of funds owing from a Mr. B. Mr. B was eventually declared bankrupt, providing an opportunity to acquire a commercial property owned by his company. Mr. Burgener introduced JM and RC and a business relationship arose between the three. They acquired the shares from the bankrupt's estate, which gave them ownership of a commercial real estate property in the hamlet.
33. According to the evidence of Robert Burgener, they planned to complete the purchase of the shares and, indirectly, the commercial property and to eventually sell the property at a profit. Mr. Burgener would be paid legal fees, JM would be paid real estate commission and, after paying out lenders, the profit would be shared between RC, JM and Mr. Burgener.
34. To facilitate this transaction, Mr. Burgener created a corporation and was initially named as director. The corporate record was then amended to remove Mr. Burgener as director and appoint JM. Subsequently, JM was removed and replaced by his wife, BJP. It does not appear any shares were issued. No memorandum of agreement or written evidence of any kind exists to explain the nature of the arrangement or the alleged agreement regarding the transaction.
35. It is clear that Mr. Burgener was the only lawyer involved in the acquisition of the

hamlet project. He did not take steps to clarify the relationship between himself and JM or RC, whom Mr. Burgener alleges was a partner in the transaction. There was no retainer agreement, and no recommendation that JM, BJP or RC obtain independent legal advice. In his testimony, Mr. Burgener alleged that he was acting both as legal counsel and as a participant in a business venture with his clients.

36. JM disagreed with some of Mr. Burgener's evidence, though there was some acknowledgment by JM that profits would be shared with Mr. Burgener in some fashion after the property was sold and the lender was paid. The evidence on this point, however, was ambiguous and there was no memorandum, agreement or letter of any type affirming exactly what the arrangement was.
37. Robert Burgener did not, at any time, in relation to this enterprise advise his clients verbally or in writing of his conflict of interest as legal counsel and as a business partner with his clients.
38. It is also noted that, while JM had experience in business and real estate investment, the nature of his evidence regarding corporate and commercial matters made it clear that he was not extremely knowledgeable regarding legal matters. He was still placing great reliance upon Mr. Burgener to advise and support him regarding the legal issues involved in what were becoming very complex real estate and business transactions.
39. Mr. Burgener became aware of an opportunity to purchase a property in a community north of Calgary and introduced JM to that opportunity. A contact of Mr. Burgener's was entitled to purchase a property but did not have funds to close. The suggestion was that, if JM could find a buyer, they could sell the right to purchase the property at a significant profit.
40. Mr. Burgener stated there was a verbal agreement between himself, RP and JM that, upon completion of the transaction, the profit would be shared between them. In this case, there was a written agreement of sorts, drafted by RP (Exhibit 79.3.18) suggesting that he was a "partner" in a "flipping of land for the in [sic] anything we do with either [DL] or [DT] and their associated group(s)" for which profits would be split equally three ways. This agreement was executed by RP, JM and Mr. Burgener.
41. RP testified on behalf of Robert Burgener, and stated that Mr. Burgener was his lawyer in a number of transactions in 2006 and 2007, including litigation on a failed business partnership regarding a property development in ●●●●, Alberta. RP wished to enter into a partnership arrangement between himself, Mr. Burgener and JM regarding real estate development. RP testified that he introduced Mr. Burgener and JM to an opportunity to purchase the property north of Calgary, and upon its sale, he felt entitled to a third of any profit.
42. Mr. Burgener acted both as a business partner and as a lawyer for RP. He made no effort to formalize the relationship or to advise RP of the conflict of interest inherent in that relationship, or of the advisability of obtaining independent legal advice.

43. It is clear that the "agreement" prepared by RP was created without the benefit of legal advice. It is equally clear that at no time did Mr. Burgener advise him of the limitations of that simple agreement or the need to clarify and formalize his intentions.
44. RP stated that JM misled him as to the true profit on the transaction and that he reached out to seek Mr. Burgener's legal assistance in asserting what he felt was his entitlement. Mr. Burgener did not advise him to seek independent legal advice and did nothing to assert RP's rights.
45. Mr. Burgener later sought payment for **one half** of the profit from that transaction and appeared quite willing to accept half of the profit without regard to RP's claim. This information became known to RP for the first time when he gave evidence in the hearing.
46. In December of 2006, JM was involved in yet another series of transactions relating to condominiums in Calgary, Alberta. Mr. Burgener was again his legal counsel in those transactions. According to JM, he purchased five units, using the names of other parties as "straw buyers" to facilitate the purchases, with the intention of re-selling them at a significant profit. He paid the deposit on the purchase of those units in the sum of \$5,000.00 and, upon closing, paid the deposit amount to the "buyers" in consideration of allowing him to use their names.
47. Robert Burgener was one of the straw buyers in the Calgary condominium purchases. Mr. Burgener confirmed that he did not pay for the property. He suggested that JM used his name initially without his knowledge. However, Mr. Burgener does acknowledge closing that transaction, and becoming the legal owner.
48. The relationship between JM and Mr. Burgener began to deteriorate in December of 2006. Mr. Burgener approached JM with two Trust Declarations (Exhibits 11.1.I and 11.1.J) dated December 11, 2006. The Declarations purported to recognize certain assets held by each party as being held in trust for another party. There was a declaration from Mr. Burgener, which he described as "giving" the Calgary condominium to JM. In addition, there was a declaration from JM that he was holding a one-half interest in the hamlet property in trust for SA, Mr. Burgener's sister.
49. According to JM, Mr. Burgener advised him that he should sign the declaration in his sister's favor, or JM's life would be "very different". Neither the evidence of JM nor of Mr. Burgener suggests any prior discussion of an existing trust relationship or of plans to create a trust relationship prior to that meeting. Mr. Burgener suggested the drafting of the documents was innocent and that he was simply trying to facilitate estate planning, though the Trust Declarations made no mention of any affairs other than the hamlet property and the Calgary condominium property, and were not accompanied by a draft will or estate plan relating to the other assets of either party.
50. In addition, Robert Burgener provided no documentation suggesting that he had any prior legal or beneficial interest in any of the transactions (aside from the straw



purchase of the Calgary condominiums).

51. JM stated that he signed the Trust Declaration under duress and as a result of Mr. Burgener's threats that he would report JM to various authorities, including the Securities Commission and the Real Estate Counsel, and that he would effectively lose his career. Mr. Burgener denies making such threats.
52. At this point, the relationship between Mr. Burgener and JM was deteriorating, and came to a head in January of 2007 when JM and Burgener travelled to attend to the hamlet development. When JM demanded to detour to speak with a mortgage holder on the development (CL), a disagreement arose between them, the details of which are in issue, but which culminated in Mr. Burgener leaving JM and taking a bus back to Calgary.
53. JM discovered from CL that Mr. Burgener had directed them not to discharge their financing, allegedly to hold up JM's ability to deal on the property. According to JM, Mr. Burgener was trying to leverage his position and make a claim to the profit in the project.
54. Following this incident, Mr. Burgener videotaped a discussion between him and JM without JM's knowledge. The video contained a confusing series of ambiguous assertions, whereby Mr. Burgener appeared to be trying to have JM admit that he had asked Mr. Burgener to breach trust conditions on funds he held on a transaction. JM consistently denied this assertion in the video and raised concerns over Mr. Burgener's honesty and his apparent effort to wrongfully obtain a portion of the hamlet development.
55. Of particular note in the video was JM's statement that he was not clear on where Mr. Burgener's entitlement to legal fees ended and his entitlement, if any, to a share of development proceeds began. During this exchange, it was abundantly clear that there was a fundamental disagreement between Mr. Burgener and his client, JM, regarding Mr. Burgener's entitlement to compensation for his involvement as legal counsel and as a possible party to the business endeavour.
56. Soon after the video was created, Mr. Burgener presented JM with a proposed "agreement" under cover of an email dated January 23, 2007. Mr. Burgener proposed that JM or his companies would pay Mr. Burgener the sum of \$800,000.00 relating to "various business transactions together"(Exhibit 11.1.M). When this did not appear to resolve to Mr. Burgener's satisfaction, a further letter was sent from Mr. Burgener to JM dated January 31, 2007, now seeking \$550,000.00 to be paid to MT, in exchange for Mr. Burgener providing files relating to Sherwood Park and a release of "any interest he may have with respect to JM or his companies." (Exhibit 11.1.M.)
57. There was no documentation to evidence any business arrangements between Mr. Burgener and JM. The evidence of JM was that this proposed agreement was part of an extortion attempt. Mr. Burgener was effectively demanding payment, failing which he would provide information to various authorities and damage JM's ability to

earn a living.

58. JM refused to agree to make the payment of \$800,000, and the relationship between the two men ended. JM moved out of the shared offices, and reported Mr. Burgener to the LSA.
59. While Mr. Burgener adamantly denied that he threatened to report JM to various authorities for alleged wrongdoing, this is exactly what he did. He filed reports with various authorities, including the Alberta Securities Commission, the Calgary Real Estate Authority, the R.C.M.P., the banks with whom JM had past dealings, the Calgary Police Service, and the Real Estate Council of Alberta. In total, the evidence disclosed 61 items of correspondence to various parties in which he disclosed solicitor-client communication between himself and JM in particular, but also communication with clients BJP and ALM.
60. The evidence further discloses, quite clearly, that as a result of Mr. Burgener filing a complaint against his own client, JM's real estate license was in fact suspended, as was the license of BJM (Exhibit 47.1).
61. Mr. Burgener conceded that the disclosures were made without the consent of any of the affected clients.
62. The explanation for these reports and Mr. Burgener's apparent breach of solicitor-client privilege was that he was seeking to prevent the recurrence of a crime. He acknowledged, however, there was no basis to suspect BJP or ALM would commit any crimes, and his allegations regarding further criminal conduct on the part of JM were only of a general nature, not with regard to any specific act he was seeking to prevent.
63. Following the breakdown of his relationship with JM, on February 13, 2007, Robert Burgener rendered an account to 121...Alberta Ltd (Numbered Company), in the sum of \$160,470.32, plus unspecified "Other Charges" of \$2,000.00, and G.S.T. He paid himself \$171,098.32 by way of trust transfer from his trust account.
64. There was no written retainer agreement between Mr. Burgener and JM and no agreement respecting an entitlement to bill for "other charges", which are distinct from specified disbursements. There is no evidence that the "other charges" were based on any substantiated expenses or services.
65. The ledger entered as Exhibit 11.5, which Mr. Burgener used to support his fee account to the Numbered Company in matter 5068, appears to support a billing for all services rendered to February 13, 2007. It is clear that, by February of 2007, the solicitor-client relationship had completely broken down between Mr. Burgener and JM.
66. The ledger entered into evidence, regarding the February 13, 2007 billing, disclosed no work in progress time entries between July and November of 2007, but was printed up to the date of billing, February 13, 2007. Mr. Burgener confirmed that his

accounting program had been operational and no records were missing.

67. Mr. Burgener appears to have billed for all time and disbursements up to February 13, 2007, and there was no further service provided after February 13, 2007. However, a further account was rendered in the same matter to the Numbered Company on May 15, 2007 (Exhibit 11.5) in the sum of \$105,000.00 in fees, \$4,113.31 in disbursements, and \$3000.00 in "other charges". Upon issuing the bill, Mr. Burgener paid himself \$68,244.33 from trust.
68. Prior to the dates of the payments of the accounts, there was no express consent to such transfer on the part of JM, who was the person in legal control of the numbered company. Mr. Burgener suggested that he was a shareholder in the company and that he had authority to consent to the payment, though it is clear that Mr. Burgener was neither a shareholder nor director in the numbered company by February of 2007. He asserted some form of parole agreement regarding the authority to take the payment, but there is nothing in writing to support such an understanding and it was denied by JM.
69. In this same time frame, the Canada Revenue Agency (CRA) issued a Requirement to Pay, dated January 25, 2007. It required certain entities, including the Numbered Company, to pay to CRA the sum of \$370,000.00 owed by Mr. Burgener. The Requirement to Pay was presumably delivered to Mr. Burgener's office at or about that time. Whether or not these writs were properly reported to the LSA was not completely clear, as Mr. Burgener suggested he had while the LSA had no record of such a report.
70. Contrary to his obligation to the CRA, Mr. Burgener did not forward payment to the CRA but instead paid his fee account from the funds held in trust on February 13, 2007 and May 15, 2007. Mr. Burgener suggested the CRA notices may have been intercepted by JM's aunt, though he acknowledges he was aware of them by May of 2007 before the final account was rendered and he took the payment from trust.
71. There is no evidence to suggest that the CRA notices were intercepted by JM's aunt as alleged, nor is there evidence to provide a reason why that would have taken place. Mr. Burgener simply asserted that the notices were not brought to his attention.
72. Mr. Burgener then commenced litigation against JM, BJP, MAM and a Mortgage Corporation, purporting to act on behalf of himself, RC and the Numbered Company. The initial suit was brought in the Judicial District of Edmonton through counsel, Robert Gillespie, with a second application being brought in the Judicial District of Calgary as Action No. 0701-●●●● by Robert Burgener himself, but essentially relating to the same matters in issue. Mr. Burgener filed the Originating Notice on his own behalf and as counsel for SB (Exhibit 79.22.29).
73. While Mr. Gillespie initially acted on behalf of the Plaintiffs, it appears that at some point Mr. Burgener began acting as both party and counsel. An Order made September 24, 2008, in Action No. 0701-●●●●, identified Mr. Burgener as

"Counsel" for the Plaintiffs, which included RC, the Numbered Company and Mr. Burgener (see Exhibit 111.w.). That Order directed Mr. Burgener to cease acting for RC and/or the Numbered Company, and the Plaintiffs were directed to pay security for costs. The action was dismissed in accordance with the Order when the Plaintiffs failed to post security for costs.

### **Citations Arising from the LSA Investigation**

74. Unrelated to the JM complaint were other matters which arose as a result of the LSA investigation.
75. A review of numerous real estate dealings disclosed numerous "flip deals" whereby Mr. Burgener's clients, including his own staff members and their families, were buying and selling properties and obtaining financing from Mr. Burgener's lender clients, at prices far exceeding the original purchase price. A summary of some of these transactions appeared at Exhibit 80.2. Mortgage instructions were provided to Mr. Burgener, but Mr. Burgener made no effort to disclose to the lender clients the true nature and circumstances of the flip transactions.
76. The mortgage instructions generally required Mr. Burgener to attend to the interests of his lender clients, and to advise them of any "material facts" which might impact the lender. The Royal Bank provided more specific instructions to advise *"of any escalation in value of the property over a short period of time... or if the vendor under the Agreement of Purchase and Sale was not the registered owner at the time the Contract of Purchase and Sale was signed."*
77. One such example is the purchase by Mr. Burgener's associate employee, RD, where a property was purchased for \$363,000.00, with a further offer disclosing a purchase and sale on the same closing date for \$422,000.00. The property was initially purchased by 135... Alberta Ltd., through its officer SD (the spouse of RD, Mr. Burgener's employee). The same property was then "sold" to RD, on the same closing date, for a price almost \$60,000.00 higher, with mortgage proceeds exceeding the original purchase price.
78. In connection with this transaction, Mr. Burgener signed a letter dated October 22, 2007, stating that "[RD] is earning 80,000.00 gross per year and there is not *[sic]* probationary period for this employment." Mr. Burgener admits that he signed the letter (Exhibit 81.6.1).
79. A similar letter was provided by Mr. Burgener dated November 14, 2007, stating that "RD is earning 120,000 gross per year and there is not *[sic]* probationary period for this employment." Mr. Burgener admits that he signed the letter (Exhibit 81.5).
80. There is no doubt that Mr. Burgener was aware these letters would be used to secure financing for a mortgage lender who was also Mr. Burgener's client. When he received financing instructions, he was in a solicitor-client relationship with the lender, the Bank of Montreal.

81. Mr. Burgener's explanation for the letters, which were clearly untrue, was that RD "could have" earned the salary asserted. The letters, however, provided no such qualification or explanation and it was intended that the lender would rely on them.
82. As earlier identified, Mr. Burgener wrote similar employment letters for BJP on January 20, 2006, and April 5, 2006. The January 20, 2006, letter to TD Investment Services stated that BJP was employed by his firm since December of 2005 and was earning \$70,000.00 gross per year (Exhibit 79.5.17). The evidence of JM was, in fact, that the letter was completed, signed and provided to him from Mr. Burgener.
83. The letter of April 5, 2006, addressed to TD Canada Trust, stated that BJP was employed by Mr. Burgener's office as a legal assistant, with a gross income of \$94,000.00 annually (Exhibit 79.26.3).
84. In fact, BJP was never employed by Mr. Burgener and never received a salary from him. These letters were both signed by Mr. Burgener, though he attempted to suggest that they were signed in blank, denying that the content of the letters was present when executed.
85. Nothing came of the January 2006 letter written for BJP until after Mr. Burgener's relationship with JM began to deteriorate in January of 2007. Mr. Burgener suggested he "discovered" the letter and then made a complaint to TD Canada Trust in May of 2007 (Exhibit 79.5.17). Mr. Burgener suggested in his evidence that this report, and others, were made simply to prevent recurrence of similar "offences". He also reported the matter to the City of Calgary Police by letter of June 4, 2007, alleging that BJP and/or JM had committed a forgery and a fraud.
86. A handwriting expert called by the LSA confirmed that the BJP letters in issue were all signed by Mr. Burgener, a fact he only admitted during the hearing.

### **Findings of the Hearing Committee**

87. The foregoing is a summary of 14 days of evidence, during which 7 volumes of exhibits were entered. While Mr. Burgener did not agree to the exhibits being entered by agreement in advance of the hearing, the exhibits were entered during the hearing with essentially no objection.
88. There were sixteen citations issued against Mr. Burgener, which, if established, were alleged to constitute "conduct deserving of sanction. Even if the specific acts impugned in the citations are proven on a balance of probabilities, a Hearing Committee is still required to decide whether the conduct is of sufficient gravity to invite a determination that it is conduct deserving of sanction, pursuant to section 71(1) of the Act.
89. Section 49 of the Act defines conduct deserving of sanction:

49 (1) For the purposes of this Act, any conduct of a member, arising from

incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society, or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

90. In addressing the specific sanctions against Robert Burgener, we are reminded that the burden of proof rests with the LSA. As directed by our Court of Appeal, the standard of that burden is proof "on a balance of probabilities" (*Moll v College of Alberta Psychologists*, 2011 ABCA 110, 42 Alta LR (5th) 2860).
91. Section 67 of the Act states that, when a member has received money or property in trust, the burden of proof that it has been properly dealt with lies with the member. This section will be considered in relation to Citations 7 and 8.

**Citation 1:**

**It is alleged that [Robert Burgener] improperly disclosed confidential information of former clients and that such conduct is deserving of sanction.**

92. A lawyer has a duty to maintain a client's confidences, even in the face of a demand from the state or the courts, except in the most serious of circumstances.
93. In *Canada v Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), [2015] 1 SCR 401 the Supreme Court of Canada recently reaffirmed that the lawyer's duty to maintain client confidentiality is "essential to the due administration of justice" (para 1).
94. The ability of a client to know that a lawyer will respect confidentiality and solicitor-client privilege goes to the core of lawyers' professional responsibilities and ethical obligations. It is an obligation of the highest order.
95. Accordingly, when a lawyer discloses confidential information received in the context of a solicitor-client relationship, without the express or implied consent of the client, such an act is a serious breach of a lawyer's ethical obligations.
96. Mr. Burgener admitted that he disclosed communication between himself and his clients, JM, BJP and ALM. Mr. Burgener wrote letters to various parties as detailed above, disclosing allegations that his clients had engaged in wrongdoing. As a result, JM was eventually suspended from practicing as a real estate agent.
97. Accordingly, in the absence of either express or implied authority on the part of his clients, or an exception to solicitor-client privilege, it is clear that Mr. Burgener

engaged in a serious breach of his ethical obligations to his clients.

98. In response to these allegations, Mr. Burgener provided two responses:
- a) In the context of a joint retainer, there should be no privilege as between jointly retained clients; and
  - b) In accordance with Chapter 7, Rule 8(c) of the Code of Professional Conduct in force at the time of the events in question, the disclosure of otherwise confidential information was necessary to prevent the commission of a crime, in the form of fraudulent conduct on the part of his clients.
99. With respect to Mr. Burgener's first assertion, it is correct that when engaged in a joint retainer, a lawyer owes a fiduciary obligation to all parties to that retainer, such that material information relevant to their respective interests can and must be disclosed to all of them. No party to the joint retainer can claim privilege against another.
100. Mr. Burgener relied on the circumstances of the joint retainers to justify his disclosure to the mortgage companies regarding the false employment letters provided to them on behalf of BJP and the "flip-transaction" involving ALM. It is important to remember, however, that Robert Burgener participated in and facilitated the fraudulent conduct.
101. The Hearing Committee accepts that the purchasers and the mortgage institutions were all Mr. Burgener's clients pursuant to the joint retainers and that Mr. Burgener was entitled to advise the mortgage institutions of the purchasers' improprieties in the relevant transactions, even after those transactions had closed. The real issue is that the information was provided "after the fact", even though it was clearly in Mr. Burgener's possession during the representation.
102. Mr. Burgener's other letters to the R.C.M.P., the Calgary Police, the Real Estate Council of Alberta, and the Alberta Securities Commission are not protected by the concept of "joint retainer" disclosures.
103. Mr. Burgener argued that disclosure to other regulatory and enforcement authorities was necessary to prevent the commission of further criminal offenses. There was, however, no reason to believe that ALM or BJP would commit a future criminal offense.
104. As such, the citation is made out with regard to both BJP and ALM. Confidential communications relating to their legal affairs were disclosed to the Real Estate Council of Alberta (Exhibit 79.5), to the R.C.M.P. and to the Calgary Police (Exhibit 79.5.2). No consent, express or implied, was provided by either client to Mr. Burgener, and there is no evidence that such disclosure was necessary to prevent the commission of a criminal offense.
105. With respect to the various communications respecting JM, the issue is more

complicated. Mr. Burgener argued he had reason to believe that JM might continue to engage in improper or fraudulent conduct, allowing Mr. Burgener to disclose confidential information to prevent such future conduct.

106. This Hearing Committee heard evidence that JM engaged in improper and possibly fraudulent conduct. This included procuring false employment letters to facilitate mortgage approval, engaging in "flip transactions" utilizing straw buyers to procure escalated levels of financing by mortgage lenders, and knowingly providing false information regarding the circumstances of the transactions for such a purpose.
107. Did JM's conduct entitle Robert Burgener to disclose confidential information to third parties, other than the mortgage lenders?
108. Rule 2.03 of the Code of Conduct of the LSA currently provides:

#### **Future Harm / Public Safety Exception**

**2.03 (3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that an identifiable person or group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.**

109. There is no suggestion that disclosure of confidential information in this case regarding JM's affairs was necessary to prevent "death or serious bodily harm." However, the circumstances in question arose prior to the enactment of the current Code in 2011, and the provisions of the former Code were more liberal regarding the disclosure of confidential information.
110. In the former Code of Professional Conduct, Chapter 7, Rule 8(c) provided that a **"lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime."**
111. Robert Burgener suggested that his conduct fell within this exception, which is more permissive than the current Code. He did not argue that there was a crime in progress or that JM had a specific plan to engage in criminal conduct which he was trying to prevent. He argued instead that JM was likely to commit future unspecified crimes, based on Mr. Burgener's knowledge of JM and his past conduct.
112. As discussed during the hearing, the somewhat permissive content of the previous Code is somewhat troubling, suggesting that confidentiality may be breached where necessary to "prevent any other crime", presumably even very minor offenses.
113. The commentary in the old Code provides little assistance. It suggests that disclosure is "discretionary" for crimes not involving death or bodily harm, but disclosure may not be warranted for a "'victimless' crime without serious consequences."
114. The Hearing Committee considered the Supreme Court of Canada decision *Smith v*



*Jones*, [1999] 1 SCR 455. In that decision, Cory J affirmed that "solicitor-client privilege has long been regarded as fundamentally important to our judicial system" (at para 45). The importance of solicitor-client privilege has been confirmed by our Supreme Court in the Federation of Law Societies case, *supra*. It is fundamental to the respect for our profession, the interests of the public and the judicial system as a whole.

115. The Court in *Smith v Jones* provided guidance as to when "public safety" outweighs privilege, at para 77:

There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

116. In this case, there was no clearly defined "victim". At best, there was a suggestion that real estate clients or mortgage lenders might be harmed. There was no suggestion of threat of physical harm or death to any third party. At best, there is a suggestion of possible financial harm for a lender or real estate client. There was no evidence that a risk was imminent, or that JM had an immediate plan or an expression of clear intent to commit further offenses.

117. This Hearing Committee has found that, not only were the disclosures regarding confidential information relating to BJP and ALM sufficient to make a finding of guilt against Robert Burgener, but the disclosures to parties other than lenders regarding the affairs of JM also constitute a breach of Mr. Burgener's duty of confidentiality. As such, we find Mr. Burgener guilty of citation 1, and that his conduct is deserving of sanction. In making this finding, we have considered the fundamental importance of confidentiality and solicitor-client privilege to the public interest and legal profession.

**Citation 2:**

**It is alleged that [Robert Burgener] acted when in a conflict of interest and that such conduct is deserving of sanction.**

118. The examples of Mr. Burgener's breach of his obligations respecting conflict of interest are so pervasive and profound as to make a full accounting of same almost impossible.

119. The most egregious examples of Robert Burgener's conduct, clearly, are reflected in the business affairs between himself and JM. From the moment of his arrival in Calgary, Mr. Burgener commenced a business relationship with JM – putting himself in a direct conflict of interest, between his own interests as a party to a business transaction, and his client's interest in obtaining full and proper independent legal advice.

120. Robert Burgener was relied upon, significantly, by JM to provide proper legal advice relating to his business affairs, and, yet, when it came to matters involving Mr. Burgener's

personal benefit, it was apparent that there was a complete absence of proper legal advice.

121. Robert Burgener at no time recommended or made any effort to document the nature of his business relationship with JM, whether as regarding the lawyer/tenancy arrangement in JM's premises, or, later, as regards his involvement with the business affairs that later became so contentious resulting, eventually, in the situation where Robert Burgener actually became legal counsel, suing former clients JM, BJP and JM's company, on his own behalf and on behalf of another client, MB.

122. At no time in the evidence was there any suggestion of Mr. Burgener disclosing his conflict to any of his clients, and nor was there any evidence of any recommendation that any of his clients obtain independent legal advice before entering into business relationships with him.

123. Beyond this, which would have been more than sufficient to make a finding of guilt on Citation 2, we have the tragic example of RP. In September of 2006, RP became involved with Burgener and JM in the development of a property in ●, Alberta.

124. In a somewhat naïve effort to protect his interests in assuring his share of any profit arising from that transaction, RP drafted his own "agreement" entered into these proceedings as Exhibit 79.3.18. With no disrespect to RP, who was not an experienced developer and clearly had marginal understanding of legal affairs, the agreement was a simplistic expression of intention which any lawyer would have immediately seen as insufficient for its purposes.

125. The evidence of RP is that prior to engaging in this endeavor, he had been a client of Mr. Burgener's who had represented him on another failed business transaction where he had, it appears, been taken advantage of by a former partner, in addition to other real estate transactions in 2005 and 2006.

126. There is no question that not only was Mr. Burgener a business partner in this transaction, but he was relied upon to provide legal services as well for both RP and JM.

127. Again, we have a situation in the clearest of terms of a conflict of interest, both with regards to his long-standing relationship and ongoing business relationship with JM, but also with respect to his own business interests with RP in this development.

128. Again, there was a complete absence of any proper advice to RP regarding the advisability of obtaining independent legal advice regarding the transaction and in particular, the failings of RP's effort at drafting a contract between himself, JM and Mr. Burgener.

129. The Committee also heard additional evidence that Burgener sought to assert an entitlement to the profit from this development of some \$300,000, completely ignoring the claim of RP towards a possible share in those profits – which became known to RP only at the time of this hearing.

130. In the circumstances, there is no question that the evidence before this panel

establishes clearly, and without question, that Robert Burgener acted while he was in a conflict of interest, and that, in the context of the evidence, such conduct is conduct deserving of sanction.

**Citation 3:**

**It is alleged that [Burgener] offered a bribe and that such conduct is deserving of sanction.**

131. The LSA called no evidence on this citation. Accordingly, this citation was dismissed.

**Citation 4:**

**It is alleged that [Burgener] signed false documents and that such conduct is deserving of sanction.**

132. This citation relates to the false letters written to mortgage lenders regarding the employment and income of BJP. Exhibits 79.26.3 and 79.10.4 are letters originating from Mr. Burgener's office, addressed to a mortgage lender, for the purpose of securing financing by BJP.

133. The letters state that BJP was an employee in Mr. Burgener's office, with an annual income of \$70,000.00 or \$94,000.00, depending on which letter is considered. In fact, BJP was never an employee of that office, and the letters are false.

134. Of some significance is that these letters were directed to the mortgage lender, who was also represented by Robert Burgener. Thus a false letter went from Mr. Burgener's office to his own client.

135. Mr. Burgener stated that the letters were signed prior to being completed with the false information. The suggestion of a conspiracy to forge letters and have him unknowingly sign blank letters is unsupported by the evidence. A handwriting expert confirmed the letters were signed by Mr. Burgener.

136. We look at this conduct in light of the additional evidence of JM who stated that Mr. Burgener knowingly and willingly provided the said letters.

137. When considering the evidence and Mr. Burgener's conduct as a whole, this Hearing Committee finds that the letters used by BJP to obtain financing were signed by Mr. Burgener, when he was aware that the contents were false and were intended to mislead his own client, the mortgage lender.

138. Accordingly, this Hearing Committee finds Robert Burgener guilty of Citation 4, and finds such conduct to be conduct deserving of sanction.

**Citation 5:**

**It is alleged that [Burgener] installed a surreptitious surveillance camera and recorded conversations without first obtaining the consent of the party being recorded and that such conduct is deserving of sanction.**

139. Chapter 1, Rule 8 of the former Code of Professional Conduct, stated:

Except under extraordinary circumstances, a lawyer must not record a conversation with anyone, nor enable a third party to hear the conversation, without first obtaining the consent of the person to whom the lawyer is speaking.

140. The evidence before this Hearing Committee establishes that there were two cameras used by Mr. Burgener. The first was a "surveillance camera" designed to look like an air freshener, which was in the front end of the office, and apparently in use until it was damaged. The second was a hidden video camera used to capture a conversation between Mr. Burgener and JM following their trip to Edmonton on January 15, 2006. The Hearing Committee decided that Mr. Burgener's use of the surveillance camera in the office is not conduct deserving of sanction as there is no evidence of an actual recording. The use of the hidden camera was, however, unethical. While the use of the hidden camera to record the conversation with JM was not known when the citations were first issued, the Hearing Committee considered the evidence pursuant to section 65 of the Act.

141. It was submitted by Robert Burgener that the current iteration of the Code does not specifically prohibit surreptitious recording of client conversations. However, the suggestion of Mr. Burgener is inaccurate, as Rule 6.02(4) of the current Code states:

A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

142. Mr. Burgener acknowledges recording the meeting with JM in January 2006 without his client's knowledge or approval. Whether under the provisions of the Code of Professional Conduct applicable at the time the citation arose, or at present, his conduct would amount to an ethical breach.

143. Based upon our review of the video, it is evident that Mr. Burgener was seeking to manipulate his client, JM, into making admissions against his own interests and in favour of Mr. Burgener, and to record that admission for use against his client. Mr. Burgener's conduct reflects negatively on the reputation of the profession generally, and amounted to an egregious breach of the trust placed in him by JM. The Committee finds that this conduct is conduct deserving of sanction.

**Citation 6:**

**It is alleged that [Burgener] threatened and attempted to extort money from a client and that such conduct is deserving of sanction.**

144. This is perhaps the most serious of the citations facing Robert Burgener. The LSA submitted that Mr. Burgener threatened to take steps to negatively impact JM's ability to earn a living, unless JM complied with demands to provide him a share of the profits from his real estate developments. This occurred in late 2006 and early 2007 after their relationship had begun to deteriorate. Mr. Burgener first presented JM with the Trust Declarations in December 2006 and then with the demand for \$800,000 on January 23, 2007.
145. JM testified that Robert Burgener threatened he would report JM to various authorities for his wrongdoing, unless he complied with Mr. Burgener's demands. Mr. Burgener denied making these threats, although he did author 61 letters of complaint against JM after JM refused to pay him.
146. Considering the evidence as a whole, where there was a conflict in the evidence between the testimony of Robert Burgener and JM, this Committee placed greater weight on the evidence of JM. JM has admitted wrongdoing relative to his practice as a realtor, and has in fact, been suspended by his regulator. His evidence was, however, generally more consistent with the evidence of other witnesses and documentary evidence.
147. The evidence relevant to the threats is found, in part, in the documentation which describes the history of the Numbered Company and identifies the shareholders. There is no documentary evidence, prior to the Trust Declarations, to suggest that Robert Burgener had any entitlement to a share in the Numbered Company.
148. The Numbered Company was the vehicle by which JM acquired interest in the hamlet development. The Numbered Company was incorporated on January 25, 2006, at which time the sole director was Robert Burgener (Exhibit 110).
149. On November 28, 2006, JM was appointed director of the Numbered Company and Robert Burgener ceased to be a director. The amendment was authorized by Robert Burgener as solicitor for the corporation (Exhibit 110).
150. These documents are evidence that Robert Burgener's status with the Numbered Company was limited to being the originating incorporating director, and ceased in November of 2006. This is consistent with the evidence of JM and inconsistent with any assertion on Burgener's part that he had any interest in that corporation or its business affairs, other than as legal counsel. This evidence supports JM's allegation that the "Trust Declaration" presented to him by Robert Burgener (Exhibit 11.1.I) was part of Mr. Burgener's effort to extort a payment from him to which Mr. Burgener was not entitled.
151. The corporate record is consistent with the evidence of JM and inconsistent with the

evidence of Robert Burgener. If Robert Burgener had held 50% of the shares in the Numbered Company, as suggested in the Trust Declaration, Mr. Burgener would likely have continued as a director with JM, and would have shares in his name.

152. There was further evidence of Robert Burgener's intent to harm JM by reporting him to various authorities, evidenced by letters directed to JM from Mr. Burgener in January of 2007 (Exhibit 11.1.M) as follows:

- a) January 25, 2007 - Mr. Burgener "reminded" JM that his company was non-compliant with regulatory obligations with "ramifications to directors who fail to conform".
- b) January 25, 2007 – Mr. Burgener "confirms" JM admitted to him that he had placed a mortgage without his knowledge or input, demanding that the mortgage be removed by noon on January 26, 2007, failing which he would commence steps to negate the mortgage action. He also stated that JM had left his office suggesting that he was being threatened, though Mr. Burgener denied this was the case.
- c) January 31, 2007 – Mr. Burgener sent a "DRAFT" letter of complaint to Re/Max House of Real Estate (JM's agency), making allegations of impropriety against JM.
- d) January 31, 2007 – Mr. Burgener sent a request for \$550,000.00 to be paid to MT, in exchange for Mr. Burgener to "sign off any interest he may have with respect to JM or his companies."

153. The threats and extortion attempts alone are enough to attract a sanction, but the circumstances were exacerbated by the fact that Mr. Burgener's efforts to extort compensation from his client were based on threats to report JM to various authorities by disclosing JM's confidential information. There is no greater breach of a lawyer's obligations to his client, to his profession, and to the welfare of the public, than for a lawyer to use his client's confidential information in an effort to extort the client's property for his own benefit.

154. The allegations in Citation 6 have been proven. This Committee finds that Mr. Burgener's conduct is conduct deserving of sanction.

**Citation 7:**

**It is alleged that [Burgener] failed to account for trust funds and that such conduct is deserving of sanction.**

155. Robert Burgener received trust funds belonging to his clients, JM and JM's corporation, the Numbered Company. LSA counsel submitted, correctly, that Mr. Burgener had the burden of proof to establish that he properly dealt with trust funds, pursuant to section 67 of the Act.

156. Robert Burgener caused himself to be paid the following sums from his clients' trust funds:
- a) On February 13, 2007, Robert Burgener rendered an account to the Numbered Company in the sum of \$160,470.32, plus unspecified "Other Charges" of \$2,000.00 and G.S.T., paying himself \$171,098.32 by way of trust transfer from his trust account (Exhibit 11.4);
  - b) On May 15, 2007, Robert Burgener rendered a further account to the Numbered Company (Exhibit 11.6) in the sum of \$105,000.00 in fees, \$4,113.31 in disbursements, and \$3000.00 in "Other Charges", for which Mr. Burgener paid himself a further \$68,244.33 by way of trust transfer from his trust account.
157. The first difficulty for Mr. Burgener is that he had no retainer agreement with his client. Accordingly, there is no basis upon which he was entitled to charge and collect "Other Fees" in the manner he did.
158. Further, in the event that he was entitled to charge "Other Fees", a lawyer is obliged to ensure fees are calculated and billed in a manner consistent with the lawyer's fiduciary obligations to the client, honestly and in good faith.
159. Robert Burgener tendered no evidence to establish what was contemplated by the term "Other Fees", or what, if any, effort he expended to determine the basis on which the "Other Fees" were billed. It appears that Mr. Burgener arbitrarily paid himself \$5,000.00 from trust without authorization from his client and without substantiating the basis on which he was charging for "Other Fees", all of which is completely inappropriate. On this basis alone, he is guilty of the citation as alleged.
160. Beyond the "Other Charges", however, is the larger question of Mr. Burgener's entitlement to pay himself the fees referenced above, in excess of \$230,000.00.
161. As the evidence in the meeting Mr. Burgener videotaped affirms, there was a very live issue raised by JM and not satisfactorily explained by Mr. Burgener, whether JM was a client or a business partner. Clearly, Mr. Burgener's evidence is that he understood JM to be both. In those circumstances, and in light of the complete absence of any retainer agreement or documentation of their business relationship, it cannot be said that the withdrawal of funds from Trust fell within the provisions of Rule 124(2) of the Rules of the Law Society of Alberta (then applicable), which provided as follows:

Money may be withdrawn from a trust account of a law firm pursuant to subrule (1)(b), if not held for a designated purpose, only in accordance with the following conditions:

- (a) money may be paid from the trust account to the law firm to reimburse the firm for a disbursement made by it if the law firm has prepared a billing respecting the disbursement and either delivers the

billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal; and

(b) money may be paid from the trust account to the law firm to pay for the law firm's fees for services if the law firm has prepared a billing for the services, the billing relates to services actually provided and is not based on an estimate of the services, and the firm either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal.

162. Implicit in this provision, this panel finds, is an obligation that the amount taken is taken in good faith, in a manner consistent with the fiduciary obligation owed by a lawyer to his or her own client. Once Mr. Burgener was put on clear and unequivocal notice that there was a dispute between him and his client regarding the nature of his relationship and his entitlement to compensation, the removal of those funds was, this panel finds, a failure to properly account for his client's trust funds.
163. This finding is consistent with the later clarification of Rule 124 in our current Rules under Rule 119.21(2)(d), which requires that the lawyer have "explicit or implicit" authority to make the withdrawal. A lawyer given notice by his client that their entitlement to fees is in question cannot seek protection of Rule 124 by later rendering an account and taking those funds for his or her own benefit.
164. In addition, and related to this finding, there is a clear question as to whether or not those funds were held "for a designated purpose" – namely, funds owed to possible investors and or other business partners, including RP. To suggest that in the climate of ambiguity and uncertainty created by Mr. Burgener himself, that Mr. Burgener was entitled to take over \$230,000.00 to his own benefit, ignoring potential claims of other parties would be a mischaracterization of a his authority arising under Rule 124(2)(b).
165. This Committee finds, based upon the evidence, that there were other failures to account for client trust funds, based upon the following evidence:
  - a) There was no retainer agreement between Mr. Burgener and JM, such that the terms of his compensation were uncertain;
  - b) The client relationship was further complicated by the ambiguous barter arrangement between Mr. Burgener and JM, in relation to their shared office premises. Some work was billed to JM and some work was "bartered" in exchange for office expenses. The distinction between billed and bartered work was unclear. Mr. Burgener had an obligation to clarify how fees were being calculated and billed, particularly in light of the conflict of interest in which he found himself, as a tenant of his own client;
  - c) Mr. Burgener was unable to rely the implicit authorization arising under Rule 124(2)(b) from JM to pay legal fee accounts from trust funds, in light of the breakdown of their relationship at the time the payments were made;



- d) In the videotaped meeting in January of 2007, when Mr. Burgener was asserting his entitlement to a share of JM's business venture, JM articulated a concern that he was not certain whether Mr. Burgener's work on the project was to be billed as legal fees, or was done as consideration for a share of the profit, as was being asserted by Mr. Burgener. At page 71 of Exhibit 116, the transcript of the videotaped meeting between them discloses this discussion:

*MR. BURGNER [J], we haven't got a bill from my office in over two years, nothing. The bills – the bills that I could have given you far exceed the rent, the mortgage and all the rest –*

*JM: Okay.*

*MR. BURGNER: -- of the bullshit, far exceed.*

*JM: Oh, okay, so now we're doing it, either a trade of service or we're a partner on these deals. Which one is it?*

*MR. BURGNER: No, no, there's –*

*JM: Yeah, give me the bills then, but suck or blow.*

*MR. BURGNER: [J], I'm not a partner on every one of your deals.*

*JM: Rob, I don't expect you to be.*

*MR. BURGNER: As -- as you aren't a partner on every one of my deals. You're not a partner in every file I do. You –*

*JM: Okay, here's what's going to happen –*

*MR. BURGNER: -- and I had an agreement whereby you got -- you get free legal services in here and you pay the rent. That's the way it's been for two and a half years.*

- e) The recorded discussion on January 18, 2007, demonstrates JM's uncertainty regarding whether Mr. Burgener was asserting an interest in the "deals" or asserting an entitlement to unbilled legal fees. Mr. Burgener himself stated that he had provided legal service for "over two years" without rendering an account, implying that the consideration for his work on the transactions was for a part of the profit. He muddied the waters even further when he asserted that "we had an arrangement whereby you got free legal services in here and you pay the rent."
- f) Finally, when the account was rendered on February 13, 2007, it was accompanied by a printed ledger to substantiate the fees (Exhibit 11.5) which showed all work in progress to and including February 13, 2007.
- g) While there was no time entered on the client file (JM, Matter No. 5068) from

July of 2006 to February 13, 2007, when the next account was rendered on May 15, 2007, Mr. Burgener billed another \$105,000.00 even though there had been no work performed on JM's behalf subsequent to the February 13, 2007 account. This Committee is not satisfied, based upon the evidence, that the amount billed for fees in the May 2007 account was billed for legal services actually provided to JM.

- h) Based upon the foregoing, there is no evidence that Robert Burgener had express or implied authority to pay himself from trust. In addition, the fee accounts were not substantiated, in that Mr. Burgener did not clarify or explain to JM the basis for the fee calculation. It appeared instead that Mr. Burgener issued fee accounts in order to justify transferring funds from trust to his own account, and that no work had actually been performed in respect of the second fee account in May of 2007.

- 166. This Committee finds Robert Burgener guilty of the allegations in Citation 7 and finds that his conduct is deserving of sanction.

**Citation 8:**

**It is alleged that [Burgener] failed to properly identify on each statement of account the amount attributable to fees and the nature and proper amount of any disbursements and that such conduct is deserving of sanction.**

- 167. In addition to those matters arising under Citation 7, Robert Burgener failed to provide a proper accounting for amounts attributable to fees or the nature and proper amount of disbursements.
- 168. The former Code of Professional Conduct, applicable at the time of the relevant conduct, provided the following guidance in Rule 4 of Chapter 13:

R.4 A lawyer must clearly identify on each statement of account the amount attributable to fees and the nature and amount of any disbursements.

- 169. In the commentary that followed Rule 4, the Code provided:

C.4 The two main categories of charges on a statement of account are fees and disbursements. However, a sub-category entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements.

Disbursements are charges levied by a third party and paid by a lawyer on a client's behalf (see Commentary 5).

A disbursement may be billed to a client as such although it has not yet been incurred or paid if its exact amount is known to the lawyer, and it will be

incurred or paid on the client's behalf within a reasonably short period of time. If it is not paid within a reasonable time, the money received on its account must be returned to the client.

A lawyer's statement of account may not mislead or confuse the client and must conform as closely as possible with information previously provided to the client. Consequently, items that are unusual or arbitrary warrant prior disclosure to the client. For example, a fee for opening a file, calling up a closed file or performing any other normal administrative function is unlikely to be anticipated by the client and should therefore be discussed with the client beforehand.

A lawyer's duty to provide as much information as possible respecting fees and disbursements (see Rule #2 and accompanying commentary) will normally require itemization of disbursements on an account and the provision of some detail as to the services provided. The amount of detail will depend on the circumstances of each case, including the extent to which the client was kept informed on an ongoing basis while the matter was current. At a minimum, a lawyer should communicate a willingness to provide further elaboration of the lawyer's charges upon request.

170. While the "Other Charges" in Mr. Burgener's fees appear relatively modest, having regard to the overall accounts in question, a lawyer is not entitled to simply assert an entitlement to \$5,000.00 based upon a vague or generic description of "Files, Stationery, postage, Fax and Photocopying".
171. As outlined in the Code, a lawyer is required to provide reasonable clarity in the provision of an account, and to the extent that "Other Charges" are billed to a client, the lawyer is obligated to provide reasonable disclosure of what is represented by those "Other Charges", either within the terms of the retainer agreement, or, alternatively, by a clear description within the account itself.
172. Mr. Burgener's fee for "Other Charges" suggests that he was asserting an entitlement to payment from JM or his corporation relating to "Files, Stationery, postage, Fax and Photocopying". However, there is no description in the account to clarify how those "Other Charges" were determined. There was also no retainer agreement to alert JM to the manner in which "Other Charges" would be calculated. There were no such charges represented in the client ledger, and there was no evidence of even a cursory effort to make an accurate assessment of the amount of the "Other Charges". This Committee finds that Mr. Burgener billed for those charges on a completely arbitrary basis.
173. The Committee finds Robert Burgener guilty of Citation 8 and that his conduct is deserving of sanction.

**Citation 9:**

**It is alleged that [Burgener] failed to provide a retainer agreement to [his] client and that such conduct is deserving of sanction.**

174. Robert Burgener admitted that he did not provide a retainer agreement to JM. Mr. Burgener's defence was that, due to the long-standing relationship between himself and JM, there was an "understanding" between them regarding the nature of his retainer and the basis of his compensation for service.
175. However, this assertion ignores the requirement of Chapter 13, Rule 2 of the former Code of Professional Conduct, which stated:
- R.2 A lawyer must provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements as is reasonable and practical in the circumstances, including the basis on which fees will be determined.
176. This Committee made two findings. Firstly, Rule 2 is not permissive. It states quite clearly that a lawyer must provide written explanation to a client respecting the basis upon which fees will be determined. Mr. Burgener was not entitled to rely on an unwritten "understanding".
177. Secondly, while the degree of explanation must be "reasonable and practical" and may vary from case to case, providing no information cannot be a defence. In this particular matter, Mr. Burgener was involved in repeated business dealings with his client, and was purporting to barter legal services in exchange for other consideration. It was inexcusable that the terms of that arrangement were not reduced to writing.
178. This Committee finds that Robert Burgener is guilty of Citation 9, and that his conduct is deserving of sanction.

**Citation 10:**

**It is alleged that [Burgener] failed to recommend that [his] client seek independent legal advice before [he] entered into a business venture with [his] client and that such conduct is deserving of sanction.**

179. Mr. Burgener's personal interests were in direct conflict with the interests of his clients, as a result of the business ventures he entered with them.
180. The most egregious examples of Mr. Burgener's conflict of interest arose in his business affairs with JM. From the moment of his arrival in Calgary, Mr. Burgener commenced a business relationship with JM by entering a tenancy arrangement, putting himself in a direct conflict of interest. Mr. Burgener's personal interest as a party to a business transaction with a client required that JM had an opportunity to

receive independent legal advice.

181. JM relied upon Mr. Burgener to provide legal advice relating to his other business affairs. JM received no legal advice when Mr. Burgener was a party to the transaction and had a personal interest.
182. At no time did Mr. Burgener recommend or make any effort to document the nature of his business relationship with JM, neither with respect to the tenancy arrangement in JM's premises, nor with respect to his involvement with JM's business affairs. The assertion that his client was "aware" of the issues was not supported. Neither Robert Burgener nor JM were able to provide any articulate explanation regarding which of Mr. Burgener's services were billable, or which part of his contribution was provided in consideration of rent or his "investment" in a business endeavor. The failure of Robert Burgener to fully explain the nature of his conflict, and the failure to recommend that JM obtain independent legal advice regarding their business relationship was, at the end of the day, the source of the majority of the difficulties giving rise to this hearing.
183. JM's business affairs later became so contentious that Mr. Burgener actually became the lawyer of record in an action in which he sued his former clients JM, BJP and JM's company, on his own behalf and on behalf of another client. At no time did Mr. Burgener identify his conflict to any of his clients.
184. While evidence of Mr. Burgener's dealings with JM would have been sufficient to make a finding of guilt on Citation 10, we also have evidence of Mr. Burgener's dealings with RP. In September of 2006, RP became involved with Mr. Burgener and JM in the development of a property in a city north of Calgary, Alberta.
185. In an effort to protect his interests in his share of any profit arising from that transaction, RP drafted his own agreement, identified in these proceedings as Exhibit 79.3.18. RP was not an experienced developer and the agreement was insufficient for its purposes.
186. Prior to engaging in this endeavor, RP had been represented by Mr. Burgener on another failed business transaction. In that transaction, RP appears to have been taken advantage of by a former partner, in addition to other real estate transactions in 2005 and 2006.
187. Robert Burgener was a business partner with JM and RP, but they also relied on him to provide legal services.
188. There was again a clear conflict of interest, arising from Mr. Burgener's ongoing business relationship with JM, and also in relation to his own business interests with RP in this development. Mr. Burgener was obliged to recommend that RP obtain independent legal advice with respect to the transaction and RP's contract between RP, JM and Mr. Burgener.

189. Mr. Burgener later asserted an entitlement to half of the profit in the development, some \$300,000.00, completely ignoring RP's claim of a share in those profits. These circumstances only became known to RP at the time of this hearing. Mr. Burgener failed to ensure his client received independent legal advice with regard to his dealings with him and also took advantage of his clients' failure to properly document their relationship and to protect their own interests.

190. Chapter 6, Rule 9 of the former Code of Professional Conduct stated:

A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects.

191. Rule 9 must be read together with Rule 7:

A lawyer must not act when there is a conflict or potential conflict between lawyer and client unless the client consents and it is in the client's best interests that the lawyer so act.

192. In considering the nature of the consent, the commentary under Rule 7 provided:

Rule #7 further requires that the client consent to the representation after full disclosure by the lawyer of the nature of the conflicting interest and the advantages of the client's retaining other counsel. Since the onus will be on the lawyer to establish that disclosure was sufficient and informed consent granted, it is advisable that these matters be confirmed in writing.

193. There was a complete and absolute failure on the part of Robert Burgener to properly advise his clients respecting the nature of his conflict of interest and of the advisability of obtaining independent legal advice. Robert Burgener essentially admitted this failure in the following passage:

With respect to the recommendation that I failed to recommend independent legal advice, that's absolutely correct. I didn't tell JM that, you know, maybe you should go get a lawyer, but at that time JM had already been involved with several lawyers, and he was well aware of -- of -- of critical documents and that sort of thing.

194. The Committee finds that Robert Burgener is guilty of the allegations in Citation 10, and that his conduct is deserving of sanction.

**Citation 11:**

**It is alleged that [Burgener] failed to protect or act in the best interests of a client by failing to observe a Requirement to Pay issued by the Minister of Finance and that such conduct is deserving of sanction.**

195. The Numbered Company was liable to the Minister of Finance for the amount Mr. Burgener paid to himself in contravention of the Requirement to Pay. This created

liability on the part of the Numbered Company. By the time the account was rendered and Mr. Burgener had paid himself from trust in May of 2007, Mr. Burgener was aware of the Requirement to Pay.

196. There is a finding of guilt respecting Citation 11, and this Committee finds Mr. Burgener's conduct deserving of sanction.

**Citation 12:**

**It is alleged that [Burgener] signed letters containing false information and that such conduct is deserving of sanction.**

197. This citation relates to the two employment letters which Robert Burgener acknowledged were provided to the mortgage lender to assist his former employee RD to obtain financing (Exhibits 81.5 and 81.6.1).
198. The letter of October 22, 2007 asserted that "RD is earning 80,000.00 gross per year" (Exhibit 81.6.1).
199. The letter of November 14, 2007 asserted that "RD is earning 120,000 gross per year" (Exhibit 81.5).
200. At no time during his brief tenure in Mr. Burgener's employment did RD earn anything close to the \$80,000.00 suggested, let alone \$120,000.00. The evidence of RD, which was not contradicted by Mr. Burgener, was that he was paid \$3,000.00 per month initially, and then \$3,500.00 per month, with an opportunity for a percentage of billings that never came to fruition.
201. Robert Burgener asserted that RD "could have" earned the sums indicated, had he worked harder.
202. The Committee finds that assertion doubtful, based upon the evidence. However, even if it were true, that is not what the letters said. They did not provide accurate information, being that RD was entitled to \$36,000.00 or \$42,000.00 per year, plus a possible bonus. The first letter stated that RD was earning \$80,000.00 per year, and the second letter stated he was earning \$120,000.00 per year.
203. Those letters were false and were written in the knowledge that the mortgage lender, who would become Robert Burgener's client, would rely on them to provide financing to his employee. In those circumstances, this Committee finds that Robert Burgener is guilty of Citation 12, and that such conduct is conduct deserving of sanction.

**Citation 13:**

**It is alleged that [Burgener] assisted a client in an improper purpose and that such conduct is deserving of sanction.**

204. This citation is related to Citation 12, and alleges that Robert Burgener assisted RD

in an effort to deceive the mortgage lender, Bank of Montreal, regarding the circumstances of his purchase.

205. It might reasonably be found that, beyond signing a false letter for RD's use, Mr. Burgener assisted his client in an improper purpose when he subsequently acted for the Bank of Montreal and failed to disclose RD's true income. However, the improper conduct went beyond misrepresenting RD's income.
206. RD purchased his home in Calgary, through a corporation, 135... Alberta Ltd., for the sum of \$363,000.00. The purchase closed November 30, 2007, and was based on an offer to purchase signed by his wife, SD, on November 5, 2007 (Exhibit 81.2.2).
207. On November 3, 2007, RD entered into an agreement to purchase the same property, from 135... Alberta Ltd., for the sum of \$422,000.00, closing on the same date, November 30, 2007 (Exhibit 81.2.1).
208. Mortgage instructions were directed to Robert Burgener by the lender, and Mr. Burgener executed a request for mortgage funds on November 28, 2007. He requested \$400,900.00, an amount \$37,900.00 more than the actual purchase price.
209. This transaction was clearly was a "flip" transaction, where the higher purchase price in the second contract was used to obtain financing in excess of the actual purchase price of the property.
210. Ultimately the actual purchase was completed for \$363,000.00, and payment was tendered by way of a trust cheque signed by Robert Burgener in the sum of \$355,674.60 (Exhibit 81.2.7). A further trust cheque in the sum of \$56,475.19 payable to RD was signed by Robert Burgener, representing RD's "profit" on this mortgage transaction (Exhibit 81.2.8).
211. While Mr. Burgener suggested this transaction was carried out without his knowledge, that is not supported by the evidence. His trust account disclosed a significant payment to a relatively junior employee, the mortgage documents were directed to his attention, and he personally signed the cheques to RD. Any lawyer seeing a cheque for \$56,475.19 payable to their employee would be obliged to make an inquiry regarding the circumstances of that payment. Robert Burgener was either actually aware of a mortgage fraud perpetrated upon the Bank of Montreal, and actually assisted his employee, RD, in committing it, or he was wilfully blind to the indicia of RD's mortgage fraud.
212. This Committee finds that Robert Burgener is guilty of Citation 13, and his conduct is deserving of sanction.



**Citation 14:**

**It is alleged that [Burgener] failed to report the issuance of one or more Writs of Enforcement as required by the Rules of the Law Society and that such conduct is deserving of sanction.**

213. This Committee has found that the evidence was insufficient to establish that Robert Burgener was aware of the writs, or that he failed to report them within a reasonable time to the LSA after having become aware of them.
214. Accordingly, this citation is dismissed.

**Citation 15:**

**It is alleged that [Burgener] failed to properly supervise [his] staff and that such conduct is deserving of sanction.**

215. It is clear that there were numerous "flip transactions", similar to RD's transaction referenced above, benefiting Mr. Burgener's support staff and their families, at the expense of Mr. Burgener's lender clients. A summary of the questionable transactions was entered into these proceedings as Exhibit 80.2, and shows that, from July of 2007 to September of 2007 alone, "flip transactions" resulting in price inflation between the original purchase price and the final purchase price of \$903,330.00. (Exhibit 80.1), The net impact upon the lenders was such that there were mortgage advances of \$2,518,485, against total purchase prices of \$1,881,170.00.
216. Mr. Burgener attempted to excuse his conduct by saying that he was kept in the dark, and that he trusted his staff, particularly GK.
217. A reasonably competent lawyer would not allow these sorts of transactions to occur under his watch. There is insufficient evidence to establish that Robert Burgener was actually aware of the transactions, though it is possible that he was. It is not, however, necessary to find actual awareness. This Committee finds that he was grossly deficient in his obligation to review the transactions taking place in his office or to review the trust account entries relating to those files.
218. By failing to engage in a reasonable level of supervision of his staff, Robert Burgener facilitated a series of frauds on mortgage lenders, whereby they appear to have collectively lent \$637,315.00 more than the total actual amounts paid to purchase the properties in question.
219. This Committee finds that Robert Burgener is guilty of Citation 15, and that such conduct is deserving of sanction.

**Citation 16:**

**It is alleged that [Burgener] failed to serve [his] lender clients and that such conduct is deserving of sanction.**

220. The relevant facts which support this citation are those which support Citation 15. A lawyer owes a fiduciary obligation to a client. This is an obligation which creates a relationship of trust and confidence. In such a relationship, the lawyer has a duty to exercise reasonable care to assure that he or she discloses to the client all facts which might be material to the interests of the client respecting the scope of the representation (see *Adeshina v Litwiniuk & Co*, 2010 ABQB 80, 483 AR 81 at para 114.)
221. On the "flip" transactions referenced above, Robert Burgener was responsible for protecting the interests of the lender clients involved in those transactions. In each case, he had a duty to advise the lenders if there were circumstances suggesting that their security might be impaired, or that the representations made to the lenders were not accurate regarding the nature of the transaction, the parties, or the price.
222. In some cases, but not all, the instructions to Mr. Burgener explicitly required him to advise the bank if there was evidence of a recent significant escalation of the purchase price. Whether those instructions were explicit or not, it is material to the lender when a purchaser is borrowing an amount which exceeds the purchase price of the property.
223. In this case, the obvious existence of numerous "flip" transactions and the extension of financing well beyond the actual purchase price of properties were relevant and material to the interests of the lenders. Robert Burgener either participated in withholding of material information, or was willfully blind to information that would have been readily available to him if he paid even modest attention to his files.
224. Mr. Burgener has failed to represent the interests of his lender clients. Citation 16 has been proven and this Committee finds that his conduct is deserving of sanction.

**Conduct Deserving of Sanction**

225. "Conduct deserving of sanction", as described in Section 49(1) of the Act, is conduct which:
- (a) is incompatible with the best interests of the public or of the members of the Society, or
  - (b) tends to harm the standing of the legal profession generally.
226. As stated in para 30 of *Law Society of Alberta v Wald*, 2011 ABLs 21:
- Conduct deserving of sanction need not be disgraceful, dishonourable or reprehensible. *Brendzan v LSA* (1997), 52 Alta. L.R. (3d) 64 (Q.B.), at paras 30 - 32. Error of judgment may or may not amount to conduct deserving of

sanction. *Law Society of Alberta v. Oshry*, [2008] L.S.D.D. No. 164; *Law Society of Alberta v. Ter Hart*, [2004] L.S.D.D. No. 25; *Law Society of Alberta v. Smeltz*, [1997] L.S.D.D. No. 144.

227. The fundamental question is simply whether or not the conduct in question is incompatible with the best interests of the public or the practice of law, or whether the conduct, once proven, would tend to harm the standing of the legal profession generally.
228. In this instance, Mr. Burgener's conduct was harmful to the reputation of our profession and incompatible with the best interests of the public.
229. With reference to the case of *Brendzan, supra*, it would be fair to say that Mr. Burgener's conduct was disgraceful, dishonorable and reprehensible. It exhibited gross incompetence, disregard for the Code of Professional Conduct, and a lack of honesty and candour in the face of very serious allegations.
230. Mr. Burgener showed no remorse or responsibility for the conduct giving rise to this hearing.

#### **Decision Regarding Sanction**

231. Pursuant to Section 72 of the Act:

- 72(1) If a Hearing Committee finds that a member is guilty of conduct deserving of sanction, the Committee shall either
- (a) order that the member be disbarred,
  - (b) order that the membership of the member be suspended during the period prescribed by the order, or
  - (c) order that the member be reprimanded.
- (2) In addition to an order under subsection (1), the Hearing Committee may make one or more of the following orders:
- (a) an order that imposes on the member conditions on the member's suspension or on the member's practice as a barrister and solicitor, a requirement that the member appear before a Board of Examiners, or any other condition or requirement permitted by the rules;
  - (b) an order requiring the payment to the Society, for each act or matter regarding the member's conduct in respect of which the Committee has made a finding of guilt, of a penalty of not more than \$10 000, within the time prescribed by the order;
  - (c) an order requiring the payment to the Society of all or part of the costs of the proceedings within the time prescribed by the order.

232. Mr. Burgener began practicing law in Alberta in 1983. Over the course of his practice, to the present date, he has a modest discipline record. He was sanctioned in two hearings, taking place in March of 2004 and May of 2010, both of which involved the breach of trust conditions. He was reprimanded and directed to pay costs in each case, and was fined in the most recent hearing.
233. Counsel for the LSA submitted that, having regard to the seriousness and number of the citations, the only appropriate sanction is disbarment. Counsel also presented a draft statement of costs and submitted that this Committee ought to direct Mr. Burgener to pay costs. The Law Society provided an estimated statement of costs, entered as Exhibit 124, in the sum of \$170,932.30.
234. Mr. Burgener provided little opposition to this suggestion, other than suggesting that he be permitted to simply resign from practice, without a formal disbarment. He made no submissions suggesting that a fine or suspension would be an adequate sanction. He did, however, suggest that the costs incurred to conduct this hearing were unnecessary and he opposed the claim for costs advanced by the LSA.
235. In considering the representations of counsel and the evidence presented, this Hearing Committee is cognizant that our primary role is to serve the public interest. Members of the public are entitled to expect that Alberta lawyers will conduct themselves with the highest level of professionalism and integrity, and that their trust will not be abused.
236. The practice of law is not a right for those called; it is a privilege, and that privilege is dependant, ultimately, upon the concept of "trust". When a lawyer holds a client's welfare in his hands, that lawyer must respect the trust being placed upon him, and act accordingly.
237. Where a lawyer breaches that trust, and puts his own interests ahead of those of the client, or where a lawyer seeks to harm the client by abusing that trust and breaching the client's confidence, there can be no more damaging conduct to the integrity and reputation of our profession.
238. In determining an appropriate sanction, we made reference to the considerations set out on page 13 of the Law Society of Alberta Hearing Guide. The factors applicable to this case include the following:
- i) The need to maintain the public's confidence in the integrity of the profession and the ability of the profession to effectively govern its own members;
  - ii) Specific deterrence of this member from further misconduct;
  - iii) General deterrence of other members who may choose to ignore or withhold full cooperation from their regulator;
  - iv) Denunciation of this conduct;
  - v) Rehabilitation of the member; and
  - vi) Avoiding undue disparity with the sanctions imposed in other cases.

239. The nature of Mr. Burgener's conduct cannot be sufficiently addressed by anything less than his disbarment. His conduct is so offensive to the essential core of our obligations as lawyers that it would be contrary to our obligation to allow him to return to practice, or to fail to strongly and unequivocally denounce his conduct.
240. Taking into account the foregoing considerations, the evidence, and the representations made to this Hearing Committee, the Hearing Committee directs that:
- A) Robert Burgener shall be immediately disbarred from the practice of law.
  - B) Robert Burgener shall pay the actual hearing costs.

**Concluding Matters**

241. There shall be a referral to the Attorney General of Alberta.
242. A notice shall be issued by the LSA, as required by the *Legal Profession Act*.
243. These proceedings and exhibits shall be made public, subject to redaction to protect the privacy of third parties and to assure compliance with the partial sealing order of the Court of Queen's Bench as referenced in Action Number 070●-●●●●●.

Dated at the City of Calgary, in the Province of Alberta, this 5<sup>th</sup> day of October, 2016

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Robert G. Harvie, Q.C. (Chair)

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Dr. Miriam Carey

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Adam O. Letourneau, Q.C.