LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT;*

AND

IN THE MATTER OF A HEARING REGARDING

THE CONDUCT OF ROBERT MACKINNON,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Julie Lloyd, QC, Chair (Bencher)

Kathleen Ryan, QC (Bencher)

Robert Dunster (Lay Bencher)

Appearances:

Counsel for the Law Society – Shanna Hunka

Counsel for Robert Mackinnon – Peter Royal, QC

Hearing Dates:

May 25, 26 and 30, 2016

Hearing Location:

Law Society of Alberta at 800 Bell Tower, 10104 – 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

Jurisdiction, Preliminary Matters and Exhibits

1. On May 25, 2016, a Hearing Committee (Committee) convened at the office of the Law Society of Alberta (LSA) to conduct a hearing regarding a number of citations against Robert Mackinnon. Counsel for Mr. Mackinnon and counsel for the LSA were asked whether there were any objections to the constitution of the Committee. There being no objections, the hearing proceeded. Mr. Mackinnon attended throughout the hearing.

2. Exhibits 1 through 4, consisting of the letter of appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act*, the Notice to Attend to the

Member and the Certificate of Status of the Member with the LSA established the jurisdiction of the Committee.

3. The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the *Rules of the Law Society of Alberta* ("Rules") pursuant to which the Deputy Executive Director and Director, Regulation of the LSA, determined that there were several persons to be served with a private hearing application, was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Accordingly, the Chair directed that the hearing be held in public.

4. At the outset of the hearing, Exhibits #1 through #12, contained in the Exhibit Books which had been provided to the Committee in advance, were entered into evidence in the hearing with the consent of the parties. Further, Exhibit #13 being the Member's Record and Exhibit #14, an estimated Statement of Costs, were added to the Exhibit Book as the hearing proceeded.

Citations

5. Mr. Mackinnon faced the following citations:

[1] It is alleged Mr. Mackinnon failed to provide conscientious service to his clients and such conduct is conduct deserving of sanction.

[2] It is alleged Mr. Mackinnon assisted his client with an improper purpose and such conduct is conduct deserving of sanction.

[3] It is alleged Mr. Mackinnon breached trust conditions and such conduct is deserving of sanction.

Agreed Statement of Fact and Admissions of Guilt

6. The Committee received a Statement of Admitted Facts and Admissions, jointly tendered and admitted as an exhibit to the proceedings at the commencement of the hearing. Through this document Mr. Mackinnon admitted guilt to Citation 3. Mr. Mackinnon also admitted guilt to Citation 1 in part. He admitted that he failed to provide conscientious service to all but one client. The Committee heard brief submissions and retired to review the Statement of Admitted Facts and Admissions.

7. The Committee was satisfied that Mr. Mackinnon was properly advised by counsel, that he made his admissions of guilt freely and voluntarily and that he understood that the Committee was not bound by the admissions made. Upon reviewing the Statement of Admitted Facts and Admissions, the Committee found that the admitted facts adequately supported the admissions of guilt. The Statement of Admitted Facts and Admissions was accepted as tendered and the hearing proceeded in respect of the balance of the citations.

8. At the end of the hearing Mr. Mackinnon, through counsel, admitted guilt to Citation 1 in its entirety. The Committee was satisfied again that the admission was made freely and voluntarily and with full knowledge that the Committee was not bound by the admission of guilt. The Committee found that the evidence supported the admission of guilt and so accepted the admission of guilt to the balance of Citation 1.

9. Citations 1 and 3 having been admitted in their entirety, the focus of the reasons to follow will be on Citation 2: Did Mr. Mackinnon assist his client with an improper purpose?

10. The Panel heard evidence from Mr. Mackinnon, counsel for EL Inc., Mr. Olesky, the Law Society investigator, and EV. JC, principal of 104●●●● Alberta Ltd. did not participate in the investigation and did not participate in the hearing.

Agreed Facts

11. Many of the uncontroverted facts were contained in the Statement of Admitted Facts and Admissions and other such facts came through the testimony of witnesses, particularly Mr. Olesky, the investigator appointed by the Law Society. What follows is a summary of the uncontested evidence relevant to an inquiry of Citation 2.

12. The citations arose from two series of real estate transactions that occurred in late 2003 and early 2004. The first series of transactions involved a real estate purchase contract dated November 8, 2003. 104●●●● Alberta Ltd. ("104 Alberta") agreed to purchase 5 units in a downtown condominium from EL Inc. The purchase price was $975,000.00. There was no per unit breakdown of the purchase price. EL Inc. was represented by the law firm Duncan and Craig in Edmonton, Alberta.

13. The second series of real estate transactions involved real estate purchase contracts dated November 18, 2003, for the same 5 downtown Edmonton condominium units. In those contracts, EV agreed to purchase the condominium units from 104 Alberta (the purchaser in the first deal) for a total purchase price of $1,335,200.00. The two series of transactions were intended to close on the same day. 104 Alberta did not secure mortgage financing.104 Alberta would use the sale proceeds from the second series of transactions to close the first series of transactions. Mr. Mackinnon represented both 104 Alberta and EV.

14. On December 10, 2003, a Memorandum of Agreement ("MOA") was made between EL Inc. and 104 Alberta amending the first series of transactions. The MOA varied the purchase price slightly (aggregate price was now $974,600.00, down from $975,000.00) and allocated the purchase price among the five condo units, setting a purchase price for the individual units. The MOA also provided that the purchaser, 104 Alberta, would include a Vendor Take Back Mortgage in the amount of $30,000.00 per unit as part of the consideration for the purchase and accordingly the cash to close would be reduced by $30,000.00 for each transaction.

15. There was no amendment made to the purchase contracts for the second series of transactions that would contemplate EV receiving units encumbered by Vendor Take Back mortgages. According to the terms of the purchase contracts between 104 Alberta and EV, EV was to receive clear title to the condominium units.

16. EV, the purchaser in the second series of transactions, secured mortgage financing. He secured financing from Toronto Dominion Bank for three of the five units and from the Bank of Montreal for the remaining two units. The banks agreed to finance 75% of the purchase price for each of the five units.

17. The instructions from Toronto Dominion Bank contained a direction that the solicitor was to ensure that the mortgage would be registered as a first charge. The instructions from the Bank of Montreal expressly contained a requirement that no other financing would be involved in the purchase of the property. Both banks directed the solicitor to contact them should the solicitor become aware of any issues related to title which might affect the bank's security or that might be contrary to the intent of the mortgage instruments. Mr. Mackinnon represented both banks.

18. Closing documents for the first series of transactions were delivered December 16, 2003. The closing documents included a form of Vendor Take Back Mortgage with 104 Alberta named as Mortgagor and statements calculating the cash to close using a closing date of December 1, 2003. The closing documents included a calculation of the cash to close for each unit. The cash to close was calculated using a closing date of December 1, 2003 and deducting $30,000.00 per unit in accordance with the Vendor Take Back Mortgage. The accompanying trust conditions required that the Vendor Take Back Mortgage be signed and submitted for registration immediately after the cash to close was released to the vendor and that executed copies of the mortgage and post-dated cheques for the payment of those mortgages were to be provided immediately on registration of the transfer.

19. Amended closing documents were provided December 18, 2003, under cover of a new trust letter. The amended documents included new transfers of land, revised statements of adjustments and a replacement first page of the Vendor Take Back Mortgage. The revised statements of adjustments had been calculated on a closing date of January 1, 2004. Further, the cash to close was calculated without adjustment for the Vendor Take Back Mortgages. The trust letter provided: ". . . if your client elects to utilize the Vendor Take Back Mortgage, then you shall have the same executed and may deduct the amount of the mortgage ($30,000.00) from the cash to close and then register that Mortgage on or before February 1, 2004 without any intervening transferees or any other encumbrances other than the first Mortgage. . .". Copies of the mortgage and the post-dated cheques were also required, though no specific date for receipt of these was provided.

20. On December 19, 2003, Mr. Mackinnon wrote to counsel for EL Inc. and requested that the trust conditions be amended so that he could "make best efforts" to register the Vendor Take Back Mortgage on or before February 1, 2004, "but no later than 30 days after receipt" of the documentation referred to in the undertakings. No written reply was received to this request to amend the trust conditions.

21. Mr. Mackinnon received a confirmation from JC of 104 Alberta that the company had received first deposits and second deposits totaling $213,200.00 for the first three of the five condominium units. A deposit of $5,000 was purportedly received in respect of the fourth unit. The real estate purchase contracts directed that deposits were to be paid to Mr. Mackinnon in trust. Mr. Mackinnon's trust records disclose that he did not receive these monies into his trust account. There was no evidence tendered (aside from JC's confirmation) to demonstrate these monies were paid to or received by either JC or 104 Alberta. Mr. Mackinnon prepared his statements of adjustments using the "confirmed amounts" and confirmed to counsel for EL Inc. that he had sufficient monies net of mortgage proceeds to close the first transaction. Mr. Mackinnon requested keys be released to 104 Alberta.

22. On January 7, 2004 Toronto Dominion Bank advanced to Mr. Mackinnon's office, on EV's behalf, funds for three of the five transactions in the aggregate amount of $639,600.00. On that same day Mr. Mackinnon advanced funds to counsel for EL Inc. in the aggregate amount of $550,309.52, advising that the vendor had elected to engage the Vendor Take Back Mortgages, discounting the cash to close accordingly and writing "We will forward the Vendor Take Back Mortgages and post-dated cheques shortly. In due course, we will register the Vendor Take Back Mortgage and provide proof thereof."

23. On January 15 and 16, 2004, EV said that he paid directly to 104 Alberta, through its principal JC, funds in the aggregate amount of $124,700.00. Documents were tendered during the hearing to substantiate this payment. Mr. Mackinnon had previously been advised that a further $5,000 had been paid as a deposit on the fourth unit, though this payment was not established by any document. In total the deposit paid by EV, the Committee was told, was $129,700.00. These funds were not paid to Mr. Mackinnon, though the real estate purchase contracts directed that all deposits be paid into the lawyer's trust account. It appears that these were the only funds directed by EV to the credit of the transaction. Mr. Mackinnon's bank records disclosed that, other than bank financing, he did not receive any monies into his trust account to the credit of the transactions.

24. On January 21, 2004, the Bank of Montreal advanced funds in the aggregate amount of $361,775.00 in respect of the two remaining condo units. Mr. Mackinnon forwarded funds to counsel for the Vendor in the aggregate amount of $275,338.00, being the stated cash to close, on that same day.

25. In the correspondence accompanying the cash to close, Mr. Mackinnon advised that the Vendor Take Back Mortgage had been engaged, discounted the cash to close and wrote to counsel for EL Inc.: "We will forward the Vendor Take Back Mortgages and post-dated cheques shortly. In due course, we will register the Vendor Take Back Mortgage and provide proof thereof."

26. On March 2, 2004, counsel for the Vendor, EL Inc., wrote to Mr. Mackinnon asking about the status of the Vendor Take Back Mortgage. On March 5, 2004, counsel phoned Mr. Mackinnon with a similar inquiry. Further similar inquiries were made March 16, 2004, and April 26, 2004. On June 1, 2004, the Bank of Montreal asked for closing documentation. Mr. Mackinnon did not respond to these inquiries.

27. On July 8, 2004, Mr. Mackinnon wrote to counsel for EL Inc.: ". . . it is my understanding that our respective clients have settled the matter with respect to the Vendor Take Back Mortgages, and the same are no longer required to be registered. It is equally my understanding that you are to provide clear title to the above referenced properties." On July 13, 2004, counsel for the Vendor wrote in part: "There is no understanding reached between our respective clients and unless this matter is resolved forthwith we are to proceed to demand you act upon the trust conditions imposed on you."

28. On August 18, 2004, Mr. Mackinnon registered the Vendor Take Back Mortgages and sent copies of title verifying registration of the mortgages to counsel for the vendor. On September 9, 2004, counsel for the Vendor asked for copies of the Vendor Take Back Mortgage.

29. On January 14, 2005, Mr. Mackinnon provided copies of the Vendor Take Back Mortgage. The Vendor Take Back Mortgage had been granted in favour of EL Inc. by EV and not by 104 Alberta.

30. The Bank of Montreal commenced foreclosure proceedings in August of 2004 and the Toronto Dominion Bank commenced foreclosure proceedings in August of 2005. In February of 2006 EL Inc. sued Mr. Mackinnon, EV and others in respect of the within transactions. In May of 2006 the Bank of Montreal sued Mr. Mackinnon, EV, JC and others in regard to the transactions and in February of 2007 the Toronto Dominium Bank sued Mr. Mackinnon, EV, JC and others in regard to these same transactions.

Controverted evidence

31. There are two relevant questions of fact upon which the evidence is controverted. First, was EV acting in concert with JC, the principal of 104 Alberta, so that he was aware of the facts material to both series of transactions? Second, were the Vendor Take Back Mortgages amended by counsel for EL Inc. or with the consent of counsel for EL Inc.?

a. **Was EV aware of the facts material to both series of transactions?**

32. It was Mr. Mackinnon's evidence that EV and JC knew each other, that they were engaging in a joint venture and that they were each aware of all of the details of both transactions. Mr. Mackinnon testified that he had met both of the parties, that he had met both of the parties together and that he met the parties at the same time and place to review and execute all of the closing documents. Mr. Mackinnon says that he was the innocent victim of the concerted scheme of two rogue actors and that his conduct should be viewed through the lens of that fact.

33. EV denies that he knew anything about the first series of transactions. EV says he knew JC only as a property manager, was not aware that JC was an intervening purchaser, did not know anything about the earlier deal and would not have entered the deal had he known. EV says he knew nothing about Vendor Take Back Mortgages, that he did not consent to any such mortgage financing and that he would not have entered the deal if he had been made aware of them. EV testified that he was a victim of JC and that Mr. Mackinnon failed to protect his interests.

34. On considering carefully all of the evidence, the Committee finds that the truth lies somewhere in the middle. EV's evidence lacked credibility in some important respects. EV is a sophisticated businessman. He was a bank manager for a number of years and then a mortgage broker. EV was knowledgeable about real estate transactions and mortgage financing.

35. Notwithstanding this extensive background and expertise, EV was unable to give a satisfactory explanation to some aspects of his real estate purchase. He had executed 5 purchase contracts and negotiated bank financing for these units from two different banks. The mortgage documents demonstrated that each bank would finance 75% of the purchase price. EV would have to come up with the balance of the funds. A twenty-five percent down payment would be $333,800.00 on the purchase price agreed to, not including any adjustments, legal fees and disbursements. Documents demonstrate that EV paid a total of only $124,700.00; nowhere near the amount of money required to close the deal with 104 Alberta.

36. EV's explanation was that the $124,700.00 was all the money he had available at the time and that he was unsure how many units he would own at the end of the deal. The Committee finds that this explanation is not credible. A person of EV's background would be aware of the details of his contractual obligations with the vendor and with the bank. It is more likely and the Committee finds that EV knew something about the first set of transactions and that in particular he knew that the full deposit monies would not be required to conclude the purchase of the condominium units because the purchase price in the first set of transactions was significantly lower.

37. EV did, however, pay $124,700.00 to JC, principal of 104 Alberta. As described earlier, 104 Alberta would be able to close its transaction with EL Inc. using only the mortgage

funds. Additional funds were not needed. There was no evidence led to suggest that the funds advanced by EV were paid back to him. It appears, and the Committee finds, that while EV had some knowledge of the earlier purchase transactions, he was not aware of all of the relevant details and he was a victim of JC.

38. Mr. Mackinnon may have thought that JC and EV were partners in the larger deal and may have thought that EV knew all of the facts material to both transactions. This belief, if held was, however, not reasonably held and was also mistaken in significant part. Further, Mr. Mackinnon's belief did not relieve him of his duty to represent this client's interests conscientiously. There was no evidence that Mr. Mackinnon communicated or confirmed the details of both transactions to EV or that he provided any advice or expressed any concern about the possible implications relevant to the bank financing secured by EV. The Committee finds that Mr. Mackinnon failed to communicate the details of the transactions to EV adequately, if at all.

39. Mr. Mackinnon knew that the Vendor Take Back Mortgage was not contemplated in the contract EV signed to purchase the condo units. Mr. Mackinnon knew that the Vendor Take Back Mortgage would put EV in breach of the mortgage covenants to the Toronto Dominium Bank and the Bank of Montreal. There is no evidence to suggest that Mr. Mackinnon brought these facts to EV's attention or that he provided any advice or caution to EV in advance of EV granting the mortgage in favor of EL.

b. **Was the Vendor Take Back Mortgage amended by counsel for EL Inc. or with the consent of counsel for EL Inc.?**

40. Mr. Mackinnon testified that counsel for EL Inc. either amended the Vendor Take Back Mortgage themselves to switch the mortgagor from 104 Alberta to EV or that counsel for EL Inc. authorized Mr. Mackinnon to do so. Counsel for EL Inc. denies both that he or his office attended to the change in mortgagor or that he or his office authorized the change. Counsel for EL Inc. testified that he did not know that 104 Alberta was an intervening purchaser and did not know that there was a second transaction to close for the same units on the same day.

41. It is unfortunate that neither Mr. Mackinnon nor counsel for EL Inc. retained a copy of the Vendor Take Back Mortgage sent under cover of the trust letters dated December 18, 2003. Other surrounding circumstances, however, lead this Committee to conclude that counsel for EL Inc. neither effected the change to the Vendor Take Back Mortgage nor authorized the change.

42. Both Mr. Mackinnon and counsel for EL Inc. agree that the first version of the Vendor Take Back Mortgage named 104 Alberta as mortgagor. This is not surprising as the real estate purchase contract and the memorandum of agreement is between EL Inc. and 104 Alberta. There is no mention of EV in any of the documents generated around the first

series of transactions. The form of Vendor Take Back Mortgage that was executed and registered at the land titles office, however, had the name of EV as mortgagor. There was no correspondence or documentation on the file and made contemporaneously that addressed the Vendor Take Back Mortgage as an obligation of EV, whether as original or amended mortgagor.

43. It was obvious from a review of the document registered at the land titles office that the name of EV had been inserted into a document after it had been printed. It is uncertain whether the earlier words were erased and EV's name typed in with a manual typewriter or EV's name was printed out and pasted into the document. The procedure would have been done by hand as the changes were clearly in a different font and offset from the rest of the text. Further, an affidavit of execution, made necessary by a change of mortgagor from a corporation to an individual, was appended to the mortgage. The difference in font made it clear that this affidavit had not been part of the original document.

44. Counsel for EL Inc. had little specific memory of the transaction but made the following observations in support of his belief that his office had not effected the change in mortgagor. First, counsel observed that the hand made changes made the document look messy and unprofessional. Counsel testified that it would be his invariable practice never to send such a document out of the office. Counsel also observed that as his office had the electronic document it would have taken less time to merely change the name and reprint the document.

45. Counsel also pointed to the December 18, 2003, letter covering the document. Only one page of the Vendor Take Back Mortgage – the first page – was sent with a direction that it be substituted for the first page of the document sent under cover of the December 16, 2003 letter. Counsel suggested this was consistent with his understanding that only the effective date of the mortgage had changed (from December 1, 2003 to January 1, 2004) and not the name of the mortgagor. Had the mortgagor been changed there would have been more substitute pages required.

46. By the end of the hearing Mr. Mackinnon conceded that it was possible and perhaps likely that his office had attended to the handmade amendments to the Mortgage. Mr. Mackinnon's memory had faded and this is not surprising given the lapse of time. In all of the circumstances this Committee finds that the change was made by Mr. Mackinnon or by someone at his direction.

47. Mr. Mackinnon testified in the alternative, however, that if he did make the change to the Vendor Take Back Mortgage by inserting EV as mortgagor, he only did so with the consent of counsel for EL Inc.

48. Counsel for EL Inc. denies this as well. Memory again having faded, counsel pointed to circumstances and documents in support of their denial. First, counsel testified that any

such authorization would have been communicated in writing to Mr. Mackinnon. Second, such amendment would have been a material change to the transaction and a material change to the contractual documents as between EL Inc. and 104 Alberta. Such change would have been documented. Further, as the amendment would have affected a mortgage document, endorsement would be required before the amendment would be accepted for registration at the land titles office.

49. Counsel for EL Inc. also testified that a change from a corporate to an individual mortgagor would be material, would have impacted his client's security position and would have been the subject of discussion between himself and the client. Such discussion would have occurred and it would have been documented on the file, almost certainly in a letter to the client. In the absence of correspondence or other documentation on the file, counsel concluded that he had not authorized a change in the identity of the mortgagor.

50. The Committee found the testimony of counsel for EL Inc. believable. The Committee also noted that there was no documentation on Mr. Mackinnon's files that would suggest consent or agreement. The Committee also noted that despite trust conditions, despite undertakings, despite persistent demands from counsel that Mr. Mackinnon provide copies of the Vendor Take Back Mortgage, he refused. When finally in August of 2004 he wrote to counsel, he sent only confirmation the mortgages had been registered and not a copy of the mortgages as he was required to do. The copy of the mortgage was sent only in January of 2005, just a few days before the units were sold again.

51. The Committee finds that Mr. Mackinnon did not have the necessary authorization to alter the Vendor Take Back Mortgage. The Committee finds that Mr. Mackinnon knew he did not have the necessary authorization when he altered the Vendor Take Back Mortgage. The Committee also finds that Mr. Mackinnon concealed his wrong doing for over a year for no legitimate reason.

Decision on Citation: Did Mr. Mackinnon assist a client in an improper purpose?

52. The Committee finds that Citation 2 is made out. Mr. Mackinnon assisted his client, JC, with an improper purpose.

53. The Committee finds the decision of *LSA v. Dewett*, 2016 ABLS 13 to be helpful in approaching this citation. In *Dewett*, *supra*, the Committee found that there need not be a finding of fraud, including a finding of mortgage fraud, made before guilt can be made out in respect of this citation. Rather, a Committee is to look at all of the relevant facts, including the duties owed by counsel to a client or clients. The citation requires that the member has assisted a client in that client's pursuit of an improper purpose. The citation does not require that the member has personally harbored an improper purpose or even that the member knew that his client was pursuing a purpose that was improper.

54. Based on the evidence, we know that Mr. Mackinnon represented four parties. Mr. Mackinnon was obligated to provide conscientious service to each of these four clients without preferring the interests of any one client over the interests of others. We know that, as Mr. Mackinnon was representing clients in the same series of transactions, he had an obligation of transparency to each as against the other: no detail material to the interests of one party may be concealed from that party. In the event of a material and significant conflict between the interests of his clients, Mr. Mackinnon was obligated to advise the clients and to consider whether he might be required to withdraw as counsel.

55. Mr. Mackinnon knew at the start of these transactions that there were two deals scheduled to close on the same day, in respect of the same units, and that there were two very different purchase prices. A good deal is not necessarily fraud and not necessarily improper. However, Mr. Mackinnon represented 104 Alberta, JC and EV, and he was obligated to take reasonable steps to ensure that EV, the second purchaser, knew the details of the earlier transactions. He did not do so adequately, if at all. There was no correspondence and there were no notes demonstrating that Mr. Mackinnon communicated the situation to EV.

56. After the initial deal was put together the deal was amended. Mr. Mackinnon knew that, according to the amended deal, the total purchase price would be reduced by $150,000.00 in exchange for JC executing Vendor Take Back Mortgages on behalf of 104 Alberta. Mr. Mackinnon knew that the purchase contract signed by EV did not contemplate such mortgages. This was a material issue that needed to be dealt with. Mr. Mackinnon did not communicate the issue to his client in writing and there were no notes on the file that would corroborate any discussion about this very significant matter. We know that the purchase contract signed by EV was not amended. Mr. Mackinnon did not adequately, if at all, communicate to EV the significance of this amendment to the agreement between EL and 104 Alberta.

57. Mr. Mackinnon knew that the purchase contracts required that deposit monies were to be paid to his trust account. No deposits were received into his trust account. Mr. Mackinnon accepted the confirmation from 104 Alberta that monies had been received. In all of the circumstances of this transaction, this was a material matter that would have been of interest to his clients, the Toronto Dominion Bank and the Bank of Montreal. Mr. Mackinnon did not advise these clients of this irregularity.

58. Further, Mr. Mackinnon knew that his clients, the Toronto Dominion Bank and the Bank of Montreal, were extending mortgage funds that significantly exceeded the funds required to conclude the first series of transactions. He knew that the banks were advancing 75% of the purchase price EV had contracted to pay and knew that the banks expected the purchase price would be close to the market value. Mr. Mackinnon also knew that the banks required that he would advise them of any material matter that might impact their security. Mr. Mackinnon knew about the two series of transactions and about the different

purchase prices; he knew about the irregularities around the deposits; he knew about the Vendor Take Back Mortgage. The accumulation of circumstances here was alarming. Mr. Mackinnon had a duty of candour, a duty to advise the banks of the circumstances that would likely interest them. He did not.

59. In the context of all of these circumstances, Mr. Mackinnon received a trust letter from counsel for the vendors, EL. That trust letter contained an election: 104 Alberta could pay the full cash to close, or 104 Alberta could engage the enclosed Vendor Take Back Mortgages and reduce the cash to close by $30,000.00 per unit. The trust conditions contemplated that the Vendor Take Back mortgage would be executed by 104 Alberta Ltd. and neither contemplated nor permitted the substitution of mortgagors.

60. Mr. Mackinnon amended the Vendor Take Back Mortgage so that EV was the mortgagor. Counsel for Mr. Mackinnon characterized him as naïve and inexperienced. It was also suggested that there was a time pressure to conclude the deals and that Mr. Mackinnon's intention was only to "get the deal done." Whatever the reason or combination of reasons were that led Mr. Mackinnon to effect the changes in the mortgage, they do not absolve him of his guilt on Citation 2.

61. When Mr. Mackinnon received the trust letter enclosing the Vendor Take Back Mortgage and the election to use it, Mr. Mackinnon could not accept instructions to engage those mortgages without the fully informed consent of EV and the banks. Further he could not accept instructions to engage the mortgages without authorization from EV.

62. What he did instead was to alter the documents, reduce the purchase price by $30,000.00 per unit, and pay a significant amount of the mortgage proceeds directly to JC and 104 Alberta.

63. It was wrong for Mr. Mackinnon not to inform and advise EV and the banks of material facts before this date. When Mr. Mackinnon made the change to the Vendor Take Back Mortgage – a change he knew was not authorized by the Vendor – and deducted the cash to close by $30,000.00 per unit, Mr. Mackinnon assisted JC in an improper purpose. Had EV known the entire circumstances of the deal he likely would have declined to close the deal. Had the banks known the entire circumstances of the deal, they likely would have declined to close the deal. Mr. Mackinnon did not inform these clients and, in the result, JC and 104 Alberta made a significant and unjustified financial gain, EV got an encumbered property and the banks got compromised security.

64. To make a bad situation even worse, Mr. Mackinnon made this election twice: first on January 7, 2014 and then again on January 22, 2014.

65. Further, Mr. Mackinnon concealed his wrongful act from the vendor, EL, for close to a year.

66. This Committee finds that Citation 2 is made out.

Decision Regarding Sanction

67. As Citation 2 is found to have been made out and as Citations 1 and 3 were admitted, this Committee has found that there has been conduct deserving of sanction. Section 72(1) of the *Legal Profession Act* requires this Committee, on finding a member guilty of conduct deserving of sanction, to disbar, suspend or reprimand the member.

68. Mr. Mackinnon is guilty of failing to provide conscientious service to his clients, guilty of breaching trust conditions and guilty of assisting a client in an improper purpose. The conduct occurred in the context of ten real estate transactions. The first series of transactions had an aggregate purchase price of $974,600.00. The second series of transactions had an aggregate purchase price of 1,335,200.00. The transactions involved mortgage funds in the aggregate amount of $1,001,375.00. The first set of improper transactions concluded on January 7, 2004, and the second set of improper transactions concluded on January 21, 2004. The improper conduct was concealed from January 2004 until January 2005. There can be no question that this was a profoundly serious matter.

69. Counsel for the LSA sought a suspension of 4 to 6 months as being appropriate in the circumstances. Counsel for Mr. Mackinnon sought a monetary consequence and no suspension or other sanction.

70. The primary purpose of disciplinary proceedings, pursuant to section 49(1) of *the Legal Profession Act,* is: (1) the protection of the best interests of the public and (2) protection of the standing of the legal profession generally. The purpose generally of law society disciplinary proceedings has been described as: ". . . to protect the public, maintain high professional standards and preserve public confidence in the legal profession" (*Lawyers and Ethics: Professional Responsibility and Discipline*, Gavin McKenzie (at p. 26-1)).

71. The Hearing Guide, published by the Benchers as a guide to the conduct of disciplinary hearings, summarizes statutory direction and case law, articulating numerous factors to be considered in determining what sanction to impose. The weight given to the various factors depends on the nature of each case, keeping always in mind the purpose of the disciplinary process itself.

72. On the facts of this case, the factors most relevant include the need to maintain public confidence in the integrity of the profession. This factor engages the principles of deterrence and denunciation.

73. The nature of the misconduct here is serious. Mr. Mackinnon decided to act simultaneously for 4 separate clients. The Code of Conduct contemplates lawyers representing multiple clients in a single cause, but lawyers must be mindful that when

doing so they must always act in a manner that serves the very best interest of each client. The lawyer must be fully transparent, ensuring that each client is aware of all of the material facts. An even hand must be maintained and must be seen to be maintained, and where interests come to be in conflict, the lawyer must cease to act.

74. Mr. Mackinnon failed to act in the best interests of his clients. As pointed out earlier, Mr. Mackinnon acted contrary to the interests of all but one of his four clients. His various failures amply made out the first citation.

75. Mr. Mackinnon also breached trust conditions. Trust conditions are a unique feature of the legal profession. Without trust conditions and without the duty of fidelity that arises in respect of trust conditions, many aspects of the practice of law, including the practice of real estate transactions, would descend into chaos. Huge sums of money change hands, title to real property is transferred, all because lawyers promise to do something and that promise is something that can be trusted "to the end of the earth." Breaches of trust conditions are infinitely grave and imperil the practice of law as we know it. They cannot be abided.

76. As concluded earlier, Mr. Mackinnon also assisted a client in a wrongful purpose.

77. It is possible that Mr. Mackinnon was not aware that JC and 104 Alberta were engaged in a wrongful purpose. It is possible that Mr. Mackinnon thought that EV was "in on" the deal. It is possible that Mr. Mackinnon was naïve and inexperienced. It is possible that Mr. Mackinnon was focused on "getting the deal done" and did not concern himself with details. Whether any or all of these conditions were in play, they do not absolve Mr. Mackinnon of his obligations to his clients, to the Code of Conduct and to his profession. The failings here were myriad and were profoundly serious.

78. Further, the Committee was most concerned that Mr. Mackinnon concealed his wrongdoing for almost a year. While the Code of Conduct does not demand that lawyers be perfect, it demands that lawyers act with integrity. Integrity is the single most important personal quality of a lawyer. The quality is extolled in the Code's preamble. Students-at-law are required to undertake to act with integrity in the oath sworn the day they are enrolled as members of the Law Society of Alberta. Integrity means being accountable. Integrity means admitting to a mistake as soon as you realize you have made it – even when it is hard; even when it is embarrassing; even when it might get you in trouble with your professional society:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed." [*Bolton* v. *Law Society* [1994] 2 All E.R. 486 at 491-2 (C.A.)]

79. Mr. Mackinnon failed in this most basic duty and in so doing acted contrary to the interests of the public and contrary to the standing of the legal profession generally.

80. In addition to the larger objectives of the disciplinary process, when considering sanction, this Committee also considered facts Mr. Mackinnon's personal circumstances and the procedural and other factors of the case.

81. There are ameliorative facts at play here. First, Mr. Mackinnon has no disciplinary record. It is ameliorative that he has been the subject of no other disciplinary proceedings before or after the present inquiry. Also, while the facts here disclose serious misconduct, it is clear that Mr. Mackinnon did not benefit financially over and above his accounts rendered for the transactions. Further, Mr. Mackinnon did admit facts and did admit guilt to one citation and part of another citation in advance of the hearing. These admissions did reduce the administrative burden of the LSA and act as an ameliorating factor.

82. That there has been a significant delay in the within proceedings is also a factor to be considered in sanction. The prejudice that often arises from a delay between the occurrence of the impugned transaction and the inquiry into that conduct can be serious. Memories fade, witnesses disappear. Here the prejudicial evidentiary effect of the delay was mitigated by the litigation that ensued in 2005 and 2006, a time period more contemporaneous with the events in question. Mr. Mackinnon would have been required to explore the incidents in some detail early on, and so the effect of delay on memory at the time of the hearing would be lessened. There can also be prejudice associated with the specter of an accusation hanging over the head of a member during the time period after citations have been issued. Accusations not promptly resolved can have a negative impact on a member's personal and professional life and the Committee was mindful of the ameliorative aspects of delay in this case. The Committee also noted that ultimately the citations were either admitted or proven, and so it is not the case that the specter of accusation looming here was without substance.

Conclusion Regarding Sanction

83. After carefully considering the governing principles, the applicable factors and the facts of the within case, the Committee determined that a period of suspension is appropriate. The Committee directs that Mr. Mackinnon be suspended for a period of 4 months, commencing January 1, 2017. The Committee directs that Mr. Mackinnon pay one half of the costs of the investigation and the hearing. Counsel for the LSA tendered a statement of costs in the estimated amount of $51,387.25. A final statement of costs will be prepared by LSA counsel and the Committee directs Mr. Mackinnon to pay half of the stated amount in the final statement of costs, within one year from the date that Mr. Mackinnon is readmitted to active practice.

Concluding Matters

84. There shall be no notice to the Attorney General.

85. A Notice to the profession and the courts shall be issued, in accordance with the *Legal Profession Act*.

86. The exhibits and the transcript of proceedings will be available for public inspection, including the provision of copies of exhibits for a reasonable copying fee, except that identifying information in relation to persons other than Mr. Mackinnon will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at the City of Calgary, in the Province of Alberta, this 23rd day of November, 2016

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Julie Lloyd, Q.C., Chair

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Kathleen Ryan, Q.C.

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Robert Dunster