THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF THE *LEGAL PROFESSION ACT,* R.S.A. 2000, C. L-8 AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF PETER SHIPANOFF A MEMBER OF THE LAW SOCIETY OF ALBERTA

I – *REASONS FOR DECISION TO DISCONTINUE UNDER S.62 (2) LPA*

1. *The Member faced three citations of misconduct arising from his alleged failures to attend court. The Committee concluded that the impugned conduct of the Member did not rise to conduct deserving of sanction. It invoked s. 62 (2) of the Legal Profession Act to discontinue the hearing at the close of the Law Society of Alberta's case, inviting no submissions from the member.*

II - INTRODUCTION

2. A Hearing Committee, of the Law Society of Alberta ("LSA") convened at the Law Society offices, in Edmonton, on June 20th and June 21st, 2013, to consider the conduct of Peter Shipanoff (hereinafter referred to as the "Member").

3. The Committee was comprised of Dennis Edney, Q.C., Bencher (Chair), Jim Glass, Q.C. Bencher, and Dr. Larry Ohlhauser, Lay Bencher. The LSA was represented by Ms. Molly Naber-Sykes. The Member was present and represented by lawyer, Simon Renouf, Q.C. Also present at the Hearing was a court reporter to transcribe the proceedings.

III - JURISDICTION

4. Jurisdiction was established by the introduction of Exhibits 1 through 5, consisting of:

   - Letter of Appointment of the Hearing Committee Exhibit J1,

   - Notice to Solicitor, pursuant to section 56 of the *Legal Profession Act* with acknowledgement of service, setting out the Citations Exhibit J2,

- Notice to Attend, with acknowledgement of service, directing the Member to attend the Hearing Exhibit J3,

- Certificate of Status certifying the Member is an active and practising Member with the LSA, pursuant to section 49 of the *Legal Profession Act.* Exhibit J4,

- Certificate of Exercise of Discretion pursuant to *Rule 96(2) (b) of the Rules of the LSA* ("Rules") by which the Director, Lawyer Conduct of the LSA, determined that no one, other than the complainants Steve Fontaine and Frederic Benard were to be served with a Private Hearing Notice Exhibit J5.

IV - EXHIBITS:

5. Additional Exhibits, 6 through 27, were entered into the record, during the course of the proceedings, with the consent of the parties:

   - Exhibit 6 – Transcripts of Proceedings dated September 08, 2009.

   - Exhibit 7 – Transcripts of Proceedings dated September 14, 2009.

   - Exhibit 8 – Letter dated September 15, 2009 from Tarrabain & Company to Peter Shipanoff. Letter dated September 15, 2009 from Tarrabain & Company to Alberta Justice.

   - Exhibit 9 – Transcripts of Proceedings dated September 22, 2009.

   - Exhibit 10 – Transcripts of Proceedings dated September 28, 2009.

   - Exhibit 11 – Transcripts of Proceedings dated October 05, 2009.

   - Exhibit 12 - Letter dated October 05, 2009 from LSA to Peter Shipanoff.

   - Exhibit 13 – Transcripts of Proceedings dated October 13, 2009.

   - Exhibit 14 – Letter dated October 19, 2009 from Peter Shipanoff to the LSA.

   - Exhibit 15 – Transcripts of Proceedings dated October 22, 2009.

   - Exhibit 16 – Letter dated November 6th, 2009 from Peter Shipanoff to the LSA.

   - Exhibit 17 – Agreed Statement of Facts.

- Exhibit 18 – LSA list of Court Appearances.
- Exhibit 19 – Court Information dated August 05, 2008.
- Exhibit 20 – Letter dated September 15, 2009 from Tarrabain & Company to Alberta Justice.
- Exhibit 21 – Court Endorsements.
- Exhibit 22 – Letter dated March 25, 2010 from LSA to Steve Fontaine.
- Exhibit 23 – Letter dated March 30, 2010 from Steve Fontaine to LSA.
- Exhibit 25 – Rule 8. LSA Code of Professional Conduct.
- Exhibit 26 – Letter dated March 30, 2010 from Frederic Benard to LSA.
- Exhibit 27 – Letter dated April 19, 2010 from Peter Shipanoff to LSA.

V - CITATIONS

6. The Member faces three (3) Citations:

> *IT IS ALLEGED THAT you failed to be candid with the court and that such conduct is conduct deserving of sanction.*
>
> *IT IS ALLEGED THAT you failed to be candid with the Law Society, client, and that such conduct is conduct serving of sanction.*
>
> *IT IS ALLEGED THAT you brought the profession and the administration of justice into disrepute and that such conduct is conduct deserving of sanction.*

VI - PRELIMINARY MATTERS

7. The Chair introduced the Committee and inquired from the Member and counsel for the LSA whether there was an objection to the composition of the Committee on the basis of bias, a reasonable apprehension of bias or for any other reason. There being no objection, the entire hearing was held in public.

8. The Chair invited private hearing applications as required by *Rule 98(1)* of the LSA Rules. Two parties were served with a private hearing notice. No one requested the hearing be held in private.

9. An Agreed Statement of Facts, dated the 18th day of June, 2013, and signed by the Member, was entered into evidence by consent. [Exhibit 17].

VI I - APPLICATIONS

(a) *SWORN EVIDENCE BY AUDIO LINK*:

10. Counsel, on behalf of the LSA, applied to have witness Frederic Benard provide sworn evidence by audio – link.

11. Frederic Benard was being called by the LSA to recount his recollection of a telephone conversation he had overheard between the Member and complainant, Steve Fontaine.

12. The application was opposed by the Member as the credibility of Frederic Benard's evidence was a live issue in these proceedings.

13. The conventional view has long been that a claim to an oral hearing is at its highest when credibility is an issue. Today, that view is not unchallenged and, in certain situations, is seen as being subject to competing circumstances.

14. A balancing of competing interests requires an assessment of various factors in determining whether the advantages outweigh possible prejudice. The following factors were considered:

- The location and personal circumstances of the witness.
- The costs that would be incurred if the witness had to be physically present.
- The nature of the witness' anticipated evidence.
- Whether a telephone conference by the witness will impede or impact negatively on the ability to cross – examine that witness.
- The integrity of the examination site and the assurance that the witness will be as free from outside influences or interruptions.
- The importance of the evidence to the determination of the issues in the case.
- The effect of the telephone conference on the Committee's ability to make findings, including determinations about the credibility of the witness.
- The importance in the circumstances of the case of observing the demeanour of the witness.

- The balance of convenience between the party seeking the telephone conference and the party opposing.

15. The above list is not exhaustive. The points are not arranged in order of importance. More importantly, it should be noted that each application will depend on its particular facts and not all of the factors which have been outlined above will have application in each case. Indeed, there may be only one or two that are of any real importance.

16. The reason advanced for requesting a telephone conference was the cost of travel and accommodation incurred in calling the witness.

> *"In my submission, it is an unnecessary expenditure of time and money to ask Mr. B to travel here from Nunavut to give ten minutes of testimony in-chief and however long Mr. Renouf would be with him in cross. I, therefore, made the decision not to bring him to Alberta at this point……"*

17. No evidence was provided that the witness Frederic Benard was unable or unwilling, for any reason, to come to Edmonton and testify on his own volition, assuming his expenses are paid.

18. The financial cost has to be assessed in light of other factors, which tend to favour the in-person attendance of the witness Frederic Benard:

- He is a critical witness whose credibility is in issue.
- It is preferable to see and hear the witness give evidence where there are factual matters in dispute.
- Receiving testimony of a witness in a hearing, conducted by telephone conference, does not permit the Committee or the parties to be satisfied the witness is not reviewing notes,
- is not being coached by someone who is present with the witness,
- or to be able to discern the witness demeanour.
- Further, the ability to conduct a cross –examination, where credibility is an issue, would be significantly impaired if it were conducted over the phone.

19. Having reviewed the evidence in this matter, the submissions of counsel and the various considerations outlined above the application was dismissed. Any cost savings in time and money are not a high cost relative to the issues at stake.

(b). *APPLICATION TO PROVIDE SWORN EVIDENCE BY VIDEO–LINK:*

20. Counsel for the LSA renewed its application for Frederic Benard's evidence to be taken by video–link. The same reasoning of "cost savings" was advanced.

21. The Committee agreed to hear this application, subject to enquiries being conducted to ensure that the video- conference monitor was of sufficient quality to be able to fully observe the witness and his demeanour; that the witness could be placed under oath on site, and all necessary documents were placed before witness FREDERIC BENARD to allow counsel examining in-chief or cross-examining.

22. On satisfying these conditions, similar balancing factors were engaged in determining whether the advantage of video conferencing outweighs any potential prejudice that might arise.

23. Simply because video conferencing is an available form of technology does not suggest that such technology should be a substitute for the personal appearance of the witnesses at hearings.

24. There have been occasions when electronic evidence has proven to be efficient, effective and reduce costs when allowed into the courtroom. The court can see, hear and evaluate a witness testimony very well, assuming the video conference arrangements are of satisfactory quality.

25. The Committee was satisfied the video conferencing arrangements are of sufficient quality to properly hear and evaluate Frederic Benard's testimony. The integrity of the examination site is not compromised by assurances that the witness will be free from outside influences or interruptions. Any potential prejudice arising from the video- conferencing could be remedied by either discontinuing the procedure or assigning the appropriate weight to the witness evidence.

26. The application is allowed.

(c). APPLICATION TO PERMIT LETTER, DATED MARCH 20, 2010 TO BE ENTERED AS A FULL EXHIBIT:

27. Counsel, on behalf of the LSA, requested that correspondence, dated March 30, 2010, prepared by witness Steve Fontaine as to his recollection of a brief conversation with the Member which had taken place six (6) months previously, be introduced as an exhibit in these proceedings.

28. This application was opposed by counsel on behalf of the Member.

29. The Committee is mindful that an administrative body is not bound by the traditional rules of evidence. It can accept and act on hearsay, such as transcripts. It may also look to the legal rules of evidence and the policies underlying them to assist in assessing admissibility and weight of the evidence.

S.68 (1) of the Legal Profession Act provides that a hearing Committee:

> *(a) may hear, receive and examine evidence in any manner it considers proper, and*
> *(b) is not bound by formal rules of law concerning evidence in quasi-judicial hearings.*

30. The evidence in question was held to be both relevant and admissible to the LSA's case. Discretionary decisions over the admissibility of evidence must not remove the entitlement of the affected person. Any potential prejudice can be dealt with by the weight attributed to the evidence.

31. The application is allowed with the correspondence dated March 30, 2010 entered as an Exhibit (23) in these proceedings.

(d). APPLICATION FOR MEMBER'S FILE:

32. Counsel for the LSA, having presented its case, applied to have the Member produce his file for review:

> "So my simple request was to have a look at that file to see, A, if there was anything that shed any light on the missing letters from the Crown's file. We have a couple of endorsements that say "See letter attached", and that letter is not on the Crown's file".

33. On an enquiry whether there was a further reason for such a late request:

THE CHAIR:	Is there another reason?
MS. NABER-SYKES:	Yes, sir. The issue of whether a Charter notice has been issued in this file has arisen, and I would like to look at Mr. Shipanoff's file to see if there's a Charter notice…

34. This late application raised various concerns, including whether such a request was relevant and timely. It being understood the LSA had investigated the Member and had the opportunity to request any relevant information on a matter that had been outstanding since 2009.

35. The matter was then recessed to allow the Member to return to his office; obtain his file for LSA counsel's review, at which time a ruling would be made on the application.

36. At the re-commencement of the hearing, LSA counsel advised she was satisfied with her review of the file. The hearing then proceeded.

VIII - OPENING STATEMENTS

37. Evidence was heard on three (3) citations, where it was alleged that the Member failed to be candid with the Court; that the Member failed to be candid with the Law Society, that the Member brought the profession and the administration of justice into disrepute.

38. Counsel for the LSA elaborated on these citations in its opening statement stating:

> "*There are two issues before this Committee.*
> *The first issue is what did Peter Shipanoff know about the September 22, 2009 trial date.*
>
> *The second issue is whether Mr. Shipanoff told the Court on October 22nd, 2009 what he knew about the September 22nd, 2009 trial date.*
>
> *And a subset of that is did he tell the Law Society of Alberta what he knew about the September 22, 2009 trial date.*
>
> *Was he candid and complete in his representations to the Court on October 22nd, 2009; was he candid and complete in his response to the Law Society of Alberta"*.

39. Counsel, on behalf of the Member, in his opening statement stated:

> *"…. he didn't do anything wrong; and that if he did anything that was an error or omission, it did not amount to conduct deserving of sanction".*

40. In the course of the proceedings, Member's counsel raised a concern that his understanding of the case from LSA's counsel's opening statement differed from his present understanding as "there *seems to be two newly emerging issues*…".

41. On being requested to re-address the constituent elements of the three citations, LSA counsel stated:

> "The conversation that Mr. Shipanoff had with Mr. Fontaine of which Mr. Benard heard a part is part of the facts related to Citation 1; but the

primary focus of the facts on Citation 1 are Mr. Shipanoff's words, representations, statements to Judge Peck on October 22nd, 2009 as in Exhibit 15. So when Mr. Renouf says that the Law Society's case is about the conversation on September 21st, 2009, that's part of it. But more broadly and more accurately, the Law Society's case on Citation 1 is whether Mr. Shipanoff accurately, completely, fully represented to Judge Peck on October 22nd, 2009 his understanding of the four elements that I began my opening statement with -- whether he was counsel of record; whether the matter was set for trial; whether he had been properly retained; whether he knew the matter was set for trial and he knew the trial date. Those are the facts in relation to Citation 1 -- much broader than the conversation Mr. Renouf is focussing on".

"Citation 2. The primary evidence for Citation 2 are Mr. Shipanoff's two letters to the Law Society of Alberta, one of which is in evidence already -- it's Exhibit 16 -- Mr. Shipanoff's November 6th, 2009 letter to the Law Society of Alberta. Mr. Shipanoff wrote a second letter to the Law Society of Alberta. It's not yet in evidence. It's a letter dated April 19, 2010. The evidence is much broader than Mr. Shipanoff's conversation with Mr. Fontaine on September 21st, 2009. The issue is whether Mr. Shipanoff, as requested by Mr. Dumont, provided a complete, fair, accurate, and appropriate response to Mr. Dumont's inquiry. And the Law Society's position is he did not".

"The third citation it's alleged that Mr. Shipanoff brought the profession and the administration of justice into disrepute. The outline of the Law Society's case on that third citation is contained in Exhibit 18. There were 16 appearances in Court on the B. matter. The B. file was in Court 16 times. Mr. Shipanoff appeared one of those 16 times. Mr. Shipanoff, the evidence before you, I suggest, shows that his Agents were not always properly instructed"

IX - BACKGROUND AND CHRONOLOGY OF EVENTS

42. In the summer of 2008, Mr. B. was charged with impaired driving and refusing to provide a breath sample. He retained the services of the Member and a trial date was set for September 22, 2009. The Member then lost contact with the client, and was unable to obtain instructions.

43. Approximately two weeks prior to trial, the Member contacted Crown prosecutor's office requesting Mr. B's file be brought into court as he wished to make an application to withdraw as counsel of record.

44. On September 08, 2009. Sid Tarrabain attended, in court as an agent, on behalf of the Member. The application was to be heard by Judge Demetrick. (Exhibit 6).

45. Due to an administrative error, Mr. B.'s file was not before the court. As a result, the Member's application to withdraw was re-scheduled to September 14th, 2009. Judge Demetrick acknowledged, on the record, that applications for leave to withdraw are a common occurrence:

> *"Yes, certainly, would be appropriate if Mr. Shipanoff is able to get in touch with his client. And, of course, aware that that a lot of times the application by defence counsel for leave to withdraw has to do with the difficulty in getting any cooperation, client cooperation from the defendant."*

46. On the re-scheduled hearing date of September 4, 2009, the Member failed to appear in court, nor had he instructed an agent to appear on his behalf.

47. Judge Demetrick directed the matter be sent back to its originally scheduled trial date, September 22, 2009. (Exhibit 7). No expression of displeasure or concern with the Member's conduct was raised by the Judge.

48. The following day, September 15th, 2009, two letters were sent out from the law office of Tarrabain and Company, on behalf of agent, Sid Tarrabain to both the Member and the Crown prosecutor's office. Each letter stated that agent, Sid Tarrabain had failed to notify the Member of the scheduled hearing date of September 14, 2009. (Exhibit 8).

49. Each letter was also ambiguous and inconsistent in reporting what had occurred in the hearing before Judge Demetrick, on September 08, 2009. The Member's letter stated, in bold print, he could expect an adjournment of Mr. B.'s matter on the day of the trial as a matter of course:

> "**I can tell you that the Court directed that the matter <u>would</u> be adjourned on the day currently scheduled for the Court: September 22, 2009, however, it could be spoken to and confirmed on September 14, 2009. As this matter was not heard in Court on September 14, 2009, we confirm that the Trial Date of September 22, 2009, in Lac La Biche <u>stands</u> wherein you may apply to be removed as counsel then**".

50. The letter to the Crown makes no reference to an adjournment being granted on the day of trial. It simply stated, in bold print:

> "***As this matter was not heard in Court on September 14, 2009, we confirm that the Trial date of September 22, 2009 in Lac La Bache <u>stands</u> wherein Mr. Shipanoff will apply to be removed as counsel then"***.

51. On the eve of trial, the Member and Crown prosecutor were involved in a telephone discussion where each party had a different understanding of what was to transpire on the day of trial. At issue in these proceedings is the respective understanding by the parties as to what was said in that telephone discussion.

52. On the day of trial, September 22, the Member instructed Dan Nagase, a lawyer from his firm, to act as his agent and request an adjournment of the trial or alternatively, to seek leave to withdraw as counsel of record.

53. The court was informed the client had attended at the Member's office the previous evening to firm up his retainer and provided instructions that he wished a witness to be called on his behalf.

54. Dan Nagase addressed Judge Peck, on the Member's understanding of the September 15 letter, including the circumstances of Mr. B. He then requested an adjournment. (Exhibit 9)

55. Crown prosecutor, Steve Fontaine relying upon third party notes, related to Judge Peck, his understanding of what had transpired in the previous proceedings before Judge Demetrick. He then attributed various comments to the Member from their earlier conversation:

> *"he would be here today, ready to handle this tria*l.…"
>
> *"…Following my discussion that I had yesterday with Mr. Shipanoff, he was having the understanding that he was out of the record on last September 8…"*

56. The Member`s client, Mr. B. was present throughout the hearing. He informed the court of his personal circumstances leading to his failure to remain in contact with his lawyer. He confirmed their understanding:

> *The Accused:* *And we discussed that, me and Shipanoff, and he told me last night, he was going to be here, and –*
>
> *The Court:* *Shipanoff was going to be here.*
>
> *The Accused:* *Yeah, I talked to him last night about 9:00, and –*
>
> *The Court:* *This is absolutely – -*
>
> *……*
>
> *The Accused::* *I've also talked to him that there was a guy that went by this at the same, it is the president of the M.S.T.,*

and we'd – I'd get him to come to court for a witness, and so he was – that was one the reasons also that we were going to ask for an adjournment.

57. Judge Peck summed up his understanding of the evidence; adjourned the trial and directed a copy of the hearing be transcribed and sent to the LSA for a review of the Member's conduct.

> *The Court:* *Through a miscommunication with his agent he was not aware of the September 14th date, but at least by September 15th he was aware that this matter was going to trial on the 22nd. On September the 20th, the accused, Mr. "B" attended at Mr. Shipanoff's office, firmed up the retainer and confirmed again, I would assume that this matter was going to trial today. I understand from the Crown that Mr. Shipanoff discussed with him last night that he would be here and ready to go to trial. I understand from the accused, Mr. B. that he discussed with Mr. Shipanoff that he would be here today ready to go to trial.*
>
> *Mr. N.:* *We just…..*
>
> *The Court:* *Mr. Shipanoff has elected to send an agent – and we do not shoot the messenger – to either apply for an adjournment or for Shipanoff to get off the record. He cannot give me an explanation as to where Mr. Shipanoff is this morning. I doubt very much if he is tied up in another trial as he only made his application to withdraw on September the 8th.*
>
> *I will not punish Mr., he has been – has not been diligent in firming up his retainer, but that retainer was in fact paid and accepted on September the 20th.*

58. The learned Judge then ordered the Member`s personal attendance in court, on the 27th of September, 2009. Mistakenly, the court had chosen a hearing date when courthouses are closed.

59. By agreement between Steve Fontaine and Dan Nagase, a new hearing was re-scheduled to September 28, 2009.

60. On that date, Judge Demetrick. was informed that the Member's attendance on Sunday, September 27, 2009 was mistakenly scheduled and the Member wished a hearing date to argue the court`s loss of jurisdiction. The matter was then put over to October 05.

61. On the hearing date of October 05, 2009, Judge Demetrick directed that a transcript of the proceedings be sent to the LSA. (Exhibit 11).

62. On October 22nd the Member appeared before Judge Peck, took full responsibility for the communication breakdown and extended his apology to Judge Peck, which was in turn accepted by the learned Judge.

X – ASSESSMENT OF THE EVIDENCE

(a) Use of Agents

63. In addressing the appropriateness of the Member's consistent use of an agent, LSA counsel took witness Steve Fontaine through various documents, including court transcripts; an agreed statement of facts, court records to establish when the Member was present in court and when he was represented by an agent.

> *"The third citation it's alleged that Mr. Shipanoff brought the profession and the administration of justice into disrepute. The outline of the Law Society's case on that third citation is contained in Exhibit 18. There were 16 appearances in Court on the B. matter. The B. file was in Court 16 times. Mr. Shipanoff appeared one of those 16 times. Mr. Shipanoff, the evidence before you, I suggest, shows that his Agents were not always properly instructed"*

64. On being challenged as to the relevance of this line of enquiry, LSA counsel stated:

> "*there is an issue whether it was appropriate for Mr. Shipanoff to continually send Agents instructed or uninstructed to go to court to deal with "B"s matter".*

65. No evidence was provided by way of policy or court practice supporting the personal attendance of the Member or the use of Agents when dealing with summary matters.

66. Nor was any concern ever raised in the various court proceedings, by either a Judge or a Crown prosecutor, with regards to the Member's use of Agents.

67. The law is clear that in summary matters the Member is entitled to use an Agent in his place.

68. This established principle of court practice was confirmed by the LSA`s own Crown witness:

Question: *Is it necessary for an accused at a summary conviction offence to be in Court if his matter is going to trial?*

Answer: *I would say no, it's not necessary. There's a lot of underlying question, but no. Summary -- everything can be done through the representative -- through the agent or the lawyer….*

69. There is no support for the position the Member`s use of Agents crossed impermissible bounds and deteriorated into professional misconduct. His actions were within the norms of criminal law practice.

(b) *Witness Steve Fontaine*

70. Steve Fontaine was called as a witness by the LSA, to give evidence on his recollection of a telephone discussion between himself and the Member, on the eve of trial, September 21, 2009.

71. He acknowledged he had only a general recollection of the telephone discussion but recalled being informed by the Member that "*he would be attending court on September 22, ready to proceed with the trial".* This statement is disputed by the Member.

72. On being challenged on his recollection, Steve Fontaine appeared defensive in his responses and often unable to answer directly.

73. On the critical issue of whether the Member stated "*he would be attending court on September 22, ready to proceed with the trial",* Steve Fontaine conceded it was possible the Member did not tell him that.

74. On being challenged on an earlier recollection, Steve Fontaine agreed it was very possible the Member had told him he needed an adjournment to raise a Charter argument.

75. The unreliability of Steve Fontaine's recollection is best demonstrated when questioned whether the Member stated he was unavailable for trial, as he was booked somewhere else:

Q. So you don`t remember whether he said that?
A. He could have told me.
Q. Is it possible?
A. It is possible
Q. And so it's possible he didn`t tell you that?
A. It is possible too.

76. Steve Fontaine's responses appear to be logically inconsistent with his original assertion that the Member stated he "... *would be ready to go to trial".*

77. At some point during the conversation, Steve Fontaine chose to turn on the speaker phone to allow Mr. B, a co- worker, to listen in on the conversation with the Member. His rational, was to ensure the conversation would be validated, in the event there was a challenge to its accuracy.

78. Notwithstanding this concern, Steve Fontaine made no notes of the telephone conversation until requested to do so, six months later.

79. Steve Fontaine's credibility was further challenged on the statements he made before Judge Peck that were attributed to Judge Demetrick. (Exhibit 9).

80. In reporting what had transpired during the hearing of September 8:

> "But what happens on September 8 is that the judge who was sitting there - and according to my notes it was Judge Demetrick at that time – he refused to carry it on with that application at that date since he said that it was improperly brought forward to the court and he did postpone that application by the defence on September 14."

81. These comments are not borne out by the evidence. On review of the transcripts from the September 8 proceedings, no concern was raised by Judge Demetrick over the propriety of the Member's application. Significantly, the Member's application was not opposed by the Crown prosecutor in attendance. It is reasonable to infer from the learned Judge's comment that he was sympathetic to the Member's predicament:

> *THE COURT: Yes, certainly that would be appropriate if Mr. Shipanoff is able to get in touch with his client. And, of course, aware that a lot of times the application by defence counsel for leave to withdraw has to do with the difficulty in getting cooperation, client cooperation from the defendant.*

82. Steve Fontaine. attributed the following comments to Judge Demetrick from the September 14 hearing::

> "On September 14, …….. and the judge said that he was not granting that application, he says it was not properly brought forward to the court."
>
> "And even I have to say that, from the – the notes I'm seeing, that your brother Judge -- Mr. Demetrick said that this trial will be held on September 22nd. And he was even considering –the possibility of

holding it ex parte, since it was claimed that Mr. – what's his name again – B was not responding".

83. These descriptors are also not borne out by the evidence. A review of the transcripts, dated September 14, indicate the hearing was very brief. On being informed the Member was not present; the Judge simply ordered the matter be put back to its original trial date. Nothing more was said other than the judge responding to an enquiry from the Crown, that the trial could be heard ex-parte.

84. It is significant Steve Fontaine acknowledged he had reviewed his complete file, a mere 16 hours, prior to misrepresenting facts to Judge Peck. At best, his comments can be considered as overstatements, with the potential to place the Member in a poor light before the judge.

85. The Committee was confronted with Steve Fontaine's ethical misconduct, in enabling a third party, Jeffrey Rudiak, to overhear his telephone conversation with the Member, without consent. Such conduct is a clear breach of the Law Society of Alberta's, Code of Professional Conduct. *Rule 8* states:

> *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.

86. No extraordinary circumstance was present. Steve Fontaine acknowledged it was his regular practice to enable a third party to listen to his telephone conversations. He explained away his misconduct as:

> *"Part of the toolbox. I will say that it is something that in the situation where you need someone to listen, let's -- let's do it".*

87. These comments by Steve Fontaine suggest a more competitive approach to his duties than is appropriate. Crown counsel have special responsibilities placed upon them as law officers of the Crown and as such are subject to certain ethical obligations which may differ from those of defence counsel. They are required to act with moderation, fairness and impartiality. These standards do not appear to be present with regards to Steve Fontaine's conduct in this matter.

88. Having regards to all the evidence, the fact remains that in the absence of circumstances which provides adequate assurances of reliability, the evidence of Steve Fontaine lacks trustworthiness.

(c) *Witness Frederic Benard.*

89. Frederic Benard was called as a witness, by the LSA, to corroborate a portion of the conversation he had overheard between witness Steve Fontaine and the Member. He recalled the Member stating:

> "*...be prepared for trial on September 22, 2009*". (Exhibit 26)

90. He acknowledged he was recalling a portion of a conversation "that had happened so fast", between the two parties, having made no notes.

> *Q* *Mr. B, did you take notes of what you heard of this conversation?*
> *A* *No.*
> *Q* *Why not?*
> *A* *I did not expect at first to have to -- it's not like if I was advised in to sit down there and take -- and take notes. It happened so fast that I was asked to sit down, that I just sat down. That's it.*

91. When pressed on his recollection of events, he could not recall being in court on the same matter involving the Member seven days later. Frederic Benard explained away his poor recollection as he was a very busy prosecutor, dealing with "over 1500 files a year", and had worked in one of the busiest Crown prosecutor offices in Alberta.

92. The reliability of Frederic Benard's memory of a brief comment attributed to the Member made in fleeting circumstances has to be weighed alongside Steve Fontaine's later concession that it was possible the Member had not told him that he would be running a trial on the scheduled trial date.

93. Having regards to the unreliability in the evidence, little weight was given to the evidence of Frederic Benard.

(d) *Judge Peck`s assessment of the evidence*

94. On September 22, 2009, Judge Peck summed up his understanding of the Member's misconduct:

> "*Through a miscommunication with his agent he was not aware of the September 14th date, but at least by September 15th he was aware that this matter was going to trial on the 22nd. On September the 20th, the accused, Mr. "B" attended at Mr. Shipanoff's office, firmed up the retainer and confirmed again, I would assume that this matter was going to trial today. I understand from the Crown that Mr. Shipanoff discussed with him last night that he would be here and ready to go to trial. I understand from the accused, Mr. B that he discussed with Mr. Shipanoff that he would be here today ready to go to trial".*

95. He reasoned the Member was aware by September 15, that the trial matter was going ahead on the 22nd. This conclusion was based on the knowledge the Member had received a letter dated September 15th from the law office of Tarrabain and Company advising such.

96. Judge Peck omitted to address a critical part of that same narrative set out in the September 15th letter, where it was also stated the Member could expect an adjournment on the trial date: (Exhibit 8)

> *"I can tell you that that the Court directed that the matter would be adjourned on the day currently scheduled for court September 22nd. However, it could be spoken to and confirmed on September 14th."*

97. The Judge then mistakenly constructed from Mr. B's evidence that in addition to having knowledge of the pending trial date, the Member intended to conduct the trial.

> *"I understand from the accused, Mr. B that he discussed with Mr. Shipanoff that he would be here today ready to go to trial".*

98. At no point in the proceedings did Mr. B. ever make such a comment. He simply advised the Court that the Member "*would be here today*" and said no more.

99. The mistreatment of Mr. B.'s evidence was further compounded by the learned Judge imputing the wrong date when Mr. B. firmed up his retainer with the Member. The transcripts demonstrate that it was September 21.

100. This minor error takes on greater significance with the Judge incorrectly assuming that Mr. B., on having firmed up his retainer, then confirmed with the Member, the trial was going ahead.

> *…On September the 20th, the accused, Mr. "B" attended at Mr. Shipanoff's office, firmed up the retainer and confirmed again, I would assume that this matter was going to trial today.*

101. There is nothing in the evidence to support such an inference. The evidence of Mr. B. is clear. He and the Member intended to request an adjournment.

> *"And we discussed that, me and Shipanoff, and he told me last night, he was going to be here—"*
>
> *"I`ve also talked to him that there was a guy ----------I`d get him to come to court for a witness, so he was—that was one of the reasons also <u>we</u> were going to ask for an adjournment."*.

102. In the circumstances of the present case, where it is necessary to resolve confused or contradictory evidence, including significant inconsistencies or conflicts in the evidence, there is an obligation by the court to provide coherent reasons. This was not done.

103. The assessment of the evidence relied upon by the learned Judge is unreliable. Assumptions were unsupported by the facts and critical evidence was ignored.

XII - CONCLUSION:

104. If counsel for an accused is no longer able to take instructions from the client, that counsel is obligated as an officer of the court to bring the issue to the court's attention. A lawyer has no authority to continue proceeding without instructions from a client. This is a general principle of court procedure.

105. As the Member attempted to carry out his professional obligation to the court, this case turned into a procedural saga, very much the result of much miscommunication between all parties. As a result, time, expense and energy were expended on an issue that should have and could have been resolved without litigation.

106. In approaching this matter, the Committee was cognizant that both the courts and the Law Society play different, but important roles in regulating a Member when withdrawing from representing the client: the courts prevent harm to the administration of justice and the Law Society discipline lawyers whose conduct falls below professional standards. These roles are not mutually exclusive; rather, they are necessary to ensure the effective regulation of the profession and to protect the process of the court.

107. In assessing what constitutes professional misconduct, reference is made to *Re Stevens and Law Society of Upper Canada, (1979), 55 O.R. (2d) 405 (Div. Ct.), at p. 410:*

> *What constitutes professional misconduct by a lawyer can and should be determined by the discipline Committee. Its function in determining what may in each particular circumstance constitute professional conduct ought not to be unduly restricted. No one but a fellow member of the profession can be more keenly aware of the problems and frustrations that confront a practitioner. The discipline Committee is certainly in the best position to determine when a solicitor's conduct has crossed the permissible bounds and deteriorated to professional misconduct. Probably no one could approach a complaint against a lawyer with more*

understanding than a group composed primarily of members of his profession.

108. Throughout, the Hearing Committee has applied the standard of proof required of this tribunal; that is, proof on a balance of probabilities and has imposed upon the Law Society of Alberta the burden of proving these allegations by "*clear and convincing proof based upon cogent evidence*".

109. This Hearing Committee must be satisfied that the Court's finding of misconduct is not based on one element only to the exclusion of others, but is based on all the elements by which it can be tested in this particular case.

110. In assessing credibility, the credibility of each witness was assessed with regards to all the relevant evidence.

111. In assessing the Member's conduct, the facts as set out did not disclose a marked departure of conduct the Law Society expects from its members. See: *Law Society of BC v. Martin, 2005 LSBC 16 (Can LII), and Law Society of BC v. Lyons, 2008 LSBC 9 (Can LII).*

112. On the LSA closing its case and prior to the Member being called upon to present his case, the Committee, in recognizing its broad statutory discretion over procedure and evidence, on its own motion, invoked the power of *s. 62 (2) LPA* and concluded the LSA had failed to discharge its burden of proving, on the whole of the evidence, that the Member's conduct was deserving of sanction.

113. In invoking *s. 62 (2) LPA,* the Committee recognized that such a power should be used sparingly and only in the clearest of cases. This is such a case.

114. The citations are dismissed.

Dated: July 10, 2013, at Calgary, Alberta.

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DENNIS EDNEY, Q.C. (Chairperson) JIM GLASS Q.C.

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DR. LARRY OHLHAUSER