

**THE LAW SOCIETY OF ALBERTA  
HEARING COMMITTEE REPORT**

**IN THE MATTER OF THE Legal Profession Act, and**

**In the matter of a Hearing regarding  
the conduct of HNAT NESTOR MAKUCH**

**A Member of The Law Society of Alberta**

**INTRODUCTION AND SUMMARY OF RESULT**

1. On February 4, 2013 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Hnat Nestor Makuch. The Committee was comprised of Robert G. Harvie, Q.C., Chair, Dennis Edney, Q.C. and Gillian D. Marriot, Q.C. The LSA was represented by Mr. Brian G. Gifford. The Member was present throughout the hearing and was represented by Mr. William B. Hembroff.
2. At the commencement of the hearing, counsel for the LSA and Mr. Makuch presented the Hearing Committee with two separate Agreed Statements of Facts in relation to all four citations, marked as Exhibit 3 respecting the issues related to the L complaint and as Exhibit 4 related to the S complaint.
3. Further, as set out in paragraphs 85 and 86 of Exhibit 3 (relating to the L complaint) and paragraphs 82 and 83 of Exhibit 4 (relating to the S complaint), the Member admitted his guilt to all of the citations and that his conduct was deserving of sanction, pursuant to Section 60 of the Legal Profession Act.
4. At the outset of the hearing, with agreement of Counsel, without any amendment of the essential facts and admissions on the part of the member, it was agreed that the conduct referenced within count 4 referred to above was, essentially, contained within the ambit of count 3, such that, with agreement of both counsel, a request was made to amend the citations against the Member to limit same to counts 1, 2, and 3. The panel accepted those submissions and proceeded accordingly.
5. On the basis of the Agreed Statement of Facts, the other evidence received at the hearing, an entry of guilty pleas to Citations 1, 2, and 3 and for the reasons that follow, the Hearing Committee found the conduct of Mr. Makuch to be deserving of sanction on the said citations. The Hearing Committee sanctioned Mr. Makuch by issuing a reprimand, a fine of \$7,500.00 and directed the payment of costs in the amount of \$5,000.00.

**JURISDICTION AND PRELIMINARY MATTERS**

6. Prior to the hearing, counsel had agreed to the preparation of two exhibit books, containing within them documents relevant to the within hearing. By agreement, the books themselves

were entered as Exhibit 1 and Exhibit 2 respectively. The exhibit books themselves contained numerous documents relating to the matters in issue which were previously marked by dividers as "exhibits" though not formally entered as same. Where necessary, the specific documents in question will be referred to by their description within Exhibits 1 and 2.

7. Contained within Exhibit 1 were the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, which establishes the jurisdiction of the Hearing Committee. The Certificate of Exercise of Discretion was also contained within Exhibit 1. These documents were included within Exhibit 1 and entered into evidence by consent, marked as documents J1 to J5 respectively.

8. There was no objection by the Member's counsel or counsel for the LSA regarding the constitution of the Hearing Committee.

9. The entire hearing was conducted in public.

## CITATIONS

10. The conduct of the member relates to a complaints brought by two former clients, C.L. and R.L., and a complaint from another former client, A.S., resulting in four citations against the member in total, which, having regard to the amendment of the citations referred to above, now consist of three citations for consideration by this panel.

11. With respect to the complaint brought by the Ls, the Member faced one citation:

- 1. IT IS ALLEGED THAT you failed to serve your client in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.**

12. With respect to the complaint brought by A.S., the Member faces two citations:

- 2. IT IS ALLEGED THAT you deceived your clients by failing to inform them of a material error or omission by you, and that such conduct is conduct deserving of sanction; and**
- 3. IT IS ALLEGED THAT you failed to serve your clients in a conscientious, diligent and efficient manner and that such conduct is conduct deserving of sanction.**

## EVIDENCE

13. As noted above, documents J1 to J5 contained within Exhibit 1 (the jurisdictional exhibits) were entered into evidence by consent, in addition to additional documents outlining the history and circumstances of the complaint where contained within Exhibit 1 and Exhibit 2.

14. The Agreed Statements of Facts marked as Exhibits 3 and 4 were entered into evidence by consent. The Agreed Statements of Facts were both signed by the Member on January 30, 2013 and the Member acknowledged same.

## FACTS

15. The Agreed Statements of Facts (Exhibit 3 and Exhibit 4) are not reproduced in this report; however, they outline the chronology of the matters in issue relative to the L complaint and relative to the S complaint.

16. Essentially, the L complaint relates to a contractual dispute regarding the purchase of a residential property acquired by the Ls, resulting in a lawsuit being commenced by the Member on their behalf alleging certain deficiencies in the home. At some point in the litigation, it is apparent that there was a significant communication breakdown between the Member and the complainants, and ultimately, without their knowledge, an application was made, and granted, dismissing their action against the other party – with costs awarded against the Ls. The resultant Order and costs only came to their attention when collections steps were instituted against them resulting in this complaint.

17. The Member admits his lack of diligence in allowing the matter to progress in this fashion, however, in mitigation he complains that the complainants did not apprise him of their most recent address change and complaints that ultimately, by the time the application for dismissal was brought, he was unable to locate his clients.

18. Without going into great detail, it is apparent that while the complainants were, to say the least, less than diligent in paying attention to their action and in keeping the Member apprised of their address, ultimately, the Member bears the burden of the conduct of their file, and clearly took inadequate steps to assure continued communication and conduct of the matter, allowing it to languish, suggesting that he “assumed they had lost interest in the action.” This panel finds, and the Member admits, that he owed his clients a higher duty and that he failed in discharging that duty.

19. More troubling is the complaints raised by A.S. In that case, the Member was acting for A.S. and a Mr. U in what, essentially, was a “home swap” where each party acquired the other party’s home. Unfortunately for A.S., shortly prior to registration of the title in A.S.’s name, a new “rogue” mortgage was placed upon title by Mr. U in the sum of \$650,000.00, such that, after drawing mortgage funds from A.S.’s bank, and after drawing mortgage funds on A.S.’s new mortgage, he paid out the existing mortgage on Mr. U’s home, and after paying himself, paid the sum of \$2,701.09 to Mr. U.

20. As the rogue new mortgage was now registered, the Member’s request for registration of the transfer and mortgage for A.S.’s new property was rejected, with the Member receiving a rejection notice from Land Titles on or about August 11, 2007 advising him of the existence of the new rogue mortgage and of the rejection of the request for registration of the transfer and new mortgage.

21. Notwithstanding this significant difficulty, the Member not only failed to advise his client, but placed his trust with the Vendor, Mr. U, to clear the rogue mortgage from title. This did not occur in a timely fashion, and, in fact, a second mortgage was registered against the same property on February 6, 2008 in the sum of \$400,000.00. In the intervening period, no effort had been undertaken by the Member to advise his client or the mortgagee, Bank A that not only

had title and the mortgage not been registered, but, in fact, there were now rogue encumbrances on title exceeding \$1 million.

22. It was not until June 18, 2008, that A.S. became aware of this problem. At that time, upon contacting the City of Edmonton to inquire of his tax statement, A.S. was advised by the City that the home was not registered in his name, and was still in the name of Mr. U.

23. By this point, A.S. had been of the reasonable assumption that he was a registered owner of the property, and yet, in fact, the home was not registered in his name and the property was encumbered far beyond its value by the two rogue mortgages – and upon bringing this to the Member’s attention it was only now, some 10 months later, that the Member finally registered a caveat on title to assert his client’s interest in the property.

24. As set out in paragraph 85 of Exhibit 4, the Member “*acknowledges that his conduct, following the discovery of the error at issue, was wholly inappropriate and inadequate.*” This is clearly the case. The failure of the Member to protect his client’s interests and, more importantly, the failure of the Member to be honest and candid with his client regarding the matters in issue is a gross failure of his obligation as counsel to A.S. and as a member of the legal profession.

25. It is apparent that A.S. brought action against the Member to recover his losses sustained as a result of this matter, and it would appear that matter has now been resolved.

#### **FINDINGS OF THE HEARING COMMITTEE**

26. Section 49 of the Legal Profession 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.

27. Based upon the content of the Agreed Statements of Facts, based upon representations of counsel for the Law Society and the Member, and based upon the admissions contained within the Agreed Statements of Facts, the panel accepts the Member’s admission, and makes a finding of guilt with respect to the three citations against him, finding that Mr. Makuch’s conduct was worthy of sanction in this matter.

## **JOINT SUBMISSIONS OF COUNSEL ON CITATIONS**

28. With regard to the issue of sanction, a joint submission was presented to the panel by counsel for the LSA and the Member suggesting the following as appropriate sanctions against the Member:

- a) With respect to Count 1 (L complaint), that it would be sufficient to issue a reprimand and an Order of costs; and
- b) With respect to Counts 2 and 3 (S complaint), that a fine in the sum of \$7,500.00, together with a reprimand, a direction of the Member to practice review, and costs.

29. The total costs sought to be asserted against the Member were \$5,000.00, and counsel for the Member took no issue with that amount.

30. Counsel for the LSA submitted the Member's conduct record, entered as Exhibit 5 in these proceedings disclosing that the Member has no prior discipline record with the Law Society.

## **DECISION OF HEARING COMMITTEE ON SANCTION**

31. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct. The primary purpose of disciplinary proceedings is the protection of the best interests of the public and protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

32. In *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

"In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree or risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

33. The Hearing Guide for the LSA, at paragraphs 60 and 61, articulate the relevant factors to be considered in determining the appropriate sanction:

60. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

- a) 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.
- b) Specific deterrence of the member in further misconduct.
- c) Incapacitation of the member (through disbarment or suspension).
- d) General deterrence of other members.
- e) Denunciation of the conduct.
- f) Rehabilitation of the member.
- g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

61. More specific factors may include the following:

- a) The nature of the conduct:
  - (i) Does the conduct raise concerns about the protection of the public?
  - (ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?
  - (iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)
  - (iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

34. The Hearing Committee was influenced in its decision as to sanction by the following factors:

- (a) the Member's co-operation with the LSA and admission of guilt;
- (b) that specific deterrence of the Member will be achieved with the combined impact of a fine, reprimand, referral to practice review, and a reprimand in these circumstances; and
- (c) that from a general deterrence perspective, that it is important for all Members of the LSA to understand that compliance with the Code of Conduct is important not only to the Bar, but also to maintain the public's confidence in the legal profession.

35. While a hearing panel is entitled to decline to accept a joint submission presented by the parties, it ought not reject such submissions lightly. Taking into account the existing

jurisprudence and the public interest, only a joint submission which is truly unreasonable or unconscionable should be rejected.

36. In *Nguyen*, reference was made to the Manitoba Court of Appeal's judgment in *R. v. Chartrand*, reflex, (1998), 131 C.C.C. (3d) 122 where Kroft J.A. stated the following:

[8] A sentencing judge is not bound to accept the recommendation, but it should not be rejected unless there is good cause for so doing.

See also, *Law Society of Upper Canada v. Stephen Alexander Cooper* 2009 ONLSAP 0007 (CANLII).

37. Based upon the evidence that the Hearing Committee has read and heard in this proceeding, we agree with the joint submission of counsel as to the appropriate sanction for the conduct of Mr. Makuch.

38. Accordingly, the determination of this Committee is that, as a result of the finding of Guilt against the Member regarding the citations in question, the following sanctions will apply:

- a) The Member is directed to pay a fine in the sum of \$7,500.00;
- b) There shall be a reprimand issued against the Member;
- c) There shall be a referral of the Member to Practice Review;
- d) The Member is directed to pay costs of the hearing in the sum of \$5,000.00.

39. Upon request by the member, not opposed by counsel for the LSA, the Member is given until August 4, 2014 to pay the combined fine and costs to the Law Society of Alberta.

40. The Chair delivered the reprimand to Mr. Makuch, which expressed denunciation for the conduct of a Member that brought discredit to the profession. A copy of the reprimand is appended to this Hearing Report.

## **CONCLUDING MATTERS**

41. The Hearing Committee Report, the evidence and the Exhibits in this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of any of Mr. Makuch's clients and such other confidential personal information.

Dated this 16 day of July, 2013.

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Robert Harvie, Q.C. (Chair)

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Dennis Edney, Q.C.

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Gillian D. Marriott, Q.C.

## REPRIMAND

Mr. Makuch, the practice of law is a practice unlike probably any other profession. You are probably aware of this in your 30 years of practice. Being a lawyer and being a part of the practice of law is a great responsibility. We are members of a self-regulated profession; and that profession, to a great extent, is a cornerstone of a free and democratic society.

To the extent that we act in a manner that undermines the public confidence and the public trust in that profession, we undermine the efficacy of that democratic society. It is very significant.

Perhaps there is no greater responsibility upon us, as members of this profession, than the responsibility of honesty and candor with our clients, with our fellow counsel, and with the Courts.

Mr. Makuch, I think you understand this, but it bears repeating that you have a fiduciary obligation to your clients. That obligation goes beyond simply being honest with them - it is an obligation that requires you to be honest and forthcoming regarding all facts which may impact on your clients' welfare.

Clearly you failed in that respect.

With regard in particular to the S complaint in Citations 2 and 3, it came to your attention that there were circumstances that adversely affected your client. You became aware of that in the early or mid part of August, and yet you did not communicate that to your client. Beyond that, Mr. Makuch, you had some communication with your client but, again, did not disclose to your client the issues that impacted on their welfare. In fact, for some period of time, your client fairly would have been of the understanding that he was the legal owner of the residential property that he intended to acquire but that he did not discover he was not the legal owner until quite some time later of his own efforts.

Those were issues clearly you had an obligation to advise your client about, and you did not. That failure resulted, unfortunately, in compounding your client's damage in some respects because not only was the initial mortgage discovered, but then there was a subsequent mortgage registered that may have been prevented had your client obtained timely information.

So I think you understand, Mr. Makuch, that it's not acceptable and it's not conduct that bodes well for the reputation of yourself. It's not conduct that bodes well for the reputation of your office; and it is conduct which, to some degree, impacts on the reputation of all of us as lawyers in the profession.

To be blunt, Mr. Makuch, while your record is exemplary, in this respect -- particularly, again, in the S matter -- you let yourself down. You let your office down, and you let your profession down.

However, sir, we are cognizant and, as indicated, appreciative of your unblemished record; that you have stood in good stead in your practice for some 30 years; and beyond that, you have been a credit, it would appear, to your community. We do take that into account.

So notwithstanding the seriousness of your error, we believe, based on representations of your counsel and your admission of guilt here, that you understand that seriousness and we feel quite confident that taking into account the sanctions that are being imposed and the Practice Review, that it is highly unlikely that you're ever going to find yourself in front of a Panel of this nature again.

With that, that concludes my representations regarding the issue of reprimand.