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 WILLIAM A. HERMAN
A MEMBER OF THE LAW SOCIETY OF ALBERTA

INTRODUCTION AND SUMMARY OF RESULT

1. On May 29, 2013, a Hearing Committee (the "Committee") of the Law Society of Alberta (the "LSA") convened at the LSA offices in Calgary, Alberta, to inquire into the conduct of the Member, William A. Herman (the "Member") The Committee was comprised of Brett Code, Q.C., Chair, Sarah King D'Souza, Q.C., and Wayne Jacques, CA, Lay Bencher. The LSA was represented by Ms. Molly Naber-Sykes. The Member was present throughout the hearing and was represented by Mr. James Lutz.

2. The Member faced one Citation (the "Citation") as set out in the Notice to Solicitor, dated November 21, 2012, that was served upon him, namely:

> It is alleged that you failed to obtain instructions from your clients D.M. and G.M. before accepting an offer on their behalf for the purchase of their land, and that such conduct is conduct deserving of sanction.

3. The jurisdiction of the Committee was confirmed, and the Member agreed through his counsel that the hearing was properly convened and that he made no objection to the constitution of the Committee. Certain agreed exhibits related to the Citation were entered as exhibits, many of them for the truth of their contents; some, for convenience, to be spoken to later by witnesses that the parties planned to call to testify.

4. Immediately after entering all of the agreed Exhibits, counsel for the LSA made an application to add a new citation. Counsel for the Member made submissions opposing the application. The Committee granted an adjournment so that counsel could consider the answers to a series of questions posed by the Committee. Subsequently, two further, brief adjournments were granted.

5. When counsel returned, they had made an arrangement for which they sought the Committee's approval. LSA counsel advised that it would not be calling any evidence on the Citation, that the Member would consent to the addition of a new citation (the "New Citation"), the exact wording of which is set out below, that the Member would admit to facts that both counsel agreed would constitute admissions of guilt, and, assuming that

that Statement of Admitted Facts was satisfactory to the Committee, counsel would then make a joint submission on sanction.

6. The Committee heard the joint submission, the Citation was dismissed and the Member was found guilty of the New Citation.

7. The Member was then reprimanded, fined $5,000, ordered to pay the actual costs of the hearing, and given 30 days from the receipt of the final Statement of Costs to pay both the fine and the costs.

THE NEW CITATION

8. By agreement of counsel and confirmation by the Committee, the Member faced the following New Citation:

> It is alleged that you acted in a conflict of interest and that such conduct is conduct deserving of sanction.

EVIDENCE

9. The jurisdictional exhibits, being Exhibits 1 through 5, were entered into evidence by consent and continued to operate validly for the New Citation.

10. Exhibits 6 through 18 were entered into evidence by consent and the Committee then adjourned to review the Exhibits. The Exhibits were entered as Exhibits in the proceeding as it concerned the Citation, not the New Citation. The exhibits, therefore, did not constitute evidence in the hearing of the New Citation.

11. The only evidence available to the Committee for use in its decision-making around the New Citation was the evidence provided by way of the Member's Statement of Admissions. That Statement of Admissions was provided orally by his counsel and was as follows:

At page 50, line 16

MR. LUTZ: That's agreeable, sir. So with respect to the new citation proposed by counsel for the Law Society, my instructions from the member, Mr. Herman, is that he is prepared to admit guilt with respect to that citation, that he acted in a conflict of interest and such conduct is deserving of sanction.

Beginning at page 52, line 5

MR. LUTZ: Okay. With respect to the conflict of interest citation, did the Panel wish to hear some facts to support that? It was sort of a rhetorical question. I was more filling out the record more than anything else.

MS. KING-D'SOUZA: Yes, please.

MR. LUTZ: Yes. With respect to this matter, the member acted, as you may have been aware from review of the material on behalf of two parties, the M.'s, G. and D. M., was retained for the purpose, as my friend has indicated, for the sale of land.

Matters ultimately ended up before or at a meeting on the 21st of September, 2009, when Mr. M., Mrs. M. and a member met with another individual, B. A. And just for the purpose of filling out the record, Mr. A. is seated behind me.

THE CHAIR: And on that, do we have any issue of exclusion of witnesses or there are going to be no witnesses now?

MS. NABER-SYKES: That's right.

MR. LUTZ: I'm sorry. I should have made that clear for the record. My learned friend and I had discussed that and we are both of the view that there will be no witnesses called.

To this end, a meeting occurred on September the 21st at the offices of the member Mr. Herman. During the course of that meeting, it became clear that there was no agreement, or appeared to be no agreement, between Mr. M., G. M., and Mrs. M., D. M., with respect to the sale of property.

At that point in time, the member agrees that a conflict would have arisen and it would have been his duty to have sent all parties to seek independent counsel. As well, it became further clear that no further attempts should have been made by the member for the purposes of attempting to facilitate any resolution of the apparent disagreement. That warranted the intervention of independent counsel. That warranted each party seeking independent counsel and reassessing the position with the member not taking any further steps.

The member agrees that in an effort to resolve the matter, he attempted to come to some arrangement or to facilitate an arrangement between the parties that were interested, between Mr. A., Mr. M. and Ms. M., and this was a conflict of interest.

In terms of the other remaining -- sorry -- flowing from that was that the parties were unable to deal with the B. lease, which is a subsequent Offer to Purchase the land. That lease couldn't be accommodated within the context of the September 21st meeting, and Mr. Herman could not have taken any part in negotiating that.

Over and above that, the other issues that my learned friend addressed you on were the Contingency Fee Agreement. As you heard, there was no Contingency Fee Agreement. As the Panel, I know, is aware the Rules do require a written Contingency Fee Agreement outlining Mr. Herman's obligations to his clients, the fees that were expected and who he would represent. None was signed, none was prepared. This represents a further conflict with respect to Mr. Herman's dealings with the M.'s, D. and G. M.

As well, part and parcel of this agreement is that Mr. Herman had a financial interest with respect to the conclusion of this particular tender process. He would be paid based on the sale of land. This also, in the mind of the Law Society, further enhanced a conflict of interest position. The member accepts that that is the case as well.

As well, there was also an issue with respect to a lender who had dealings with Mr. A. Mr. Herman accepted a retainer on behalf of the lender to act in regards to Mr. A.'s financing. This would have been, and is accepted to be, a conflict of interest on Mr. Herman's behalf. He could not be in a position to adequately represent Mr. -- sorry -- could not represent the M.'s and could not represent adequately the lender or the interests of Mr. A. at the same time. It would have been impossible to construct any conflict letter capable of doing so.

With that in mind, Mr. Herman agrees that his responsibility was to the -- or to the members of the public, to ensure they had independent legal advice, to understand that they fully had the opportunity to

canvass what their respective remedies may have been, and that was not done.

Those would be my respectful submissions as to the facts outlining and supporting the plea or the admission of the second citation.

THE CHAIR: On the conflict around the retainer, is there agreement now about whether the B. contract would have resulted in Mr. Herman being paid or not?

MR. LUTZ: No.

THE CHAIR: And you don't think it matters for our purposes?

MR. LUTZ: I'll let my learned friend speak to that. We understand the difficulties in second guessing or looking into the future as to whether or not that might be the case, and I can't answer that question. Maybe my learned friend would have a different view of it, but I certainly can't answer that question.

MS. NABER-SYKES: Mr. Code, it's an excellent question. I think the answer -- it's not important to answer the question whether Mr. Herman's retainer encompassed any offer outside the tender. And the reason that I say that is my understanding of the conflict of interest rules and the code of conduct is that it's the appearance of a conflict or the appearance of an interest, and Mr. -- the difficulty that Mr. Herman had is that he -- he had a financial interest in this transaction by virtue of the way his fees were structured. And so -- and it's agreed between the parties that if the M.'s were to accept one of the three tenders that came as a result of the tender process, Mr. Herman would receive 3 percent of the sale price plus disbursements. That in and of itself, if we even forget about B., is enough to put Mr. Herman in a conflict when an issue arises about whether the -- whether the deal of the A. is binding because he --

THE CHAIR: Yes, you're right, but if his Retainer Agreement had been in writing and Contingency Agreements are permitted and if that had been a permissible kind of Retainer Agreement, then that would have been the normal course.

What takes it out of the normal course is the potential that the B. deal isn't within the confines of what he had understood his arrangement was, his retainer arrangement with his clients, and it creates a difficult -- a different kind of conflict, one that settled -- the kind we're used to.

The other one, the second nature of the conflict that we're talking about is independent advice and making sure that everyone has proper independent advice.

Finally if there is no interest in the B. contract, what suddenly comes into it -- walks into the mix is pure self-interest on the part of the lawyer, who actually is at risk of getting nothing in the face of this.

So somehow to me it -- it's a different kind of conflict depending on what the answer to that question is, but I may be wrong about that.

MS. NABER-SYKES: And the Law Society's answer to your question, Mr. Code, is the reason we don't know the answer is because this isn't in writing, and that is a problem with this file. Because there is no Contingency Fee Agreement in writing, there is no Retainer Agreement in writing, and there is very little evidence before you that goes to the first citation, the citation that you were convened to hear, and so --

THE CHAIR: Without those, the question -- at least one possible question is, is Mr. Herman a lawyer or is he a business partner?

MS. NABER-SYKES: By virtue of the fee arrangement.

THE CHAIR: Right. He's offering his services as part of a joint venture to obtain a share of the profits from the sale. It is a problem.

MS. NABER-SYKES: It's a problem, and unfortunately, I know Mr. Lutz won't like me saying this, but it's true I believe, that it's a problem of Mr. Herman's creation because the file is not documented.

THE CHAIR: Ultimately I think that we all agree that the lawyer is the one who is supposed to be holding the pencil

when it comes to these issues, and clients also agree to enter into that kind of oral retainer, but that doesn't let Mr. Herman off the hook.

MR. LUTZ: No, but again I just caution the Panel that before we start venturing down the road of speculation, I -- and all the points that the Panel makes are valid points, and it is the lawyer's responsibility. Mr. Herman agrees that that's the case. I would never change that direction. But I just think we have to be cautious about how much weight we suggest on speculation of what could happen.

THE CHAIR: Okay. I was asking a question that tried to clarify what I understood to be the admitted facts that were given orally. And so I thought it was important to ask the question. One question leads to another, to another, to another, and it creates a certain level of uncertainty.

When we're talking about admissions of guilt, one of the things that we have to be able to do is to accept those admissions of guilt as a Hearing Panel. Now, it's not clear to me what we do about that in terms of -- our normal process is to have them written in front of us, we read them, we ask questions about them, we say this is satisfactory.

Here we've been given an oral rendition, and I'm wondering whether we are being asked to proceed to accept that Mr. Lutz's statement of his client's admissions as the facts upon which we are now to adjudicate on?

MS. NABER-SYKES: You are, sir, being so asked.

MS. KING-D'SOUZA: So I just wanted to clarify for myself that Mr. Herman at some point in this process, and unbeknownst to Mr. and Mrs. M., accepted a retainer on behalf of Mr. A. to act on the other side of the transaction.

MR. LUTZ: On behalf of the financing. It's not Mr. A. himself, but on behalf of the lender.

MS. KING-D'SOUZA: To act on behalf of the lender in relation to Mr. A.'s efforts to get credit from the lender to close the transaction.

MR. LUTZ: Correct.

MS. KING-D'SOUZA: But he didn't inform -- he didn't send a letter out to anybody saying --

MR. LUTZ: The conflict letter saying that, in fact, he was acting for that party. And as my learned friend rightly points out in our discussions, no matter what conflict letter would have been envisioned, it could never have possibly been in compliance with the Law Society rules on conflict. It just couldn't be done. Not in the sense that it couldn't physically be done, but it just couldn't satisfactorily answer the questions of conflict.

THE CHAIR: And when you say she points that out, she pointed that out to you in some other room. We never heard anything about this.

MR. LUTZ: I should have been more clear on that point. That was a point of discussion with my learned friend, and, yes, I should have been more clear on that point.

CONCLUSION ON GUILT

12. The Committee confirmed that the Statement of Admissions of guilt was in a form acceptable to the Committee. The Committee then, as discussed above, dismissed the Citation, LSA counsel having called no evidence on it, and found the Member guilty of the New Citation.

JOINT SUBMISSION ON SANCTION

13. Counsel for the LSA tendered the record of the Member, which was entered as Exhibit 19, by consent. The Member's record indicates that he had one prior disciplinary matter for conduct that resulted in a reprimand, costs, and a $500 fine. The conduct deserving of sanction that was sanctioned in that case was similar to the conduct being sanctioned under the New Citation.

14. Counsel for the LSA and counsel for the Member jointly submitted that an appropriate sanction would be:
    a. A reprimand
    b. A fine of $5,000
    c. Payment of the actual costs of the hearing.

15. LSA counsel provided the Committee with a lengthy and detailed submission as to the appropriateness of the joint sanction. Counsel for the Member confirmed the Member's

agreement with those submissions and provided some supplemental submissions on sanction, all designed to persuade the Committee that the joint submission was reasonable and should be accepted.

DECISION AS TO SANCTION

16. The Committee did accept that joint submission and sanctioned the Member accordingly.

17. In determining an appropriate sanction, the Committee is guided by the duty of the LSA to protect the public interest and the standing of the legal profession, pursuant to s. 49 of the *Legal Profession Act*.

18. The primary purpose of disciplinary proceedings such as this proceeding is forward looking, seeking to assure the public that the LSA deals seriously with those of its members whose conduct is deserving of sanction and whose conduct lowers the standing of the profession in the eyes of the public. The purpose of sanction is not to punish the Member as though he had been found guilty of a crime under the *Criminal Code*. The emphasis is not on punishment but on protection of the public interest and, to that end, an assessment of the degree of risk, if any, in permitting a member of the LSA to hold himself out as legally authorized to practice as a barrister and solicitor.

19. Once it has been determined that the ongoing practice does not pose a risk, the question becomes what level of sanction must be imposed in order to ensure that the member in question has learned his or her lesson and will be specifically deterred from again conducting himself or herself inappropriately.

20. Sometimes a suspension is warranted; other times it is felt that a public reprimand, before his or her peers and often before his or her clients is sufficient. There is a level of humiliation and of discipline that is thought to result such that the LSA is satisfied that a reprimand, given in public, particularly when combined with a significant fine, will provide the necessary protection to the public and assist in recovering the standing in the public eye lost as a consequence of the member's misconduct.

21. In this case, the Committee is persuaded that the sanctions recommended jointly by counsel will accomplish those objectives. Consequently, as announced orally at the hearing, those sanctions were imposed upon the Member.

REPRIMAND

22. The following reprimand was delivered by the Chair in the presence of both of the complainants, G.M. and D.M., their current legal counsel, and two other members of the public who had been called in attendance to testify at the proceedings. The Member was asked to stand, and the Chair delivered the following reprimand:

Mr. Herman, you should know better. You're a lawyer of 30 years experience. You have failed us, all of us. You failed your clients, you failed your profession, you failed the public.

All of us rely on you to act in accordance with your legal and ethical responsibilities. Such failure is devastating and a menace to the public interest and to the profession today.

Standing here you are publicly reprimanded, fined and ordered to pay costs for conduct incompatible with Section 49 of the *Legal Profession Act*. Section 49 of the *Legal Profession Act* says, (As Read)

> For the purposes of this *Act*, any conduct of a member arising from incompetence or otherwise that is incompatible with the best interests of the public or of the members of the Law Society or 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.

That is the key sanctioning section of the *Legal Profession Act*, and you are in breach of it, and we have found you to be in breach of it today, sir.

Were I to refer only to that, it would be to cleanse the misconduct. Your misconduct goes well beyond a mere breach of some statutory language. You have caused real and palpable harm.

We heard hints of it during the opening submissions. We saw hints of it in the documents that were submitted as exhibits. We have no facts on which to make real findings, but we know that your clients, the M.'s, did not get what they bargained for. They lost their plans. They lost their contract. They gave up an offer. They suffered financially, personally and emotionally, at least in part because you acted in a conflict. They had a long standing relationship and a friendship with the A.'s. They're neighbours, mired in contractual uncertainty; they ended up in litigation -- again, at least in part, because of your having acted in conflict of interest.

And what of their faith in lawyers, in our profession, in our system? All diminished or lost. Your conduct has gone a long way to undermining our standing as a profession, caused them to doubt, to lose faith in our profession, one of the most honourable professions that exists.

We admonish you for that conduct here today. We urge you to do better. We urge you to act as a member of our Law Society must, with honour, integrity and in a way that makes you always able to do what your counsel has done for you here today, that is, to represent you zealously and only

you, to fight for your rights and interests without compromise and with integrity.

Mr. Herman, your conduct is a disgrace. You have been part of the problem. We expect you after today to become part of the solution.

CONCLUDING MATTERS

23. The 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. Herman's clients and such other confidential personal information as is thought necessary by the LSA in the normal course as they concern publication of such records.

24. No referral to the Attorney General of Alberta is directed.

25. There shall be no notice to the profession issued.

26. Both the fine and the actual costs of the hearing are to be paid within 30 days of receipt by the Member or his counsel of the final Statement of Costs.

Dated at Calgary, Alberta as of the 12th day of June, 2013.

W.E. Brett Code, Q.C., Chair

Sarah King D'Souza, Q.C.

Wayne Jacques, CA