

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 DARRELL ELGERT, a Member of the Law Society of Alberta**

INTRODUCTION

1. On May 7, 2012, a Hearing Committee of the Benchers convened at the Law Society office in Edmonton to inquire into the conduct of Darrell Elgert (the "Member"). The Panel was comprised of Kevin Feth QC, Bencher (Chair), Gillian Marriott QC, Bencher, and Amal Umar, Lay Bencher. The Law Society of Alberta ("LSA") was represented by Brian Gifford. The Member was present for the Hearing and was represented by Charles Davison.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits J-1 to J-5 established the jurisdiction of the Hearing Committee. The parties had no objections to the composition of the Panel.
3. The Hearing was held in public.

CITATIONS

4. The Member was responding to the following Citations:
 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.
 2. IT IS ALLEGED THAT you filed to respond to your client's communications in a complete and appropriate manner on a timely basis, and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED THAT you failed to respond to the Law Society on a timely basis and in a complete and appropriate manner, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

5. The Member tendered an admission of guilt on each of the three Citations in accordance with the provisions of an Agreed Statement of Facts dated May 4, 2012.
6. The Hearing Committee imposed a 15 day suspension and directed the Member to pay Hearing costs of \$3,814.55.

SUMMARY OF FACTS

7. The Member was admitted to the Alberta Bar on August 15, 1986 and practiced in Edmonton, Alberta, primarily in corporate and real estate law, and litigation. At the time of this Hearing, he was 51 years old.
8. On June 4, 2009, the LSA received a complaint from one of the Member's longtime clients [D.M.], who was the principal behind two of the Member's corporate clients. The corporate clients are described here as "DCM Ltd." and "Numbered Company".
9. The complaint was that the Member "consistently provided poor and less than adequate and professional service" to DCM Ltd. and the Numbered Company, including failing to follow up on three litigation files, failing to file annual returns in a timely fashion, failing to update a corporate Minute Book, and failing to convey to the client an Order received from Alberta Employment Standards about a claim against one of the companies, which had the effect of depriving the client of the ability to appeal.
10. On April 1, 2009, D.M. formally communicated to the Member the termination of the lawyer-client professional relationship and indicated that the companies wished to take possession of their corporate seals, files and documents. The Member promised to deliver those items to the clients, but after two months, delivery was still not forthcoming. D.M.'s complaint to the LSA then followed.
11. The Member and the LSA entered into an Agreed Statement of Facts dated May 4, 2012, which described the relevant background and events for these Citations as follows:

2007

Jun 02/07 On this date, [Numbered Company] was struck off for failing to file its Annual Return (See Ex. 21).

2008

Feb 14/08 On this date, the Annual Return for [Numbered Company] was filed and the Corporation was revived (See Ex. 21).

Jun 17/08

By letter of this date (Ex. 10, Tab 3), [DCM Ltd.] provided the Member with the following information to be included in their corporate records:

"1. Minutes of the AGM held May 27, 2008.

- a. Please note the election of 5 Directors of [Numbered Company]:
 - i. [D. T.]
 - ii. [D.M.]
 - iii. [D. Tr.]
 - iv. [H.K.]
 - v. [M. A.]
 - b. Please note the election to 5 Directors for [DCM Ltd.]:
 - i. [D.T.]
 - ii. [D. M.]
 - iii. [D. Tr.]
 - iv. [H. K.]
 - v. [M.A.]
 - c. Please note the declaration of a dividend from [DCM Ltd.] to [Numbered Company] by promissory note in the amount of \$213,000.
2. Financial Statements of [Numbered Company].
3. Financial Statements of [DCM Ltd.].
4. Minutes of the Directors' Meeting of [Numbered Company].
- a. Please note the Special Resolutions endorsing the redemption of the shares held by [BDRP Corporation] and of the shares held by The [DTG Inc.] [L.T.]”

2009

Jan 27/09

On this date, Alberta Employment issued an Order (Ex. 212, Tab 1A) directing [DCM Ltd.] to pay their former employee ... the amount of \$4,328.00, and sent the Order to their registered office address, which was the Member's office.

The Member failed to notify or provide [DCM Ltd.] with this Order.

Mar 17/09

The Order was not appealed and the amount of \$4,328.00 was not paid, which resulted in Alberta Employment filing the Order and directing that in addition to the \$4,328.00, an Order of Officer fee of \$432.80 also be paid (Ex. 21, Tab 1A, second page).

Mar 19/09 By letter of this date (Ex. 21, Tab 1A), Alberta Employment mailed a copy of the Order to [DCM Ltd.'s] mailing address, stating the Judgment had been referred to a collection agency and that [DCM Ltd.] was responsible for full payment of the judgment amount and the additional fees.

The Complainant [D.M.] only learned of this Judgment as a result of receipt of this letter mailed directly from Alberta Employment.

Mar 24/09 By e-mail of this date (Ex. 21, Tab 1), the Complainant [D.M.] informed Alberta Employment that since the Order was not directed to [DCM Ltd.'s] correct address, the penalty fee of \$432.80 should be waived.

By e-mail of this date (Ex. 21, Tab 1, page 2), Alberta Employment informed [D.M.] that the Order had been sent to [DCM Ltd.'s] registered address and as such, service was valid and the amounts in the Order were enforceable.

By e-mail of this date (Ex. 21, Tab 1, page 3), [D.M.] wrote to the Member as follows:

"We are now in receipt of an Order of Officer – Claim number [xxxxx] – addressed to [DCM Ltd.] at your corporate address and dated January 27, 2009.

As you are aware, your office did not advise us of this correspondence.

We have now received correspondence from Alberta Employment and Immigration that since the matter is now in default, Employment Standards has now undertaken legal action to collect the monies.

[DCM Ltd.] will pay the judgment – but again, we are completely dissatisfied with the lack of professional service that your office is providing us."

Apr 01/09 By letter of this date (Ex. 8, Tab 4), [D.M.] wrote to the Member as follows:

"Since you have not been responding to our recent correspondence and since we have not received your promised updates concerning our 'open' files, we must conclude that you have discontinued acting in the best interest of [DCM Ltd.].

Please make immediate arrangements to have all of our files, records, seals and documents that relate to:

1. [DCM Ltd.]
2. [Numbered Company] and
3. [D.M. Investments Ltd.]

ready for pickup.

If you would be so kind to advise when these items are available, we would appreciate it."

The Member did not respond.

Apr XX/09 On this date, Corporate Registry informed [D.M.] of its intention to strike [DCM Ltd.] off the Registry for failing to file its 2008 Annual Return (not in our materials – see Ex. 6, second page).

Apr 03/09 By an e-mail of this date (Ex. 5), [D.M.] provided the Member with the letter from Corporate Registry concerning the 2008 Annual Return and requested that the Member respond to his April 1, 2009 letter.

May 04/09 By letter of this date (Ex. 15, Tab 1), the Member provided the [Numbered Company] Corporate file and Seal and then went on to state in part:

"... I have outstanding accounts for legal fees for the 2006 and 2007 Annual Returns as follows:

<i>December 19, 2006</i>	<i>\$138.03</i>
<i>February 5, 2007</i>	<i>\$139.67</i>

I enclose copies of the accounts. I have not rendered accounts with respect to the 2008 and 2009 Annual Returns. I confirm the Annual Return's (sic) have been filed and the company is current at Corporate Registry. All things considered I do not intend to render accounts for those two Annual Returns. Upon receipt of a payment in the sum of \$277.70 I confirm that I will close my file."

Note: The Member was incorrect in stating that the company was current at Corporate Registry. The last Annual Return filed was 2007.

Note also: The Member confirms that this was a draft letter on file, was not sent to the Complainant and that [D.M.] did not receive this letter and materials.

May 28/09 On this date, the 2008 and 2009 Annual Returns for [DCM Ltd.] were filed by the Member (See Ex. 8, Tabs 1 and 2).

Jun 02/09 By letter of this date (Ex. 1), [D.M.] lodged a complaint against the Member with the Law Society as follows:

"Our lawyer, Darrell Elgert of Barry, Elgert, Peddie has consistently provided poor and less than adequate and professional service to our company over the past several years.

Specifically, he has refused or neglected to follow up on three open litigation files resulting with a significant financial loss to our company.

We have provided Mr. Elgert with ongoing requests for action on his part – only to be misinformed and misled by him concerning the status of these open files.

In addition, Mr. Elgert's office has consistently been in arrears with filing annual reports with Annual Registries resulting in annual warnings that our corporations will be struck.

His office has not provided updates to our corporate Minute Book which has resulted in additional costs, charges and fees assessed to our company.

Mr. Elgert failed to notify us of correspondence he received from Alberta Employment Standards which resulted in costs, charges and penalties assessed to our company.

Recently, on April 1, 2009, we officially informed Mr. Elgert that we wished to terminate our professional relationship with his firm and that we wished to attend his offices to take possession of all our seals, files and documents.

Mr. Elgert continues to refuse to release these seals, files and documents to us. He has promised several delivery dates over the past 60 days – all of which have been missed.

Please advise our recourse to secure our files and documents from Mr. Elgert."

Note that the member asserts:

- *that he admits that he failed to pursue the litigation but that this was a result of his inability to do so due to the demands of his practice, rather than any refusal to do so;*
- *he has not been advised of any verifiable additional costs to the Complainant as a result; and*
- *he did not refuse to provide the seals, files or documents but admits that he was unacceptably slow to do so.*

Jun 02/09 By letter of this date (Ex. 2), the Law Society acknowledged receipt of [D.M.'s] complaint.

Jun 09/09 By letter of this date (Ex. 3), the Law Society provided the Member with [D.M.'s] complaint and requested a response.

Jun 29/09 By registered letter of this date (Ex. 4), a s.53 demand was made on the Member by the Law Society.

The records indicate that the Member received this demand on June 30, 2009.

The Member failed to respond.

Jul 08/09 By e-mails of this date (Ex. 6), [D.M.] sought the Law Society's assistance in ascertaining whether the Member had filed [DCM Ltd.'s] 2008 and 2009 Annual Returns.

The Law Society contacted the Member who in turn contacted [D.M.] and confirmed that the 2008 and 2009 Annuals Returns for [DCM Ltd.] had been filed (See Ex. 7).

By e-mail of this date (Ex. 8), the Member provided [D.M.] with confirmations from Corporate Registry (Ex. 8, Tabs 1 and 3) of the 2008 and 2009 Annual Return filings for [DCM Ltd.].

Jul 09/09 By e-mail of this date (Ex. 8), [D.M.] provided the Law Society with the Member's July 8, 2009 e-mail and attachments from Corporate Registry and stated as follows:

"We address this email and include the attachments to indicate the degree of professional attention (or lack thereof) that Mr. Elgert has provided to our companies.

As a recent example, in June of 2008, we forwarded the Minutes of our AGM together with our financial statements ... to Mr. Elgert. And, as a matter of fact, Mr. Elgert acted in the share redemption of Mr. [B.R.].

Yet, as the current Corporate Registry indicates ..., Mr. [B. R.] is shown as a Director of [DCM Ltd.J.

We are at our wit's end.

Over the past 36 months, we have documented numerous occasions where Mr. Elgert failed to follow up and act in the best interests of our companies. In addition to [DCM Ltd.] and [Numbered Company], Mr. Elgert also has the corporate files and records for [D.M. Investments Ltd.J. On April 1, 2009 we requested that all of our files, seals and documents be returned to us. As you are aware, he has refused to comply with our request.

Have we no recourse but to seek legal action against Mr. Elgert and his firm to retrieve our documents?"

Jul 31/09 By email of this date to the Law Society (Ex. 9), [D.M.] stated in part as follows:

"...

30 days have elapsed since your letter dated June 29 to Mr. Elgert. In that letter, you indicted an obligation on Mr. Elgert's part to respond to your letter within 14 days of June 29 and to forward a copy to us.

Other than the brief contact concerning [DCM Ltd.'s] 2008 Annual Return (July 8 and 9, 2009) we have received no correspondence nor have we received any of our files, seals and records.

Has Mr. Elgert corrected the errors with filing [DCM Ltd.'s] 2008 and 2009 Annual Returns?

What steps are available to us to gain possession of our property?"

Aug 16/09 By e-mail of this date (Ex. 10), the Law Society wrote to [D.M.] as follows:

"I apologize for not responding sooner to your email of July 9, 2009 at 10:04.

I have been busy chasing Darryl (sic) to have him provide you with your materials.

I spoke with him again on Friday and he promised the (sic) he would for SURE have that to you on Monday.

I will follow up on Monday to make sure it happens.

In the course of chasing Darryl (sic), I lost sight of keeping you informed."

Aug 31/09 By e-mail of this date (Ex. 11), [D.M.] wrote to the Law Society as follows:

"Another two weeks have elapsed since our 'promised' deadline. Apparently, Mr. Elgert continues to mislead you as well.

Bearing in mind that you have become familiar with our issues and since Mr. Elgert continues to ignore your directives, are you able to recommend our legal course of action to secure our property?"

Sep 01/09 By e-mail of this date (Ex. 11), the Law Society responded to [D.M.] as follows:

"I can assure you that I fully understand your frustration.

Mr. Elgert has made repeated promises which he has failed to keep.

I spoke to him this afternoon and now he absolutely promises to have all files to you by "the close of business this Friday".

...

Mr. Elgert will in due course have to answer for his conduct, however that does not in the meantime provide you with your files.

All we can do at this time is to keep up the pressure and that I assure you we will do."

Sep 04/09 By letter of this date (Ex. 15, Tab 2), the Member wrote to [D.M.] as follows:

"Enclosed is the corporate minute book for [Numbered Company]. Annual Returns up to and including 2009 are filed at Corporate Registry.

Upon reviewing the file I note that the only account sent with respect to filing annual returns was for the 2004 annual return.

At this point I do not intend to send the bills related to the annual returns for subsequent years.

The Annual Return for 2008 remains to be filed.

The one item that I think would be reasonable to render an account for relates to the redemption of [B.R.'s] shares. That was completed in June of 2008. I will not do so without speaking to you."

(Emphasis added).

Note: The Member's letter is inconsistent with respect to the 2008 Annual Return filing for [Numbered Company]. He is correct in his second statement that the 2008 Annual Return was yet to be filed.

Note also that the member asserts that:

- *The reference to 2009 is a typographical error which should have read 2007 and not any attempt to mislead or deceive the client; and*
- *When the corporate records were delivered to the client the seals were inadvertently overlooked and then couriered to the client the next day.*

By letter of this date (Ex. 15, Tab 3), the Member provided [D.M.] with the Corporate Minute Book for [DCM Ltd.] stating the Annual Returns up to and including 2009 were filed and then went on to state as follows:

"...

I have filed to Notice of Change of Directors to reflect that Brian Rosser ceased to be a Director as of the Annual Meeting May 27, 2008 and that [H.K.] commenced acting as a Director as of the date. ...

Upon reviewing the file I note that the last account sent with respect to filing annual returns was for the 2005 annual return at

this point I do not intend to send the bills related to the annual returns for subsequent years."

By letter of this date (Ex. 15, Tab 4), the Member provided [D.M.] with the file and materials related to the [P. C.] ... civil litigation file and stated he would render an account for unbilled time.

By letter of this date (Ex. 15, Tab 5), the Member provided [D.M.] with the file and materials related to the ... [BCMD Ltd.] civil litigation file and stated he would render an account for unbilled time.

By letter of this date (Ex. 15, Tab 6), the Member provided [D.M.] with the file and materials related to the ... [S. I. Inc.] et al civil file. The Member provided [D.M.] with a status update and a draft account of time and disbursements incurred to date and requested [D.M.] review the account and provide the Member a cheque for an amount he considered to be fair.

Sep 10/09 *By e-mail of this date to the Member (Ex. 13), [D.M.] acknowledged receipt of the file materials and requested the Member provide the Corporate Seals for [DCM Ltd.] and [Numbered Company].*

Sep 30/09 *By letter of this date (Ex. 12), the Law Society inquired of the Member whether he had provided [D.M.] the requested Corporate Seals.*

Oct 16/09 *By e-mail of this date to the Law Society (Ex. 13), [D.M.] confirmed that the Member had provided him with the requested Corporate Seals.*

Oct 20/09 *By letter of this date (Ex. 14), the Law Society requested the Member provide a response to the s. 53 demand received by the Member of June 30, 2009.*

Nov 14/09 *By letter of this date (Ex. 17, Tab. 1), Alberta Registries wrote to the Secretary Treasurer of [Numbered Company] as follows:*

"The 2009 annual return for the above corporation is now due and the 2008 annual return is one year past due. Please file the 2008 annual return by the end of May 2010. In accordance with legislation, failure to do so will result in the dissolution of this corporation."

Nov 19/09 *By letter of this date to the Law Society (Ex. 15), the Member responded to the complaint stating in part as follows:*

"I. Corporate Matters

[D.M.] requested that all corporate minute books and seals. The corporate minute books and seals were forwarded to him on September 4, 2009 ...

...

I cannot comment on any additional costs, charges and fees assessed to the corporations as suggested by [D.M.]; as I am unaware of any. ... I advised [D.M.] that in light of the situation I would not be rendering accounts for filing of the Annual Returns completed by our office prior to the minute books being forwarded. Because I did not render accounts I would not think there would be any duplication of legal fees in the event that the lawyer who takes over as the Registered Office sent a bill.

I had not refused to provide [D.M.] his files; but had informed him that I believed I should get the filings with Corporate Registry up to date before forwarding the files. It took me longer to do that than I had anticipated. I do not think that there was any detriment to the corporations as a result in my delay to complete the corporate filings.

2. *Litigation Files*

I understand the litigation files being referred to are:

- a. *[P. C.] v. [DCM Ltd.] This is a file where a developer has not paid its (sic) account for [DCM Ltd.] providing cabinetry to a condo project. A lien claim has advanced with a significant payment on account obtained for [DCM Ltd.], for an undisputed portion of the account. [DCM Ltd.] claimed for further payments owing, [P. C.] denied the claim and alleged deficiencies, incomplete work and a counterclaim of approximately \$200,000.00 for delay. In addition the balance claimed on its account [DCM Ltd.] claims a loss of profit for [P. C.] wrongfully terminating the contract to supply cabinetry during the course of construction.*

The litigation is ongoing. I have \$13,901.12 in my trust account; funds being held as security for the builder's lien portion of the claim and costs. The balance owing on the account is just over \$9,000.00 and the Loss of profit portion of the claim is just over \$19,000.00. Offset against these amounts is the Defendants counterclaim for delay of \$200,000.00.

...

The next steps in the litigation would be to finalize answers to undertakings and conduct further examinations for discovery, particularly with respect to the counterclaim.

- b. [DCM Ltd.] v. [BCMD Ltd.] This is a file where another developer did not pay its (sic) account in full. The action was started by Statement of Claim and was defended by the developer. Affidavits of Records were filed which included extensive documentary production and the examinations for discovery were conducted. At the conclusion of the examinations for discovery the parties entered into settlement discussions. Counsel for the Defendant, made a settlement proposal of payment to [DCM Ltd.] of \$14,353.00 which was approximately one half of the outstanding account (principal only). This settlement was not acceptable to [DCM Ltd.]. [DCM Ltd.] proposed settlement for approximately \$58,000.00, which was the account balance, interest at 24% per annum and costs.

There are outstanding undertakings that need to be answered and a second round of examinations for discovery to be scheduled.

- c. [DCM Ltd.] v. [S. I. Inc.], et al. [DCM Ltd.] obtained a Default Judgment against the corporate defendant for cabinetry supplied. The corporation was judgment proof and a Fraudulent Preference Action was commenced against individual shareholders and directors. The claim is just over \$22,000.00 and the question is whether or not it is economical to pursue a Fraudulent Preference Claim for the amount, considering the legal fees which would be incurred to prosecute the claim. Affidavit for Records have been exchanged but examinations for discovery have not been held.

... With respect to the complaint in general I do not feel that I have ever misinformed or misled [D.M.J]. I believe his complaint is that I did not actively push the litigation forward after he and I would discuss a litigation file and I would advise him I would do my best to work on the file. I have told him that I work on the file 'over the weekend' and then not got the work completed. I acknowledge that I have made promises to work on the files on set deadlines, and have failed to meet those

deadlines. I do not view that as 'misleading' or 'misinforming' [D.M.].

2.(sic) Employment Standard Form

A claim was sent to Barry, Elgert, Peddie's address as the Registered Office of [DCM Ltd.] and it did not come to my attention. As a result I failed to forward the notice to [D.M.]. I do not have knowledge of the merits of the employment standard claim; but in the event an amount was paid that would not have been properly payable, I am prepared to compensate [DCM Ltd.] for any overpayment.

When I forwarded the files to [D.M.] I identified some unpaid accounts and pointed out that I had not billed for time spent on litigation files. Given the complaint to the Law Society I did not consider it the proper time to send accounts and had advised [D.M.] that I wished to speak to him to discuss matters before billing any accounts. I still think that would be the proper approach. Any compensation [DCM Ltd.] may be claiming for the employment standards matter, or other matters, could perhaps be dealt with by writing off fees. As I understand this response will be provided to [D.M.], perhaps he can call me if he is interested in proceeding in this matter.

Finally, it would be helpful to [DCM Ltd.] if any lawyer they retain to move the litigation forward, had the opportunity to speak to me to discuss the claims generally with respect to proceeding. The new lawyer should feel free to phone me and I will provide any input I can, of course at no cost to [DCM Ltd.]."

Nov 23/09 *By letter of this date (Ex. 16), the Law Society provided [D.M.] with the Member's November 19, 2009 letter and invited comment.*

Dec 03/09 *By e-mail of this date to the Law Society and copied to the Member (Ex. 17), [D.M.] responded as follows:*

"...

We note that Mr. Elgert's response is dated November 19, 2009, fully 5 months after our complaint and well past the July 15, 2009 deadline that you imposed.

Although we have not yet had the opportunity to review Mr. Elgert's response, we attach a letter sent to our Secretary Treasurer from Alberta Registries, dated November 14, 2009.

Has Mr. Elgert misinformed us and you when he advised that our corporate records were up to date?

We reserve the right to respond more fully to Mr. Elgert's complaint."

By e-mail of this date to [D.M.] and the Law Society (Ex. 18), the Member responded to [D.M.'s] December 3, 2009 e-mail as follows:

"Upon receipt of [D.M.'s] email I have went (sic) to our corporate assistants (sic) Annual Returns received for her to prepare the minutes for the corporations we act as registered office for. When the corporate minute book and seal were couriered to [D.M.] I had assumed he was retaining a new lawyer who would be filing a notice of change of registered office. This apparently is not the case as corporate registry still has our address as the registered office and mailed the annual return to our office.

I have attached the Annual Return which was mailed to our office. For your ease of reference I also attach the September 4, 2009 cover letter sent when the corporate minute book was forwarded. There is a typo in the first paragraph as it should read 2007 but the third paragraph clearly advises that the 2008 annual return remains to be filed. I apologize if the typo caused some confusion.

Where would [D.M.] like me to send the Annual Return form?"

Dec 04/09 By e-mail of this date (Ex. 18), [D.M.] responded to the Member as follows:

"Your explanation offers just another inexcusable excuse for your office's inability or reluctance to provide us with the legal services to which we were entitled.

We have retained a new firm to represent us and we are currently in the process of filing our Directors' Resolution to affect that change.

In the meantime, we would ask that you do nothing to rectify the situation."

2010

Feb 04/10

By letter of this date (Ex. 20), the Law Society requested [D.M.] provide the following:

"1. Correspondence from Alberta Employment Standards to Mr. Elgert (referred to in your letter of complaint to the Law Society of June 2, 2009);

2. The three litigation files for which you had retained Mr. Elgert:

- (a) *[P. C.] v. [DCM Ltd.];*
- (b) *[DCM Ltd.] v. [BCMD Ltd.];*
- (c) *[DCM Ltd.] v. [S. I. Inc.]*

Mar 02/10

By letter of this date to the Law Society (Ex. 21), [D.M.] provided pleadings, some correspondence and summaries relating to the Employment Standards matter and the three civil litigation files, and suggested that the Member be fined for misconduct and negligence.

[D.M.] commented on the Member's November 19, 2009 letter with respect to the three civil litigation files. With respect to [P.C.], [D.M.] stated as follows (Ex. 21, Tab 2, page 16):

"...

On page 2, paragraph 2.a, Mr. Elgert advised that 'the next steps in the litigation would be to finalize answers to undertakings and conduct further examinations for discovery, particularly with respect to the counterclaim.

- *In fact, [DCM Ltd.] accepted [P. C.]'s (sic) settlement offer on October 26, 2007 (above). It is obvious that Mr. Elgert did not follow up to accept the offer.*
- *During discovery on March 10, 2006, the defendant was questioned concerning his \$200,000 counterclaim for damages as a result of alleged delays to the construction schedule. When questioned by Mr. Elgert, the defendant admitted that there was no actual construction schedule – except for the one in his head. Mr. Elgert failed to follow up concerning this matter – which resulted in a settlement offer substantially less than amounts rightfully due to [DCM Ltd.]*

With respect to [BCMD Ltd.], [D.M.] stated as follows (Ex. 21, Tab 3, page 16):

"..."

- *We lost our right to lien the property due to the tardiness of Mr. Elgert's office to conduct a timely search and file the lien ...*
- *An approximately amount of \$20,000 payable to [DCM Ltd.] was not disputed by the defendant. In his letter to BCM's lawyer dated March 1, 2005, Mr. Elgert threatened to file an Affidavit to seek Summary Judgment in the amount of \$20,000. To [DCM Ltd.'s] knowledge, that affidavit was never filed and the monies were not paid.*
- *During Examinations for Discovery, each party was requested to provide undertakings. All of [DCM Ltd.'s] undertakings were forwarded to Mr. Elgert. There were several key undertakings requested of the defendant that would or would not substantiate his counterclaim for deficiencies. As far as we know, Mr. Elgert did not follow up on the defendant's undertakings."*

With respect to [S. I. Inc.], [D.M.] stated as follows (Ex. 21, Tab 3, page 16):

"..."

- *In October, 2003, [DCM Ltd.] responded to the defendant's offer to settle in the amount of \$14,000 by directing Darrell to counter-offer at \$20,000. In his letter dated October 2, 2003, Darrell did not reflect [DCM Ltd.'s] offer. He increased the amount to \$24,000 which did NOT result in a settlement."*

Mar 04/10 By letter of this date (Ex. 22), the Law Society requested [D.M.] provide any correspondence with the Member on the three civil litigation files and provided him with information concerning ALIA.

Apr 22/10 By letter of this date to the Law Society (Ex. 26), [D.M.] provided hard copies of all correspondence with the Member on the three civil litigation files.

12. The Agreed Statement of Facts also contained the following admissions by the Member:

- “5. *The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings.*
6. *For greater clarity, the Member admits that the client made the complaint dated June 2, 2009 (Exhibit 1), but does not admit that all of the details and allegations in that document are correct. In particular, the Member does not admit that he "refused" to follow up on the litigation files and does not admit that he "misinformed and misled" the client as alleged.*
7. *For greater certainty, the Member's position is as generally set out and described in his letter of November 19, 2009 (Exhibit 15). Additional details of his position will be provided in evidence during the hearing.*
8. *The Member admits that all correspondence sent to him was received by him on or about the dates indicated, unless stated otherwise.*
9. *For the purposes of Section 60 of the Legal Profession Act, the Member admits his guilt to Citations 1; and to Citations 2 and 3 in that he did not communicate with his client or the Law Society in a timely fashion; and to the facts contained herein as particulars of conduct deserving of sanction.”*

ADDITIONAL EVIDENCE

13. The Member testified about the background to the events giving rise to the Citations.
14. He practiced at the same firm for approximately 20 years, which usually had three and later four lawyers.
15. From approximately 2005 to 2009, he was working long hours, taking on more work than he should have. During that same period, one of the lawyers left the firm, followed by another who took an extended leave. The Member therefore assumed an increased workload, which imposed a heavy demand on his time and compromised the quality of his client service.
16. Six complaints to the LSA resulted from this period of time, most of them from clients. The complaints involved the Member failing to respond to other lawyers and the LSA in a timely manner, breaching undertakings that required him to take steps, failing to properly serve clients, and acting in a conflict of interest by representing clients who were vendors and purchaser in the same transaction when not in their interests to do so.
17. Five of the six complaints were referred to a Hearing Committee on November 29, 2010. The Member entered an admission of guilt on 18 citations at that time, which was accepted by that Hearing Committee. The Hearing Committee imposed a six month

suspension, and ordered the Member to pay hearing costs, estimated at \$9,124.50 (Exhibit 38).

18. Prior to that Hearing, the Member had also submitted to Practice Review and had accessed the ASSIST program for two informal counseling sessions. The Hearing Committee which convened on November 29, 2010 also directed the Member to continue with the Practice Review process and to implement the directions provided by the Practice Review Committee of the LSA.
19. The Member was entitled to apply for reinstatement following his six month suspension, but expected that he might not be reinstated until the present Citations were addressed by a Hearing Committee, and that even if he was, he would potentially compromise and inconvenience his clients if he were then suspended again for the conduct underlying the present Citations. The Member therefore voluntarily absented himself from the practice of law while these Citations remained outstanding.
20. The Member has not been employed since November 2010, and has sustained himself by exhausting his savings.
21. As for the present Citations, the misconduct overlaps in time and kind with many of the other matters for which the previous Hearing Committee accepted an admission of guilt. The Member thought that he might be able to resolve the content of the present Citations with his former client, D.M., but did not deliberately separate and delay the present matters from those previous Citations.
22. In addressing the substance of the D.M. complaint, the Member freely acknowledged that he did not serve his clients in a conscientious and diligent manner. He was not timely in his responses to the clients and the LSA.
23. The Member also freely admitted that he was at fault in failing to forward the Employment Standards Branch Order to his client. He had previously offered to make restitution to his former client for any loss suffered as a result.
24. The Member denied that he ever tried to deliberately mislead his clients. In particular, on the filing of the Annual Return, and the reference in one of his letters to providing the client with the corporate seals, the misinformation provided to the client occurred through carelessness. The letter mentioning the Annual Return contained a typographical error. The letter stating that the client had been provided with the corporate seals was based on a mistake about what his assistant had actually delivered to the client. He had failed to check before responding.
25. As for the litigation matters, the Member acknowledged that his failings had occasioned inordinate delays. However, the clients were not seriously prejudiced by the delays. Some litigation steps were delayed or not taken because he was trying to control litigation

expenses for his client in advancing claims that were for modest amounts or fraught with difficulty in actually collecting on any judgment.

26. As for the S. I. Inc. litigation, the Member denied that he had deliberately refused to follow any settlement instructions from his client. The party opposite was never prepared to settle for a figure that was acceptable to the Member's client, and the party opposite did not make an offer at a figure the Member was instructed to accept. The Member then filed a fraudulent preference claim on behalf of his client. However, the amount in issue was little more than \$22,000, and such a lawsuit would be complex, expensive and risky. The Member therefore did not see value for his client in pursuing such a claim. He acknowledged, however, that he failed to have the "hard discussion" with his client about the imprudence of pursuing that claim.
27. The Member did not charge his clients for the BCMD Ltd. and S. I. Inc. litigations. He issued one invoice for the P. C. matter when some monies were paid out of court to the benefit of his client. Accordingly, the client did not pay for any of the litigation services that were unsatisfactory, and there was no duplication of cost for the client in bringing new counsel on board.
28. As for the unfiled Annual Returns, those deficiencies, including the company being struck, were rectified in due course and the Member did not charge the client for the filings and the steps necessary to remedy those mistakes.
29. The Member recognized that he had failed to serve his clients, but felt that he had benefited from Practice Review and the time away from practice.

FINDINGS ON THE ADMISSION OF GUILT

30. In accordance with Section 60 of the *Legal Profession Act*, the Member proffered an admission of guilt on the three Citations, qualified by the reservation found in paragraph 6 of the Agreed Statement of Fact, and invited the Hearing Committee to accept that admission of guilt.
31. The only factual controversies before the Hearing Committee were whether the Member deliberately refused to follow his clients' instructions on the S. I. Inc. litigation file, and whether he deliberately misrepresented to the client and the LSA the status of the corporate registration and the whereabouts of the corporate seals.
32. On each of these issues, the Hearing Committee received testimony from the Member. He provided a reasonably detailed and plausible explanation for why he could not have settled the S. I. Inc. litigation. The client did not testify before this Panel, and the evidence in the record provided insufficient detail to contradict the Member's explanation. The Member was contrite and made admissions against interest during the course of the Hearing, including his failings in other aspects of the litigation files. In sum,

the Hearing Committee found the Member and his explanation credible and accepted that he did not deliberately disregard any settlement instructions from his client.

33. As for the misinformation about the status of the corporate filings, and the whereabouts of the corporate seals, the Hearing Committee accepted the Member's explanation that the misrepresentations were not deliberately made. They were the results of unintentional errors, and those errors were consistent with the kinds of mistakes and carelessness that, sadly, were prevalent within the Member's practice during this time in his career.
34. The Hearing Committee accepted that the Member nevertheless failed to conscientiously, diligently and efficiently serve his clients in the following respects:
 - Failing to prosecute litigation in a timely fashion;
 - Failing to adequately report to his clients about the status and merits of litigation;
 - Failing to file Annual Returns in a timely fashion;
 - Failing to properly update a corporate Minute Book;
 - Providing inaccurate information to clients about the status of corporate filings and the whereabouts of corporate property;
 - Failing to deliver client files and property in a timely way.
35. The Member also repeatedly failed to respond to his clients and the LSA in a timely, complete and appropriate manner. Those failings were egregious.
36. Accordingly, the Member's Statement of Admission of Guilt was accepted.

SANCTION AND COSTS

37. In determining an appropriate sanction, the Hearing Committee is "guided by a purposeful approach, which seeks to ensure that the public is protected, that high professional standards are preserved, and that the public maintains confidence in the legal profession": *Law Society of Alberta v. Mackie*, 2010 ABLS 10, at para. 41.
38. 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 of

risk, if any, in permitting a practitioner to hold himself out as legally authorized to practise his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practise, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

39. The purpose of sanctions is therefore "not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession": G. McKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (4th ed. 2006), at page 26-1.
40. Various factors may be taken into account when deciding how the public interest should be protected, including: a) the nature and gravity of the proven misconduct, including the number of times it occurred; b) whether the misconduct was deliberate; c) whether the misconduct engages the respondent lawyer's honesty or integrity; d) the impact of the misconduct on the client or other person affected; e) general deterrence of other members of the legal profession; f) specific deterrence of the respondent lawyer from engaging in further misconduct; g) whether the offender has incurred other serious penalties or financial loss as a result of the circumstances; h) preserving the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members; i) the public's denunciation of the misconduct; j) the extent to which the offensive conduct is clearly regarded within the profession as falling outside the range of acceptable conduct; and k) imposing a penalty that is consistent with the penalties imposed in similar cases.
41. In addition, the Hearing Committee considers mitigating circumstances that may temper the sanctions to be imposed, including: a) the respondent lawyer's attitude since the misconduct occurred; b) the prior disciplinary record of the offender, including whether this is a first offence; c) the age and experience of the lawyer; d) whether the individual has entered an admission of guilt, thereby showing an acceptance of responsibility; e) whether restitution has been made to the person harmed; and f) the good character of the offender, including a record of professional service.
42. In the present case, needless anxiety and frustration was occasioned on the clients and their confidence in the legal profession was undermined. The lack of conscientious, diligent, efficient and timely service persisted over an extended period of time. Errors occurred many times.
43. The Member's interactions with the LSA showed a reckless disregard for his professional responsibilities, including timely and accurate communications with his regulator, even during efforts to redress the clients' concerns. The Member's irresponsible behavior was even more egregious since he was already the subject of other client complaints before the LSA. His vigilance should have been heightened.

44. Self-regulation through an independent Law Society is a privilege that serves a societal interest. But that privilege is only preserved if lawyers firmly commit to and honour the ethical tenets of the profession. The Member's carelessness and dilatory approach in his communications with his clients and the LSA demonstrated a lack of insight about his most basic obligations.
45. Nevertheless, the Member by his admission of guilt and testimony before this Hearing Committee demonstrated that he now understands the errors he committed, and that he is contrite. He has utilized the Practice Review process to remediate deficiencies in his skills and his understanding of professional obligations. He has taken a break from the practice of law to reflect and refocus. All of these steps speak to the development of greater awareness, which should help him to better serve the public in the future.
46. The evidence depicted little in the way of real financial harm to the clients' interests, and the Member had offered restitution through fee reductions. (While the evidentiary record is not clear, the client's financial losses were likely addressed through fees that were never billed.)
47. Prior to the misconduct captured by these Citations and those heard in November 2010, the Member had practiced for approximately 20 years, without a disciplinary history. The pressures on his practice from 2005 through 2009 might help to explain the behaviours that were at odds with his long history of presumptively satisfactory service. However, the workload under which he toiled was largely within his control, and he remained responsible for the resulting failures.
48. A key issue for the Hearing Committee is how it should deal with the Member's previous six month suspension and the subsequent period of self-imposed withdrawal from the profession.
49. A prior disciplinary record is typically an aggravating factor because it suggests that a lawyer has not sufficiently learned from past sanctions, which invites more severe sanctions to effect the necessary change in behavior. The focus of sanctions is to modify future conduct in such a way that the public is protected, rather than imposing punishment for its own sake.
50. This application of the deterrence principle does not arise where the misconduct in question arose before the lawyer was ever sanctioned. Here, the Member had not yet been found to have engaged in professional misconduct, nor had he been sanctioned, when the facts giving rise to the present Citations arose. As a consequence, in dealing with the current Citations, he should not be treated as a repeat offender.
51. The Hearing Committee is also cognizant of the totality principle: in considering the current sanction, the Panel is mindful that the nature of this misconduct is very similar to and overlaps in time with other events for which the Member has already been

disciplined through a lengthy suspension. Accordingly, the totality of the sanctions imposed by the previous Hearing Committee and this Panel should be taken into account.

52. An issue also arose before this Panel about the impact of the Member's self-imposed exile from the profession following the expiration of the original six month suspension.
53. Counsel for the LSA asserted that the additional period of inactivity should be afforded no weight as a mitigating factor. A parallel was drawn to an interim suspension, the duration of which is not considered a relevant factor when sanctioning after a finding of guilt: *Law Society of Upper Canada v. Oleg Oleksandro Kryvenko*, 2011 ONLSHP 0017.
54. The Hearing Committee does not view the Member's self-imposed period of inactivity in this case as being akin to an interim suspension, nor governed by the same principles. The interim suspension in *Kryvenko* was involuntary, and was not imposed as a result of a finding of misconduct in the disciplinary process.
55. Here, the Member voluntarily withdrew from the profession for an additional period of approximately one year, following the previous Hearing Committee's directions on sanction, while he reflected on the errors that resulted in multiple client complaints. His evidence before this Hearing Committee, which the Panel accepts, was that one of the reasons for his withdrawal was that he felt a disservice might befall his clients if he obtained reinstatement, only to then be suspended again. The Member therefore demonstrated self-awareness and attention to client interests, which serve to mitigate the need for a harsh sanction. A similar conclusion was reached by a Hearing Committee in *Law Society of Alberta v. Aperocho*, 2009 LSA 25 where a lawyer's decision to voluntarily place himself on the inactive list, and by his own actions protect the public, was held to be a mitigating factor in assessing the sanction.
56. Having regard for the sanctioning principles outlined above, and those articulated in the *Hearing Guide*, the Hearing Committee made the following Orders:
 - a. the Member be suspended for 15 days effective May 7, 2012;
 - b. the Member pay the actual costs of the Hearing, calculated as \$3,814.55;
 - c. the Member be given six months from May 7, 2012 to pay the actual costs of the Hearing.
57. As the Member is already subject to the Practice Review process, the Hearing Committee made no further Order in that regard.

CONCLUDING MATTERS

58. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of proceedings shall be redacted to protect the identity of the Member's former clients, and any information subject to proper claims of privilege.

59. No referral to the Attorney General was directed.
60. A Notice to the Profession about the suspension issued following the oral decision.

Dated at Edmonton, Alberta this 7th day of August, 2012.

KEVIN S. FETH, QC, Bencher, Chair

AMAL UMAR, Lay Bencher

GILLIAN MARRIOTT, QC, Bencher