LSA FILE NO.: HE20110067

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

HEARING COMMITTEE:

FRED R. FENWICK, Q.C. (CHAIRPERSON)

ROBERT HARVIE, Q.C. (COMMITTEE MEMBER)

LARRY OHLHAUSER, M.D. (COMMITTEE MEMBER)

COUNSEL APPEARANCES:

BRIAN GIFFORD, FOR THE LAW SOCIETY OF ALBERTA ("LSA")

GORDON MCKENZIE, Q.C., FOR ROBERT J. BISHOP (THE "MEMBER ")

DATE AND PLACE OF HEARING:

EDMONTON, ALBERTA

MAY 17, 2012

HEARING REPORT

I. INTRODUCTION

1. This matter involves the management and mismanagement of what is commonly known as the "current client conflict rule". The Member represented two clients who, although not originally in conflict gradually drifted into an actual conflict (plaintiff and defendant in a mortgage foreclosure). The Member filed a Statement of Defence on behalf of one client (the foreclosure defendant) at a time when he was actively representing the

foreclosure plaintiff, (not on the specific foreclosure in question, but on other mortgages and foreclosures). The Statement of Defence was filed not withstanding warnings from the foreclosing client that a conflict had in fact developed.

2. The Member was cited under Part 3 of the *Legal Profession Act*, as follows:

> "It is alleged that you breached your firm's duty of loyalty to the complainant, and that such conduct is deserving of sanction."

3. A hearing was held at Edmonton, Alberta May 17, 2012 at the Law Society offices. The Member submitted an Agreed Statement of Facts which contained an "Admission of Facts and Guilt" and consented to the admission of a binder of exhibits which had been previously circulated to the Hearing Panel.

4. The Hearing Committee accepted the Member's admission of guilt pursuant to section 60 of the *Legal Profession Act* and found that the conduct was deserving of sanction.

5. The Hearing Panel heard submissions from counsel for the Law Society and counsel for the Member (but no new evidence) and rendered its decision on sanction which the Hearing Committee ordered to be a reprimand plus hearing costs. The reprimand was given by the Chairman of the Hearing Committee at the date of the hearing, with these written reasons to follow at a later date.

II. JURISDICTION and PRELIMINARY MATTERS

6. The LSA and the Member consented to the make up of the Hearing Committee. A binder of exhibits was circulated before the hearing with the consent of the LSA and counsel for the Member which contained jurisdictional exhibits:

J-1 Letter of Appointment

J-2 Notice to Solicitor

J-3 Notice to Attend

J-4 Certificate of Status

J-5 Certificate of Exercise of Discretion and Re: Private Hearing Application Notices

7. Counsel for the Member consented to the entry of the jurisdictional exhibits and agreed to the jurisdiction of the committee. The Hearing Committee determined that it did have jurisdiction.

8. No submission was made concerning exercise of discretion regarding a private hearing, and the Hearing Committee ordered that the hearing would be a public hearing, with names of clients redacted.

III. THE RECORD

9. A binder of exhibits had been circulated to the Hearing Committee in advance of this hearing composed of jurisdictional exhibits (J-1 to J-5) and exhibits 1 through 28 including email correspondence between the Member, the clients, complainant, counsel for the complainant and the LSA. Additional exhibits were entered as follows:

Exhibits 30-34	Intentionally left blank
Exhibit 35	Agreed Statement of Facts
Exhibit 36	Estimated Statement of Facts
Exhibit 37 (during sanction phase)	Disciplinary Record of the member

10. A copy of the Agreed Statement of Facts with Admission of Facts and Guilt is attached as Appendix 1 to these reasons.

IV. EVIDENCE and FINDINGS OF FACT

11. The specifics of the evidence is well described in the Agreed Statement of Facts and the exhibits entered by agreement. The Hearing Committee summarizes the evidence as follows.

12. The Member had for some time been representing a farm family (the "Z.s") including the placement and renegotiation of mortgages, and most particularly including acting for the Z.s in the placement of a mortgage loan from the complainant who at the time was represented by his own independent counsel.

13. The Z.s entered into a period of financial difficulty and the Member continued to represent the Z.s, most particularly in the attempting to arrange refinancing and the payment out of mortgages (which would have included the complainant's mortgage).

14. The complainant, Mr. P. who administered his own RSP portfolio of mortgages, eventually came to retain the members firm with regards to the collection of mortgages in arrears, although not the "Z" mortgage.

15. During the refinancing process, the Z.s fell into arrears with their mortgages to the complainant and the Member began an email correspondence with the complainant firstly setting out his position on behalf of the Z.s that once the complainant had made a demand on the mortgage, that the mortgage that crystallized as to principle and interest and that contractual payout penalties were no longer available, and requested payout statements for the purpose of the refinancing. The member was met by a very specific allegation from the complainant that there was a conflict of interest. Particulars of the email correspondence include:

    (a) December 2, 2010, 5:47 p.m., the complainant tells the Member: "… with all due respect, you cannot act on this matter due to the potential for a conflict of interest. accordingly, we will not be able to provide you with any figures [payout figures]"

(b) December 3, 2010, 16:50, the Member tells the complainant: "I am acting for K.D. on her refinancing intended to payout your mortgage. Please provide me with the name of your lawyer so that I can request both a payout statement and an arrears statement from him or if you have not yet instructed counsel, please provide them to me directly. If an action is commenced without receiving the requested statements, I think a Master will not look favourably upon you. Usually the reaction is to order that the action is stayed until the statement is provided and costs are payable by the Plaintiff to the Defendant. So I suggest you not take this request lightly."

(c) December 3, 2010, 10:30 a.m., the complainant emailed the Member: "For the third and last time, I demand that you cease acting in this matter as to do so will put you in a conflict of interest."

(d) December 3, 2010, the Member emailed to the complainant: "I refuse."

16. Eventually, the complainant retained a separate law firm for the commencement of foreclosure proceedings against the Z.s, had the Z.s served and the Z.s contacted the Member regarding the commencement of foreclosure proceedings.

17. The Member arranged for one of his associates to file a Defence on behalf of the Z.s which defence included a plea that the complainant (still a client of the Member and his firm, although on other matters) be imprisoned for failure to follow certain notice provisions within the *Farm Debt Mediation Act* of Alberta.

18. The complainant immediately initiated this complaint and at that time the Member and his firm ceased acting for the Z.s.

19. The only evidence entered at the hearing was the binder of agreed exhibits and the Agreed Statement of Facts. The Hearing Committee heard submissions from the Member's counsel with regards to sanction but did not hear any additional evidence other than documentary evidence, i.e., it did not hear evidence directly from the Member or the complainant.

V. WHETHER THE CONDUCT WAS DESERVING OF SANCTION

20. Pursuant to section 60 of the *Legal Profession Act*, the Hearing Committee accepted that the facts as set out in the Agreed Statement of Facts, the Agreed Book of Exhibits, and the Admission of Facts and Guilt were in a form acceptable to the Hearing Committee and that the conduct of the Member is deserving of sanction.

21. Issues raised in the submission by counsel for the LSA and the Member relevant to the Hearing Committee's findings included as follows:

(a) Current Client Conflict Rule

22. In his response to the LSA dated April 20, 2011 (Exhibit 18), the Member described his position concerning a current client conflict at the time of receipt of the Statement of Claim and deciding to file a Statement of Defence as follows:

> "I did not believe that I nor my firm was in a conflict since I didn't have any confidential information regarding Mr. P that could be used to his disadvantage with respect to his loan to Mr. and Mrs. Zed and Ms. D. and the new financing is intended to pay the full amount owing on the P mortgage."

23. What is commonly known as the "current client conflict rule" arose out of *R. v. Neil*, 2002 SCC 70, a case which originated in Alberta and which has been well discussed in legal educational material in Alberta since 2002. The Code of Professional Conduct of the Law Society of Alberta was amended very shortly after the decision in *Neil* to describe the duty of loyalty owed to current clients. The duty of loyalty to current clients was further developed by the Supreme Court of Canada in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24.

24. The duty of loyalty owed by a lawyer and his firm to a client was described in *Neil* at paragraph 19:

> It is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated (emphasis in original) – unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

25. It is not the law of conflict in Alberta and certainly has not been since 2002 that a current client conflict is created by the possession of confidential information, as the member originally stated. This is more properly part of the conflict test for acting against former clients.

(b) Development of the Conflict

26. The Hearing Committee heard in sanction submissions presented by the Member's counsel, that the Member had originally taken the position that the Z.s as the borrower and Mr. P as the lender were not initially in conflict during the pre-litigation stages. The Member's position was that as he was acting for the Z's in attempting to arrange for refinancing, to pay out Mr. P., that there was no conflict of interest.

27. Although this was not well developed in the Member's correspondence with Mr. P, the complainant does acknowledge in his initial complaint to the Law Society that the Member had originally taken the position that acting for the Z.s in a refinancing was not in conflict with Mr. P's desire to collect the mortgage arrears.

28. The Committee accepts that there may be a "grey area" where it would be arguable when exactly a current client conflict developed, but it does notice that:

- Mr. P was alleging the conflict throughout.

- Mr. P was refusing to give the Member payout statements concerning the Z.s mortgage because of the alleged conflict. Therefore whether or not there was an actual conflict, Mr. P's perception of a conflict was actively interfering with the Member's ability to obtain necessary information and properly represent the Z.s.

(c) Conflict of Interest at the Filing of a Statement of Defence

29. Whatever one's decision is concerning the date and time for the crystallization of the conflict, certainly the conflict developed when the Member was called upon to and did in fact instruct a junior member of the firm to draft and file a Statement of Defence to Mr. P.'s foreclosure claim. There can be no doubt that a current client conflict existed at that point.

30. Further, and of concern to the Hearing Committee was another portion of the response of the Member in his letter of April 27, 2011 (Exhibit 18) where he commented on the development of the conflict and the decision to file a Statement of Defence and then cease to act:

> "On March 3, 2011 when it became apparent that Mr. P strongly objected to myself and Ms. S [the Member's associate]acting on this matter and he demanded that Ms. S cease to act or he would report us to the Law Society, I instructed Ms. S to cease to act and she filed and served a Notice of Ceasing to Act without delay on March 8, 2011."

31. The statement "On March 3, 2011 when it became apparent that Mr. P strongly objected …" is inaccurate at best. It is clear that Mr. P strongly objected to the conflict throughout and not just at March 3 when the Statement of Defence was filed.

(d) The Conduct of the Complainant

32. Several times in his submissions to the Hearing Committee, counsel for the Member mentioned that the complainant, Mr. P, was a retired and suspended member of the Law Society who was taken throughout an aggressive and potentially "difficult" stance regarding the collection of this mortgage.

33. The Hearing Committee notes that the complainant is not on trial. He was throughout a current client of the Member and his firm, and both the Member and his firm throughout owed a duty of loyalty to Mr. P. If Mr. P was in fact collecting on his personal RRSP investments, it is not beyond the realm of possibility that he would be personally engaged and directly interested in the details of this collection process.

34. Even if Mr. P was being "difficult" (and the Hearing Panel makes absolutely no finding on this whatsoever) then that in itself ought to have been a warning signal or "red flag" to a lawyer as experienced as the Member of the necessity of proceeding carefully.

35. All and all, the Hearing Committee upon review of the evidence, the submissions by counsel for the Member and the LSA, together with the Admission of Facts and Guilt found in the Agreed Statement of Facts has found that the conduct of the Member was in fact sanctionable and ordered that the Member be reprimanded and pay the full costs of the hearing which have been set out in Exhibit 36 in the amount of $3,814.55.

36. In correspondence received by the Committee after the hearing, it was confirmed by the counsel for the LSA that the amount referred to above was in error and that the correct amount of the costs of the hearing is the amount of $2,551.50. The Committee agreed that this decision ought to reflect the correct amount and that as the member has already paid the originally stated amount, authorized the LSA to refund the difference to the member.

37. The Hearing Committee notes that the Member has had a long and distinguished legal career without sanction or complaint. But this story is one of how easily, by not paying attention to the Code of Professional Conduct and the availability of independent advice, a series of mis-steps can lead to sanctionable conduct.

38. The Code of Professional Conduct describes a member's many and overlapping responsibilities to the public, other members and to the administration of justice but it also provides practical guidelines for the avoidance of conflict and other issues that predictably develop within a law practice. Firms the size of the Member's firm always have conflict committees and senior people to discuss matters with and in addition the LSA maintains senior and experienced Practice Advisors in both Calgary and Edmonton, available for telephone consultation on a continuous basis.

39. This matter would have benefitted greatly from the member seeking advice on an obviously contentious matter early on and in the crafting of a more fulsome response to the LSA, when the complaint was made and recommends such advice to all members.

40. One of the highest and best uses of the experience and wisdom of a senior practitioner is in the mentoring of less experienced members. The Hearing Committee hopes that the Member will have the opportunity to pass along his recently hard won experience concerning the management of conflicts and conduct matters to junior members.

VII. RECORD OF DECISION

41. Any portions of the Record shall not be accessible to the public, unless personally identifying information of any individual involved (other than the Member) is redacted.

DATED at Calgary, Alberta, this _____ day of May, 2012.

_____
Fred R. Fenwick, Q.C.
Chair

_____
Robert Harvie, Q.C.

_____
Larry Ohlhauser, M.D.

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF ROBERT BISHOP A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

INTRODUCTION

1. The Member was admitted to the Alberta Bar on June 17, 1977. He practices in Edmonton, Alberta.

2. The Member's primary area of practice is real estate law.

CITATIONS

3. On October 13, 2011, the Conduct Committee referred the following conduct to hearing:

   A. IT IS ALLEGED THAT you breached your firm's duty of loyalty to the complainant, and that such conduct is conduct deserving of sanction.

BACKGROUND

1. The Complainant, G P, was a client of the Member in connection with the preparation of mortgages and foreclosures.

2. The Member represented the Z's in connection with loan defaults on their various farm lands.

3. The Z's obtained a mortgage loan from the Complainant. The Member represented the Z's in connection with this loan, but the Complainant had his own counsel for this transaction.

4. The Member subsequently represented the Z's in connection with the refinancing of their farm lands.

5. Refinancing was completed on some of the farm lands. Financing on the remainder of the farmlands was not completed because it involved the construction of a house which was and continued to be under construction.

6. The Member became aware that the Z's mortgage was in default and subject to foreclosure by the Complainant.

7. The Member sent an email both to the Z's and to the Complainant advising that a legal consequence of commencement of a foreclosure action is that a prepayment penalty cannot be charged.

8. Subsequently, the Complainant commenced a foreclosure action and issued a Statement of Claim against the Z's.

9. The Member was not acting for the Complainant in the foreclosure against the Z's.

10. Commencing on or about December 3, 2010, the Complainant repeatedly asked the Member to cease acting for the Z's, on the basis that to do so would place the Complainant in a conflict of interest.

11. The Member refused to cease acting for the Z's.

12. The Member instructed a junior in his office ("M.S.") to prepare and issue a Statement of Defence in the subject foreclosure action.

13. The Complainant's lawyer wrote to the Member and noted the Complainant's position that the Member was in a conflict of interest.

14. The Member complied and instructed his associate M.S. to file a Notice of Ceasing to Act, which she did on March 8, 2011.

FACTS

15. The Complainant, G P, notified the Law Society regarding his concern that the Member had acted against the Complainants interests, while the Member was actively representing the Complainant.

16. The Complainant stated, in an email to the Law Society dated March 07, 2011, as follows [Exhibit 1]:

> "…
> The Information:
>
> I am active in loaning mortgage funds personally or through my RRSP at Canadian Western Trust (CWT).
>
> Bob Bishop and Bishop McKenzie have for many months acted for me in preparing new mortgages and doing foreclosures. At present they

have 2 active foreclosure files for me. Many times over the last many months I have personally confided in, revealed to and discussed with Bob Bishop my foreclosure strategy and procedures. On more than one occasion I talked to him about the [Z's] situation, at a time when they were in arrears. They have been in arrears, on and off, for several years.

Some weeks ago I hired the Lovatt firm to act for me in a foreclosure against [Z's], et al, who are many months in arrears. My 220,000 first mtg is from my RRSP at CWT. Craig Lupul of the Lovatt firm sent the usual demand letters for payment of arrears. Bob Bishop replied saying he was acting for the defendants, that they were about to achieve refinancing to payout my loan, and we should forebear in starting a foreclosure action.

At that time both Mr. Lupul and myself notified Bob Bishop directly he could not act for them as he was in a conflict of interest. He replied in writing he absolutely refused to cease acting, saying his work for them in refinancing to pay me out was not acting against my interests. He did, however, say if he was ever asked to do any acts for them that were against my interests he would at that time agree he was in conflict, and would cease acting for [Z's]. He acknowledged the potential for a conflict of interest.

Their new financing did not materialize and we proceeded to issue, file and serve a Statement of Claim against the defendants.

A few days ago M.S. of the Bishop McKenzie firm served us with a Statement of Defence on behalf of [Z's]. The defence is much more than a blanket denial: it proposes serious financial penalties against me. This is the first we hear of M.S. on this file. I believe she is Bob Bishop's puppet. However, I believe she knew the situation well before she served the Statement of Claim as a surrogate for Mr. Bishop, and is complicit in the conflict of interest.

On Friday, March 14, 2011 I advised M.S. she and the firm were in a conflict of interest and they had until noon today, Monday, March 7, 2011 to cease acting to avoid this complaint.

M.S. advised this morning, before the deadline, she was filing a ceasing to act for [Z's].

Although someone at the Bishop McKenzie firm came to his/her senses today once they were threatened, there is a BIGGER CONCERN:

> Bob Bishop was warned a few times several weeks ago about this conflict of interest. At that time he invented a neutral position to keep us happy. Last week he and M.S. filed a Defence against my interests, ignoring the warnings from my lawyer and me. He ignored that he was acting for me on 2 other foreclosure files. Bob Bishop ignored advice from another lawyer, Craig Lupul, and proceeded to act against me ... " **[Edited for brevity and privacy]**

17. April 27, 2011, Bishop provided his response [Exhibit 18]:

> "I have acted for [Z's and Ms. D] since June 2006 with respect to defaults on their mortgages and refinancing of their various farmlands. I acted for them when they obtained the loan from Mr. P which is the subject of the foreclosure action referred to in his complaint. Mr. P had his own counsel then and has his own counsel now with respect to this loan.
>
> In September 201 0, I was asked to act for Z's on another refinancing intended to payout the P and other mortgages which at the time I understood were not in default. The refinancing of some of the farmlands has been completed and the mortgages of those properties paid out in full. The refinancing of the remaining farmlands was not completed initially and has not yet been completed because it involves the construction of a new house which was under construction and continues to be under construction to this date.
>
> In November of 2010 I became aware that the P mortgage was in default and that Mr. P was threatening to commence foreclosure action. Mr. P asked if the writer would accept service of the Statement of Claim for the Z's and Ms. D and I advised him that I wasn't prepared to do that. Between November 2010 and the end of February 2011, I continued to act for [Z's and Ms. D] assisting them with meeting the conditions of the new financing and during this time I was advised that the construction of the house continued to progress. The date when the new financing would be funded and the P mortgage paid out was uncertain. Mr. P did not seem to be uncomfortable with me acting for the [Z's and Ms. D] on the refinancing initially despite the fact that I was acting for him on other unrelated matters.
>
> On or about February 23, 2011, [Mr. Z] advised me that Mr. P had commenced a foreclosure action and he sent me a copy of the Statement of Claim. He indicated that he had not been served with Farm Debt Mediation Act notices prior to commencement of the action and so I gave the Statement of Claim to my associate M.S. and instructed her to file a defence on that basis. I did not believe that I nor

my firm was in a conflict since I didn't have any confidential information regarding Mr. P that could be used to his disadvantage with respect to his loan to [Z's and Ms. D] and the new financing is intended to pay the full amount owing on the P mortgage.

On March 3, 2011 when it became apparent that Mr. P strongly objected to both myself and M.S. acting on this matter and he demanded that M.S. cease to act or he would report us to the Law Society, I instructed M.S. to cease to act and she filed and served a Notice of Ceasing to Act without delay on March 8, 2011. I thought that was the end of the matter." **[Edited for brevity and privacy]**

18. In reply to the Members submission, the Complainant noted that the member has not denied the complaint. [Exhibit 21]

19. The Member indicates that the Complainant has overstated the extent of communications between the Member and the Complainant relating to the Complainant's foreclosure strategies. The Member notes that the Complainant formerly practiced as a lawyer, and was familiar with foreclosures. The extent of the discussions between them was that foreclosures were to be completed as quickly and cheaply as possible, as was the case with other legal work.

20. The Member copied the Complainant with some of the Members email advice to the Z's, dated 2 Dec 2010. [Exhibit 7]

21. The Complainant emailed the Member, dated 2 Dec 2010, and stated "... you cannot act on this matter due to the potential for a conflict of interest..." [Exhibit 8]

22. By reply email, dated December 3, 2010, the Member stated to the Complainant "I refuse". [Exhibit 9]

23. By reply email, dated December 3, 2010, the Complainant stated to the Member "for the third and last time, I demand that you cease acting for in this matter as to do so will put you in a conflict of interest."". [Exhibit 9]

24. By letter dated December 14, 2010, the Complainants lawyer for the subject issue, Craig Lupul, wrote to the Member and stated " ... you are in a conflict..." [Exhibit 10; Tab 1]
25. By letter dated March 2, 2011, the Member's associate M. S. wrote to Mr. Lupul and stated that the firm of Bishop & McKenzie act for the Z's and provided him with a filed Statement of Defence in the subject issue. [Exhibit 11; Tab 1]

26. By email dated 4 Mar 2011.Mr. Lupul advised the Complainant "I think

there is a conflict. You must make the necessary complaint. I can't complain about your lawyer ... " [Exhibit 28]

27. The Member instructed M.S. to cease to act and she filed and served a Notice of Ceasing to Act on March 8, 2011. [Exhibit 18]

ADMISSION OF FACTS AND GUILT

28. The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. The Member admits that all correspondence sent to him was received by him on or about the dates indicated, unless stated otherwise.

29. For the purposes of Section 60 of the Legal Profession Act the Member admits his guilt to the Citation as particulars of conduct incompatible with the best interests of the public and conduct which tends to harm the standing of the legal profession generally.

30. This Agreed Statement of Facts is not exhaustive and the Member may lead additional evidence not inconsistent with the stated facts herein. The Member acknowledges that the Law Society is not bound by this statement of facts and that it may cross-examine the Member, adduce additional evidence, or otherwise challenge any point of fact it may dispute in this statement.

THIS AGREED STATEMENT OF FACTS IS MADE THIS 24 DAY OF APRIL, 2012.

_____

ROBERT BISHOP