THE LAW SOCIETY OF ALBERTA
BENCHERS' APPEAL REPORT

IN THE MATTER OF an Appeal to the Benchers of the Law Society of Alberta by Ming Fong, a Member of the Law Society, pursuant to Section 75 of the Legal Profession Act from the Sanction of a Suspension imposed upon him by the Hearing Committee in a Decision dated November 17, 2010

BACKGROUND

1. On November 16 – 17, 2010, a Hearing Committee of the Law Society of Alberta ("the LSA") comprised of John Higgerty, Q.C. (Chair), Frederica Schutz, Q.C., and Miriam Carey, Ph.D, convened at the LSA offices in Calgary, Alberta, to inquire into the conduct of Ming Fong, a Member of the LSA ("the Member"), on the following Citations:

    1) IT IS ALLEGED THAT you breached the trust condition imposed on you by opposing counsel to provide a clear copy of title, and that such conduct is conduct deserving of sanction.

    2) IT IS ALLEGED THAT you failed to respond to opposing counsel on a timely basis, and that such conduct is conduct deserving of sanction.

    3) IT IS ALLEGED THAT you were in a conflict of interest or potential conflict of interest and failed to obtain the necessary consent permitting you to act on behalf of the vendor, and the buyer, and that such conduct is conduct deserving of sanction.

    4) IT IS ALLEGED THAT you failed to obtain instructions from your client, the buyer, and that such conduct is conduct deserving of sanction.

    5) IT IS ALLEGED THAT you implemented instructions from the vendor that were contrary to professional ethics, and that such conduct is conduct deserving of sanction.

    6) IT IS ALLEGED THAT you failed to fulfill your commitments to your client, and that such conduct is conduct deserving of sanction.

    7) IT IS ALLEGED THAT you failed to respond to communications from your client that contemplated a reply, and that such conduct is conduct deserving of sanction.

    8) IT IS ALLEGED THAT you failed to ensure the buyer was fully informed as to the progress of the transaction, and that such conduct is conduct deserving of sanction.

    9) IT IS ALLEGED THAT you failed to respond to communications from the buyer's subsequent counsel that contemplated a reply, and that such conduct is conduct deserving of sanction.

10) IT IS ALLEGED THAT you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

HISTORY OF PROCEEDINGS

2. The Citations against the Member arise from two separate complaints.

The McFarlane Complaint:

3. Mr. James McFarlane ("the Complainant") was a lawyer acting for a lender. The lender provided financing to one of the Member's corporate clients in May of 2006. The Complainant placed the Member on trust to provide him with a Certified Copy of Title evidencing the discharge of a mortgage registered in favor of a numbered company within a reasonable period after releasing the borrowed funds to his client.

4. The Member released funds to his client on May 11, 2006. The numbered company was not a financial lending institution and its principal delayed in providing a discharge. Ultimately, the loan was paid out in August of 2008, and a discharge of mortgage was obtained and a copy of Title provided to the Complainant some 26 months after the funds had originally been provided to the Member.

The H Complaint:

5. Eight of the Citations issued against the Member arose from his conduct in the purchase and sale of residential property. The Member was retained jointly by the Vendors and the Purchaser.

6. The Real Estate Purchase contract was signed on April 10, 2007. The closing date was July 15, 2007.

7. The Member was retained on or about June 6, 2007 and he prepared a "Conflict letter" dated July 23, 2007, which was signed by the Purchaser. Sometime thereafter, the Vendors asked the Member to transfer the title to a third person who was an unregistered owner of the residence. The Vendors' purpose in doing so was to ensure that the third party would have personal liability on the CMHC insured high ratio mortgage if the purchaser of the residential property defaulted in payments on the mortgage.

8. The Member did as he was instructed by the Vendor but did not disclose the transfer to the intended Purchaser or seek her instructions to do so.

9. The Member undertook to assist the Purchaser in applying to the financial institution to assume the mortgage. When the Member had not submitted the application by the Fall of 2008, the Purchaser retained another lawyer, Mr. George Fixler, Q.C. to assist in extricating her from the purchase. When Mr. Fixler, Q.C. learned of the intervening transfer to the third party, he encouraged his client to report the Member to the LSA.

10. The LSA wrote to the Member on January 30, 2009, and on February 20, 2009. The Member responded on February 23, 2009. However, on March 12, 2009 the LSA informed the Member that his response was unresponsive and asked for another response by March 27, 2009. The Member responded further on April 6, 2009.

11. The LSA was represented by Ms. Molly Naber-Sykes ("Counsel for the LSA") and the Member was represented by Mr. Timothy Meagher ("Counsel for the Member").

12. The evidence before the Hearing Committee consisted of an Agreed Statement of Facts, an Exhibit Book containing some 67 exhibits, and the sworn evidence of two witnesses, being George Fixler, Q.C., also a Member of the LSA, and the Member.

13. After the completion of evidence and argument from Counsel for the parties, the Hearing Committee adjourned to consider matters and when it returned, found the Member had not engaged in Conduct deserving of Sanction on Citations 7 and 9. The Member was found to have engaged in Conduct deserving Sanction on the remaining eight Citations.

14. On the matter of Sanction, Counsel for the Member took the position that as the only discipline record the Member had was stale-dated, and as the matters in question did not involve an issue of integrity, that a reprimand, or at worse, a reprimand and a fine should be the appropriate Sanction.

15. Counsel for the LSA argued that the Member's conduct did raise issues of integrity, and that in transferring title to real property without the knowledge or consent of one of his clients, and without properly protecting that client's interest, the Member had acted deceitfully, and that the appropriate Sanction was a suspension of 30 days.

16. The Hearing Committee agreed with the LSA's submission that a 30 day suspension was in order. Costs were also ordered against the Member.

17. Immediately subsequent to the Chair advising of the Sanction, the Member requested that the suspension start at an unspecified later date. The request was declined by the Chair, who reiterated the ruling of the Panel.

18. On November 23, 2010, pursuant to Section 75 of the *Legal Profession Act*("the LPA"*)*, Counsel for the Member filed a Notice of Appeal on behalf of his client, appealing the findings that:

    a) His conduct was contrary to professional ethics;
    b) His conduct was a matter of a breach of integrity; and
    c) The imposed Sanction of a 30 day suspension. (Jurisdictional Documents, Exhibit 2).

19. In the Notice of Appeal, Counsel for the Member gave Notice that the Member would be applying pursuant to Section 75(6) of the LPA on November 25, 2010 for a Stay of the 30 day suspension.

20. When the application was heard on November 25, 2010, before the original Hearing Committee, Counsel for the LSA advised that the LSA took "no position" on the application. During the course of the application, counsel for the Member advanced argument and provided authorities to justify the granting of a Stay. The Hearing Committee allowed the Member's application and granted a Stay of the 30 day suspension.

21. On May 6, 2011, the Hearing Committee rendered its written decision (Appeal Binder, Volume I, Section A, Tab 1).

22. On June 30, 2011, the Member's Counsel was advised that the Appeal would be considered on October 24, 2011 (Appeal Binder, Volume 1, Exhibit 3).

23. On July 5, 2011, Douglas R. Mah, Q.C., the President of the LSA, wrote to Donald F. Thompson, Q.C., the Executive Director of the LSA, naming the eight Benchers who had been assigned to hear the Appeal (Jurisdictional Documents, Exhibit 8).

24. By written Brief dated September 2, 2011, Counsel for the Member provided argument on behalf of the Member. In his written Brief, he advised that the Appeal would be limited to the issue of the 30 day suspension (Appellant's Brief, paragraph 3).

25. On September 30, 2011, a responding Brief was provided on behalf of the LSA by Ms. Lois J. MacLean.

26. On October 4, 2011, the following materials were provided to the Appeal Panel:

    1) Binder of Jurisdictional Documents consisting of a letter dated July 5, 2011, from the President to the Executive Director appointing the Benchers to hear the Appeal (Exhibit 1), Notice of Appeal dated February 23, 2010 (Exhibit 2), Notice of Hearing of Appeal dated June 30, 2011 (Exhibit 3), Letter dated June 28, 2011 serving the Notice of Hearing of Appeal with courier proof of delivery (Exhibit 4), Notice of Hearing of Appeal with acknowledgment of service of the Hearing Report, Hearing Record and the within Notice accepted on July 5, 2011 (Exhibit 5);

    2) Record of Appeal Binders consisting of 67 Exhibits filed during the course of the Hearing on November 16 – 17, 2010 (Volume 1) and a copy of the original decision from the Hearing Committee and a transcript of the proceedings on November 16 – 17, 2010 (Volume 2);

    3) Brief of Ming Fong dated September 2, 2011;

    4) Brief of the LSA dated September 30, 2011.

THE APPEAL

27. The Appeal was heard on October 24, 2011, in Calgary, and on November 25, 2011, in Edmonton. The Appeal Panel consisted of the following Benchers:

Ron Everard, Q.C. – Chair
Kevin Feth, Q.C.
James Glass, Q.C.
Wayne Jacques
Adam Letourneau
Dale Spackman, Q.C.
Amal Umar, and
Anthony Young, Q.C.

28. The LSA was represented by Ms. Lois J. MacLean ("Counsel for the LSA") and the Member was represented by Mr. Timothy T. Meagher ("Counsel for the Member").

29. No objection was made to the composition of the Appeal Panel by either Counsel for the LSA or Counsel for the Member.

30. Counsel for the Member confirmed that the Appeal was limited to the issue of the 30 day suspension.

31. The substance of the Appeal was heard and determined on October 24, 2011, at the LSA offices in Calgary and the issue of the costs of the Appeal was adjourned to November 25, 2011, to be heard in Edmonton.

PART I – APPEAL OF SANCTION

SUMMARY OF RESULT

32. Four Members of the Appeal Committee (referred to as "the First Cohort") were of the view that the Hearing Committee had regard to an irrelevant consideration during its deliberations on sanction, rendering the decision unreasonable. The four Benchers who held this opinion would have allowed the Appeal from the Sanction of a 30 day suspension and in its place would have imposed a fine of $10,000.00 and a reprimand, along with the existing referral to Practice Review.

33. Four other Members of the Appeal Committee (referred to as "the Second Cohort") were of the view that the appropriate sanction had been meted out by the Hearing Committee when it imposed a suspension of 30 days and they would have dismissed the Appeal.

34. As there was an equality of votes for either allowing or dismissing the Appeal, Section 77(2) of the LPA governed, with the result that the finding below was deemed to have been confirmed.

35. The issue of the costs of the Appeal was adjourned to November 25, 2011, to be heard in Edmonton.

36. On November 18, 2011, counsel for the Member applied to the Chair of the Appeal Committee for leave to dispense with an in person appearance by either the Member or his counsel and for leave for both to appear by telephone. The application was consented to by counsel for the LSA and was granted by the Chair of the Appeal Committee.

37. Supplemental Briefs on the issue of costs were provided to the Appeal Committee by e-mail on November 18, 2011.

38. At the recommencement of the Appeal on November 25, 2011, Counsel for the Member advised that the Member had appealed the Appeal Panel's decision of October 24, 2011, to the Alberta Court of Appeal and that a Consent Order staying the 30 day suspension had been granted by the Court of Queen's Bench on November 24, 2011.

39. The Appeal then continued on the issue of costs, and subsequent to argument by Counsel for the LSA and Counsel for the Member, the Appeal Panel determined that the Member should be responsible for the costs of the Appeal in their entirety.

PART II - PARTIES' ARGUMENT ON SANCTION

A. THE MEMBER'S ARGUMENT ON THE SUSPENSION

40. Counsel for the Member argued that the Sanction of a 30 day suspension was excessive and was influenced by improper considerations on the part of the Hearing Committee.

41. Counsel for the Member maintained that the Hearing Committee made no finding that the Member acted without integrity; he did not mislead his client nor opposing counsel, nor the Court. The Member had not demonstrated that he was ungovernable or that he profited personally from his conduct. These were factors that were often considered as important by a Hearing Committee if a suspension was to be ordered.

42. The Hearing Committee had considered improper factors in arriving at its decision on Sanction. In this regard, Counsel for the Member referred to the following comments made by the Chair of the Hearing Committee during the Sanctioning phase of the Hearing:

> "Counsel for the Law Society is suggesting that [sic] 30 day suspension of Mr. Fong's privileges to carry on practice as a lawyer are in order. The panel agrees with that particular submission. We are mindful of Mr. Meagher's comments.
>
> The finding of guilt citation in 1990, we put very little weight on that. We consider that in these times, these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis, that a suspension is entirely in order [**emphasis added]** and that a fine – even a high fine would not adequately address the concerns of the panel and, quite frankly, would not adequately address the public interest regarding the practice of lawyers and protection of clients." (Appeal Record, Volume 2, pages 274 – 275, lines 14-1).

43. Member's Counsel submitted the Hearing Committee had "punished" his client because lawyers in general have a poor reputation and that, in doing so, the Hearing Committee had reference to "political considerations far beyond the matters at issue in the Hearing."

44. The prevailing economy and questions regarding the validity and existence of the legal profession were irrelevant considerations in determining the appropriate Sanction for a Member facing discipline.

45. Member's Counsel further argued that there was no evidence tendered at the Hearing which would, in any way, connect the Citations which the Member faced with "the unknown and unstated concerns" expressed by the Chair as to the very existence of the legal profession.

46. Member's Counsel argued that suspensions in discipline matters were typically imposed for matters which involved issues of integrity and in support he cited the decision of *LSA v. Smith*, [2007] LSA 24. Counsel for the Member maintained that where the Citations proven against the Member did not involve integrity issues (which was a very important factor in establishing an appropriate Sanction), a reprimand, and perhaps a fine, might be the appropriate penalty: *Law Society of Alberta v. Holder*, [2009] LSA 17.

47. Even if it could be said that deliberate deception connected with the practice of law would ordinarily give rise to a suspension, mitigating factors might influence the Sanctioning decision otherwise, and, in that regard, Member's counsel cited *LSA v. Geisterfer*, [2009] LSA 15.

48. In his submissions, Counsel for the Member argued that the Appeal Panel was entitled to vary the Sanction if it was "demonstrably unfit or based on an error in principle" (Appellant's Brief, paragraph 22).

49. Further, the Sanction imposed could not be regarded as reasonable when compared against decisions which had imposed a suspension where an integrity breach had been proven.

50. In conclusion, Member's Counsel argued that the Appeal should be allowed on the issue of Sanction, the 30 day Suspension set aside, and replaced with a reprimand and perhaps a fine.

B. THE LAW SOCIETY'S ARGUMENT ON THE SUSPENSION

51. Counsel for the LSA pointed out that although the Appeal Panel was empowered to make any Order authorized by Section 77 of the LPA, and in particular Section 77(1)(c) and (d) (which provide the Benchers with authority to confirm or vary the Order of the Hearing Committee under Section 72 (on Sanction), or replace it with any other Order which could have been made under Section 77), nevertheless the Member Conduct Appeals Guideline listed several cases which set out the test to be applied in considering Appeals from Sanction. Those cases made the point that where the Hearing Committee had acted on proper principles, an Appeal Panel should be loathe to interfere with the Sanction imposed.

52. Counsel for the LSA maintained that the Appeal Panel should show deference to the decision of the Hearing Committee and that the Standard of Review was one of "reasonableness." If it could be said that the Sanction imposed was within the range of

outcomes that could be described as "reasonable," then the Appeal Panel ought not to interfere with it.

53. Counsel for the LSA noted that there were a number of significant factors to be considered in reviewing the Hearing Committee's decision:

    1) The Hearing Committee included a public representative and the importance of having this individual present "was not to be understated";

    2) The Hearing Committee had the advantage of observing the Member, and of weighing his answers and demeanor as he responded to the various questions posed to him;

    3) It was reasonable and fair for a regulating body to consider the issues of limiting the number and cost of Appeals, and the need to preserve the economy and integrity of the proceedings of the Hearing Committee.

54. Counsel for the LSA argued that the reasons for Sanction articulated by the Hearing Committee were sufficient and met that standard of review.

55. Alternatively, if it could be said that the Standard of Review was one of "correctness," then the Sanction of a 30 day suspension was within the range which might be expected, based on the conduct involved and a finding of Guilt on eight Citations.

56. Counsel for the LSA agreed with Counsel for the Member that the Hearing Committee decision in *Smith (supra)* was authority for the proposition that normally a breach of integrity should be found before a suspension was imposed; however, it should be noted that the Hearing Committee in *Smith (supra)* did not attempt to define any specific ingredients which must be present before a suspension is considered appropriate.

57. Counsel for the LSA maintained that while the Member focused on only one sentence in the Chair's remarks on the issue of Sanction, other wording in the Chair's remarks – that the Member was guilty of a "breach of professional ethics," that he had "failed miserably in his duties to abide by the professional ethics of his profession"- made plain that on a proper and full reading of the Chair's remarks, the Hearing Committee had made a finding of "breach of integrity" as that was phrase was used in *Smith (supra)*, and the 30 day suspension imposed on the Member was consistent with the decision on Sanction made in that case.

58. On the issue of whether the Hearing Committee had reference to improper considerations in arriving at its decision to suspend the Member for 30 days, Counsel for the LSA argued that the language utilized by the Chair – "we consider that in these times, these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis, that a suspension is entirely in order" – was one sentence delivered at the end of a two day Hearing and that the oral decision, when viewed in its entirety, and in conjunction with the later written decision of the Hearing Committee, and along with the submissions made as to Sanction by Counsel for the LSA, made it clear that the Hearing Committee had before it the relevant factors for

consideration as stipulated by the Hearing Guide. The Hearing Committee had serious concerns with respect to the Member's conduct, his lack of communications with his clients, and his lack of understanding with respect to the issue of conflict of interest.

59. Counsel for the LSA concluded that the Sanction imposed was appropriate, that it was well within the range which would be considered reasonable, and that the Appeal should be dismissed.

PART III - STANDARD OF REVIEW

60. Section 77(1) of the LPA provides as follows:

> "77(1) Within a reasonable time after the conclusion of their appeal hearing under section 76, the Benchers may, in respect of any conduct that resulted in the order of the Hearing Committee under section 72(1)(a) or (b), make one or more of the following orders:
>
> a) An order
>
> (i) Confirming the Hearing Committee's finding of guilt in respect of the member's conduct, or
>
> (ii) Quashing the finding of guilt, with or without a further order under subsection (3);
>
> b) An order confirming or quashing a determination by the Hearing Committee that the member's conduct arose from incompetence;
>
> c) Where the Benchers confirm the Hearing Committee's finding of guilt, an order confirming or varying the Committee's order under section 72 or replacing it with any other order that the Committee could have made under that section;
>
> d) Where the Benchers replace the Hearing Committee's order under section 72(1)(a) or (b) with an order of reprimand under section 82(1)(c),
>
> (i) An order confirming the Committee's determination, or making their own determination, that the member's conduct arose from incompetence, and
>
> (ii) Any order under section 73 against the member that the Hearing Committee could have made;
>
> e) If the appeal does not result in the confirmation or making of an order of disbarment, an order
>
> (i) Confirming the Committee's order under section 72(4), or
>
> (ii) Directing that the member is not ineligible for nomination or election as a Bencher because of the finding of guilt on which the order under section 72 is based."

61. The Member Conduct Appeals Guideline adopted by the Benchers of the Law Society of Alberta in March 2002 states at paragraph 27:

> "On appeals, the Benchers should not interfere with the sanction imposed by the Hearing Committee unless that sanction is demonstrably unfit or based on an error of principle."

62. Relying on the principles articulated in *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.), the Guideline suggests that where the Sanction has been arrived at on the basis of the application of proper principles, the Standard of Review is reasonableness, and the tribunal is entitled to deference and its decision ought to be upheld. The relevant principles from *Shropshire* state:

> "[46] The question, then, is whether a consideration of the "fitness" of a sentence incorporates the very interventionist appellate review propounded by Lambert J. A. With respect, I find that it does not. *An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the Court of Appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.*
>
> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of *R. v.* Pepin (1990), 57 C.C.C. (3d) 355, 98 N.S.R. (2d) 238, 10 W.C.B. (2d) 457, and *R. v.* Muise (1994), 94 C.C.C. (3d) 119, 135 N.S.R. (2d) 81, 25 W.C.B. (2d) 301. In Pepin, at p. 373, it was held that:
>
> In considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles of [if] the sentence is clearly or manifestly excessive …
>
> [48] Further, in Muise it was held at pp. 123-4 that:
>
> *In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate …*
>
> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts *…My view is premised on the realty that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the only basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive."*

63. The prevailing authorities in Alberta about the standard of review within a professional regulatory body, from a hearing committee to an appeal panel of the governing council, where the issue concerns the sanction imposed, indicate that the standard is reasonableness: *Nelson v. Assn. of Registered Nurses (Alberta),* 2005 ABCA 229; *College of Physical Therapists (Alberta) v. H.(J.),* 2010 ABCA 303.

64. Given the nature of the issue in the current appeal, the Appeal Panel accepted that the standard of review was reasonableness.

PART IV -SPLIT DECISION OF THE APPEAL PANEL

65. The eight Benchers who sat on the Appeal Panel were evenly divided as to their view of the Sanction of a 30 day suspension which was imposed by the original Hearing Committee.

66. Half of the Benchers on the Appeal Panel ("the First Cohort") were of the view that the Hearing Committee had relied on an error in principle, which rendered the decision unreasonable. They would have allowed the Appeal and set aside the 30 day suspension and would have imposed a fine and reprimand, in addition to a referral to Practice Review.

67. The second half of the Benchers on the Appeal Panel ("the Second Cohort") were of the view that the decision, when viewed as a whole, did not disclose that the Hearing Committee had relied on improper considerations, and that the Sanction imposed was within the range of reasonable outcomes. They would have dismissed the Appeal.

68. As there was an even split in votes between the eight Benchers who comprised the Appeal Committee, Section 77(2) of the LPA governed with the result that the decision below was confirmed and the Appeal dismissed. The reasoning of the two Cohorts of Benchers is described below.

PART V - DECISION OF THE FIRST COHORT OF THE APPEAL COMMITTEE (FETH, Q.C., SPACKMAN, Q.C., UMAR, YOUNG, Q.C.)–– THE HEARING COMMITTEE ERRED IN PRINCIPLE

69. The purpose of reasons is to demonstrate "justification, transparency and intelligibility": *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, at para. 47.

70. When reviewing the decision of an administrative body on the reasonableness standard, the guiding principle is deference. An unduly formalistic approach to review should be avoided. "Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive." – *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII), at para. 18.

71. In conducting a review for reasonableness, the appeal panel "inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." – *Dunsmuir, supra*, at para 47.

72. The Benchers have adopted a Hearing Guide to provide assistance to Hearing Committees during the course of conduct hearings. At paragraphs 60 and 61, the Hearing Guide articulates the relevant factors to be considered in determining the appropriate sanction:

> "A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.
>
> a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.
> b) Specific deterrence of the member in further misconduct.
> c) Incapacitation of the member (through disbarment or suspension).
> d) General deterrence of other members.
> e) Denunciation of the conduct.
> f) Rehabilitation of the member.
> g) Avoiding undue disparity with the sanctions imposed in other cases.
>
> In one-way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.
>
> More specific factors may include the following:
>
> a) The nature of the conduct:
>
> (i) Does the conduct raise concerns about the protection of the public?
> (ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?

(iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties of the court, other lawyers or the Law Society)

(iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.

c) Impact or injury caused by the conduct.

d) Potential injury, being the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

e) The number of incidents involved.

f) The length of time involved.

g) Whether and to what extent there was a breach of trust.

h) Any special circumstances (aggravating/mitigating) including the following:

- prior discipline record
- risk of recurrence
- member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
- restitution made, if any
- length of time lawyer has been in practice
- general character
- whether the conduct involved taking advantage of a vulnerable party.
- a dishonest or selfish motive
- personal or emotional problems
- full and free disclosure to those involved in the complaint and hearing process or cooperative attitude towards proceedings
- physical or mental disability or impairment
- delay in disciplinary proceedings
- interim rehabilitation
- remorse
- remoteness of prior offences."

73. In the present matter, the Hearing Committee provided oral reasons immediately before pronouncing on sanction. The reasons were brief:

> "THE CHAIR: We can deal with the sanctioning phase. The Panel has heard from Ms. Naber-Sykes and from Mr. Meagher who has ably represented the member Mr. Fong.

> Counsel for the Law Society is suggesting that 30 day suspension of Mr. Fong's privileges to carry on practice as a lawyer are in order. The Panel agrees with that particular submission. We are mindful of Mr. Meagher's comments.
>
> The finding of guilt citation in 1990, we put very little weight on that. We consider that in these times, these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis, that a suspension is entirely in order [**emphasis added]** and that a fine – even a high fine would not adequately address the concerns of the Panel and, quite frankly, would not adequately address the public interest regarding the practice of lawyers and protection of clients.
>
> Accordingly, we are imposing a 30 day suspension, but we are mindful of Mr. Fong's obligations." (Transcript of Hearing, pages 274-275).

74. The Panel did not state that it was relying on other reasons, which either were not articulated or would be addressed in follow up written reasons. As a matter of general practice, hearing committees typically provide written reasons in due course. However, in the absence of any other explanation from this Hearing Committee (and there was none), the logical inference is that the reasons mentioned by the Committee Chair reflected at least some of the principal considerations that went into the Hearing Committee's deliberations at the time of sanctioning.

75. The only considerations expressly identified were: a) the Member's prior discipline record; b) "these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis"; and c) the public interest regarding the practice of lawyers and protection of clients. The Committee also stated that it was "mindful of Mr. Meagher's comments", but without identifying the comments or explaining whether it relied on or distinguished any of those comments.

76. When the Panel issued its written report, the sanctioning discussion included some elaboration about the Committee's analysis on sanction. After noting that the Member's prior discipline record was given "very little weight" in determining the sanction, the report included the following comments at paragraphs 61 to 64:

> "61. …The Panel is mindful of the need for individual and general deterrence, the status of the legal profession in the public eye, but most of all, the public interest. Bad lawyers endanger the public.
>
> 62. The Hearing Committee has observed Mr. Fong's demeanor throughout these proceedings. He has presented himself as a reasonable person who wants to do right by his clients. But his actions are appalling. He has placed his clients in jeopardy. In the case of H, he kept his own client in the dark as he executed a highly questionable legal maneuver. He has put lawyers and clients in the position of having to complain to the LSA to get straight answers. Members of the public can only view this behavior with disdain.
>
> 63. The purpose of a lawyer is not to simply smooth legal transactions between friends and business associates. Those relationships are transitory. The public rightfully expects lawyers to vigorously protect their interests of their clients

> within the law and the ethics of the profession. By his actions Mr. Fong deliberately ignored these duties. He seems to have difficulty grasping that his actions were fundamentally wrong.
>
> 64. For all of these reasons the Hearing Committee agrees that fines and a reprimand are inadequate. A suspension of 30 days is imposed upon Mr. Fong."

77. The written reasons provide no clear explanation for the comment, given orally, about "these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis".

78. It is possible that some of the words used by the Committee Chair were intended to capture the notion of public confidence in the legal profession. Alternatively, the words might have been a reference to the challenge to independent regulation of the legal profession, especially as experienced in other countries. However, those possibilities do not explain the reference to "these economic times".

79. Financial pressures in the economy do not alter the duty owed by a lawyer to his clients, his profession and the public at large. Indeed, counsel for the LSA on this appeal fairly conceded that the economic times in which we live are not a relevant consideration.

80. The reference to "these economic times" might suggest that lawyers in the conduct process should be treated more harshly when the economy is poor, so that public acceptance of self-regulation is maintained and the economic well-being of the legal profession is not threatened. Such a view would be misguided, and an error in principle.

81. The Appeal Panel was cautioned not to put too much emphasis on a few casual words, which might not have accurately captured the true reasoning of the Hearing Committee. We agree that words should not be finely combed in a search for minor snags or knots. But here, we have relatively few words from the Hearing Committee before it pronounced on sanction. The Chair was an experienced courtroom lawyer and Bencher, accustomed to verbally articulating his thoughts in such a forum. Neither he nor the other members of the Hearing Committee chose to explain the comment, either at the hearing or in the reasons that followed. The transcript of the entire hearing does not provide any context that would explain the comment. Absent some explanation, or some surrounding context, the words are what they are. These Benchers are not prepared to ignore them as if they were not spoken.

82. The Hearing Committee is presumed to have meant what it said and said what it meant. The reference to "these economic times" was a misdirection about the relevant principles in the sanctioning process.

83. We have considered the possibility that the words spoken were not so consequential that they affected the outcome on sanction. We accept that the Hearing Committee was presumed to have knowledge about the relevant sanctioning principles. However, in this case, the brevity of the oral reasons suggests that the comment made by the Committee Chair was a significant consideration. Other sanctioning principles were not mentioned, except to largely dismiss the Member's discipline history and to make a passing reference

to the general concept of the "public interest". Accordingly, we are not satisfied that the misdirection was inconsequential and did not affect the result.

84. The Member was on notice that he faced the possibility of suspension. His professional reputation and livelihood were at stake. Notice to the profession would invariably follow any suspension. In the circumstances, the Member was entitled to both meaningful insight into the reasoning for the suspension and the comfort that the Committee had properly directed itself in the sanctioning process.

85. We therefore found that the Hearing Committee engaged in a substantial error in principle during the sanctioning process, which rendered the decision unreasonable.

86. In light of the error, we would have applied the sanctioning principles set out in paragraphs 60 and 61 of the Hearing Guide and substituted the sanction of a $10,000 fine and a reprimand, along with the referral to Practice Review, in lieu of the suspension. In coming to that conclusion, we relied primarily on the following considerations:

a) Specific deterrence – The Hearing Committee concluded that the Member "presented himself as a reasonable person who wants to do right by his clients." The Member has practiced since 1983 with the only relevant discipline history being more than 20 years old. A long history of competent and ethical service should be presumed, absent any cogent evidence to the contrary. While the Hearing Committee noted that the Member "seems to have difficulty grasping that his actions were fundamentally wrong", the Member did acknowledge during the original hearing that he now realized that "something could have gone wrong" for his client (Transcript of Proceedings, page 213). Based on the record, the risk of recurrence appeared to be low.

b) General deterrence – The type of misconduct in which the Member engaged is contrary to established norms within the profession. However, nothing before this Appeal Panel suggested that a suspension – one of the gravest sanctions available -- was necessary in order to maintain the current standards of practice within the profession.

c) Public Confidence – Much of the debate on the Appeal was about the Member's integrity, and whether the Hearing Committee made an adverse finding about his integrity. The concept of "professional ethics" is more expansive than integrity. The latter deals with moral excellence and honesty, while the former may also include issues of recklessness and gross incompetence. The record does not suggest that the Member's moral character was impugned. Rather, the concern was about his reckless indifference to his obligations to his client, counsel opposite and his regulator. While such behavior is deserving of serious sanction, the sanction should be proportionate to the misconduct, and does not necessarily require a suspension. The public's confidence in the integrity of the profession and independent regulation is not threatened by a proportionate response. Furthermore, the evidence before the Appeal Panel suggested that the Member's client and that of counsel opposite did not suffer any actual loss.

d) Denunciation – A reprimand accompanied by a substantial fine is a tangible demonstration of the profession's condemnation. The impact of a reprimand was addressed in *Law Society of Alberta v. David Westra* (February 25, 2011 Hearing Committee Report) at paragraph 155:

> "A reprimand has serious consequences for a lawyer. It is a public expression of the profession's denunciation of the lawyer's conduct. For a professional person, whose day-to-day sense of accomplishment, self-worth and belong is inextricably linked to the profession, and the ethical tenets of that profession, it serves as a lasting reminder of failure. Additionally, it remains a permanent admonition to avoid repetition of that failure. Deterrence, public confidence, and rehabilitation are therefore served."

The gravity of the misconduct, including the cumulative effect of several failures, may be emphasized through a substantial fine. Suspending a lawyer from actively servicing his clients, especially where his clients are otherwise well served and the disruption triggered by a suspension might cause inconvenience or even hardship to those clients, does not facilitate the public interest.

e) Rehabilitation – Rehabilitation has already been addressed through a referral to Practice Review. The Member did not appeal from that part of the original sanction, suggesting that he understood the value of engaging in that remedial exercise.

f) Consistency – The sanctioning guidelines seek to avoid disparity as between like matters. The parties did not identify any previous decisions where the cumulative findings were factually similar to the cumulative findings against this Member. Similarities between certain elements of the Member's misconduct and previous decisions can be identified, and in those cases, fines and reprimands were typically utilized. While the presence or absence of adverse integrity findings is a significant factor in sanctioning, it is not determinative of whether a suspension is appropriate. All relevant factors should be considered and weighed.

87. In conclusion, the Benchers who comprise the First Cohort of the Appeal Panel were of the view that a proportionate response to the Member's misconduct, which reflected the sanctioning principles in the Hearing Guide, would have invited a reprimand, a substantial fine, and a referral to Practice Review. These Benchers would therefore have granted the Appeal and substituted the sanction indicated above.

PART VI - DECISION OF THE SECOND COHORT OF THE APPEAL PANEL (EVERARD, Q.C., GLASS, Q.C., JACQUES, LETOURNEAU)--- THE HEARING COMMITTEE DID NOT ERR IN PRINCIPLE

88. Essentially, the Member's argument against the Sanction of a 30 day suspension is two fold:

(i) In having reference to considerations of public policy (broadly stated, the reputation of the legal profession), the Hearing Committee took into account

factors which were irrelevant and unfair to the Member and in doing so the Hearing Committee erred in principle;

(ii) The Sanction of a suspension is generally reserved for only those cases where an integrity breach was found, which was not the case here.

89. In support of the first argument, Counsel for the Member referred to the following language from the Chair of the Hearing Committee: "We consider in these times, these economic times, these times where the validity, the existence of the legal profession has been questioned on a regular basis, that a suspension is entirely in order [emphasis added] and that a fine – even a high fine would not adequately address the concerns of the Panel and, quite frankly, would not adequately address the public interest regarding the practice of lawyers and protection of clients."

90. The answer to this argument is that when the decision is considered as a whole, including the thrust of the questions asked of the Member on cross-examination by all of the Members of the Panel, and the remarks of the Chair in their entirety, as well as the Hearing Committee's later written decision, it is clear that the Hearing Committee had reference to all of the appropriate considerations in arriving at an appropriate Sanction.

91. The one sentence spoken by the Chair came at the end of a two day Hearing and was, in effect, the granting of the application by LSA Counsel, after considering her thorough and accurate review of all of the evidence, as well as her summary of the Hearing Committee's concerns. Viewed from on high and in its totality, it is clear that the Hearing Committee had reference to all of the appropriate considerations in arriving at a Sanction which is within the range of reasonable outcomes.

92. Counsel for the LSA suggests that this one statement by the Chair of the Hearing Committee, "might have been better phrased" (Respondent's Brief, paragraph four). Perhaps. However, the Chair, as was his wont, expressed the opinion of the Hearing Committee in language which was folksy, colorful, refreshingly direct, and clear. By understandable, down to earth examples, the Chair expressed the Hearing Committee's concerns in a manner that anyone, particularly the Member (who, in the view of the Hearing Committee seemed to have little insight into the negative implications of his conduct), might be made to understand the serious concerns harbored about his conduct.

93. Some examples of the concerns that the Hearing Committee had about the Member's conduct were expressed by the Chair in the following language (from Transcript of Hearing, Appeal Record, Volume I, Section B, Tab 1):

- "A trust condition for a lawyer is sacrosanct to his profession, indeed, sacrosanct for the smooth functioning of society in general. Without a lawyer's word being paramount in dealing with other lawyers, there is really not much point in going to the profession" (page 54, lines 4 – 8).

- "It should have been elementary. It is elementary. It's perhaps lawyer 101 that before you hand over the money you get the documents signed because once that money is – is gone then your – it's a very real risk that you're going to have

problems getting a signature in – at all or in some type of timely fashion as, indeed was the difficulty here" (page 254, lines 17 – 23).

- "The Panel finds that the delay of some 28 months is right off the chart in terms of delay. That Mr. McFarlane's inquiries, his pushing to see that the trust condition was complied with was not an invitation to a golf game. The response that it should have engendered was for Mr. Fong to essentially drop everything that he was doing and to realize that this isn't just a matter of inconvenience being created for somebody. That he had failed in a fundamental duty of a lawyer and to take every step including informing Mr. McFarlane on a timely basis what the problem was and get the matter rectified. And the Panel notes that essentially three requests for Mr. McFarlane went unanswered and, again, the time span is completely unacceptable and contrary to the way that any lawyer should act in this situation. A trust condition is the lawyer's – the lawyer's word, sacrosanct to the profession" (page 54, lines 3 – 19).

- "The Panel finds that – regarding Mr. [T], Mr. Fong should have brought to Ms. [H] and Ms. [C] – should have brought to their attention immediately the fact that some type of transfer to Mr. [T] was contemplated at all. The response we have had from Mr. Fong is that he thought it was okay because Mr. [T] was an okay guy. The Panel points out – or the Panel finds without any reservation whatsoever that this was not okay. It was fundamental for Mr. Fong to bring this conflict to the attention of his client and to get instructions" (pages 256-257, lines 20 – 2).

- "The Panel points out something which is known by perhaps most members of the public which is the purchase of a house is one of the most important, if not the most important, purchase – most important asset that a member of the public has and that the client has every right to be brought in and to something – any important development, some would say any development in the file itself and certainly fundamentally to get instructions on something this unusual" (pages 256 – 257, lines 20 – 11).

94. Counsel for the Member has suggested that the Chair's impugned statement refers to "the Panel's unknown and unstated concern regarding the very existence of the legal profession" (Appellant's Brief, paragraph 26). However, when both the Hearing Committee's oral and written decisions are considered as a whole, it is apparent that what the Chair was actually referring to the over-riding rationale for continued lawyer self-regulation –if an independent legal profession is the goal, then the LSA is the body best placed to regulate it in the public interest.

95. It is not in the public interest for lawyers to take short cuts in real estate transactions, to transfer title without disclosing that they are doing so and without instructions from a client, and then to fail to take even the most basic steps to protect the client's interest (such as filing a Caveat on the Title to the property).

96. As the Chair indicated, for many members of the public, the purchase of a home may be the single most important transaction that they will ever enter into in their lives. For some members of the public, it is one of the few times that they will deal with a member of the legal profession. Often the purchaser of a home is not a sophisticated business person. Members of the public rely upon lawyers to selflessly protect their interests. The

Hearing Committee was acutely alive to the concerns of that the public would have, perhaps more so because one of the Benchers on the Hearing Committee was a lay representative of the LSA.

97. The Hearing Committee said as follows:

> "Counsel for the Law Society has pointed out that there was no Caveat on title. That this is an integrity breach. Mr. Meagher urges – has urged us to consider that this is just negligence and some that was rectified in the final analysis. The Panel finds that as a matter of professional ethics that this breach, this implement – implementing of instructions from the vendor and not protecting the interests of Ms. [H], Ms. [C], as far as that property was concerned on S. Drive was so utterly basic the danger to the clients in terms of Writs of Judgment of a potential transfer by Mr. [T] and other potential dangers were or should have been, at the very least, completely obvious to Mr. Fong and he failed miserably in his duties to abide by the professional ethics of this profession."
>
> "The Panel points out that it is in the best public interest for a lawyer to unreservedly protect the interests of the clients. And while Mr. Meagher has ably represented Mr. Fong, the Panel disagrees with the assertion that a Caveat would have been an elegant solution to circumstances that – whether he took the instructions of the vendor or not is – if he was going to proceed, he should have taken the obvious steps, the Caveat, to protect the interests of Ms. [H] and Ms. [C]." (Transcript of Hearing, pages 257 – 258, lines 17 – 12).

The Hearing Committee went on to state as follows:

> "Going back to the previous Citation 5, I would like to refer to Mr. Meagher's submissions. And I – in regards to the breach of professional ethics, I will refer to page 4 of the *Diamond* decision given to us by Mr. Meagher. In terms of a breach of the professional ethics, the Panel does rely on the case submitted to us by Mr. Meagher. The Panel finds that the public in looking at this breach of professional ethics would be incredulous, find it troubling, shocking and to use the words on page four at the bottom – I am sorry, yes, at the bottom of page 4, that this is conduct which would reasonably be regarded as disgraceful or dishonorable by Solicitors of good repute." (Transcript of Hearing, pages 258 – 259, lines 26 – 10).

98. Moreover, in considering the impugned quote itself, the Chair articulated that it was the "public interest regarding the practice of lawyers and protection of clients" (Transcript of Hearing, pages 274 – 275, lines 27 – 1), which was uppermost in its deliberations as to the appropriate Sanction.

99. In summary, the Second Cohort of the Appeal Panel is of the view that entirely appropriate factors were taken into account (particularly the all-important factor of the public interest), by the Hearing Committee, that the Standard of Review is one of reasonableness and that deference is owed to the Hearing Committee's decision on sanction.

100. Having found that deference is owed to the decision of the Hearing Committee, then if it can be said that the decision on Sanction is within the range of what can be described as "reasonable," then the penalty imposed upon the Member ought not to be interfered with by this Appeal Panel.

101. Counsel for the Member suggests that the Sanction imposed is not reasonable. The argument made is that suspensions as a Sanction are usually reserved for cases of an integrity breach: *Smith (supra).*

102. In response to that suggestion one answer is that, in fact, the Member was found Guilty of what can be viewed as integrity breaches. Firstly, he was in breach, and continued to be in breach, of a trust condition imposed upon him by another Member of the LSA for 26 months, despite three requests to comply with the trust condition on the part of the Member who imposed it. Only after the LSA became involved did the Member rectify the breach.

103. With respect to the second Complaint, the Member had transferred a significant asset (real property) without informing his client (the purchaser) that he had done so and without adequately protecting her interests. He was in a conflict position and did not disclose it to his clients.

104. Aggravating the situation further was that the Member appeared to lack insight and he showed no remorse for his actions. As an example of this, he had made no arrangements to have his practice attended to by either members of his firm in the event of a suspension, and effectively argued that he should receive a lesser penalty, or that it should be delayed, on the theory that his suspension would unduly inconvenience his clients. In fact, what would unduly inconvenience the Member's clients was that he had made no arrangements to protect their interests in the event that he was suspended and unable to attend to their affairs.

105. This lack of insight evidenced itself again on the hearing of this Appeal. On the conclusion of the Appeal, notwithstanding that it ought to have been apparent to the Member that one possible outcome was that his Appeal would be dismissed and he would be subject to the previously imposed suspension, no arrangements whatsoever had been made by him to ensure that his clients' interests would be looked after should his Appeal be unsuccessful.

106. In fact, at the conclusion of the Appeal, Member's counsel advised that he was instructed to apply for a Stay in order that the Member might attend to approximately 30 real closings which were to occur within the next two weeks.

107. The Hearing Committee had an opportunity to observe the Member's demeanor over two days of hearing. The Members of the Committee were concerned both that he had failed in his obligations to his client, and that he lacked insight into the seriousness of his actions. That view was shared by the Second Cohort of the Appeal Panel.

108. These were factors which would mitigate penalty and would, in fact, motivate the Hearing Committee to impose a Suspension in order to provide the Member with time to reflect upon the seriousness of his transgressions.

109. In conclusion, for all of the reasons given, the Second Cohort of the Appeal Panel is of the view that the Sanction of a thirty day suspension was within the range of reasonable outcomes and would dismiss the Member's Appeal.

PART VII - COSTS OF THE APPEAL

A. THE MEMBER'S ARGUMENT ON COSTS

110. Member's Counsel provided a written Brief on the issue of costs prior to the Continuation of the appeal on November 25, 2011.

111. The Member's position was that the Appeal Panel had no jurisdiction to award costs of the appeal.

112. Counsel for the Member submitted that Section 76(11) of the LPA provides that the Benchers may make an Order dismissing the Appeal and directing costs in those circumstances where the Member fails to attend an Appeal, applies for an unjustifiable adjournment, or has abandoned the Appeal. He argued that as none of these circumstances apply on this Appeal, there is no jurisdiction in the Appeal Panel to award costs.

113. Counsel for the Member submits that Rule 102 of the Rules only enumerates the class of charges, and costs, and expenses that may be included in an award of costs, but the Rule does not in any way empower the Appeal Panel with jurisdiction to award costs.

114. It is the position of Counsel for the Member that there is no jurisdiction in the Appeal Panel to order the costs of the Appeal against the Member.

B. THE LSA'S ARGUMENT ON COSTS

115. Pursuant to Rule 102(1) of the Rules, the Appeal Panel has jurisdiction to award costs.

116. The Pre-Appeal Guidelines passed by the Benchers make it clear that the Member is expected to pay the costs of preparing the Hearing record, and implicit in the power directing the preparation of the record, must have been the expectation that the Appeal Panel would also have the jurisdiction to deal with costs in their entirety.

117. Decisions on the issues of costs recognize that where regulatory bodies have brought discipline proceedings then some or all of the costs of those proceedings may be ordered against the offending Member: *Cartledge v. Veterinary Medical Association* (1999) CarswellAlta 337 (CA); *Sussman v. College of Psychologists (Alberta),* 2010 ABCA 300; *Hoff v. Pharmaceutical Association (Alberta),* (1994) 151 CR (QB).

118. Counsel for the LSA suggested that as there was a division of votes on the appeal, that the Appeal Panel might wish to consider awarding only a portion of the entire costs against the Member.

C. APPEAL PANEL DECISION ON COSTS

119. Section 74(5) of the LPA provides that if an Appeal is taken by a Member to the Benchers, that the Executive Director shall arrange for preparation of the Hearing Record at the expense of the Member.

120. Section 74(6) provides that the costs of an Appeal may be reduced in certain circumstances.

121. Rule 102(1) of the Rules provides as follows:

> "An Order of the Benchers respecting the payment of all or part of the costs of Appeal proceedings under Section 75 and 76 of the Act may be based on or otherwise made referable to all or part of the following classes of charges, costs and expenses . . . . "

122. There then follows a list of eight items of expenses for which costs may be awarded. The items of recoverable expenses include: expenses incurred in serving documents, expenses incurred in connection with the Appeal hearing before the Appeal Panel, hearing charges at a rate, prescribed by the Benchers by the Finance Committee, and other items. Rule 102 (2) stipulates that the Finance Committee may prescribe an hourly rate to be used to determine the costs of services performed by the Society's Discipline Counsel for the purposes of (1)(f).

123. The list of items which appears in Rule 102(1) is an almost exhaustive list of costs that would be incurred on an Appeal.

124. As well, the case law cited in the Pre-Appeal Guidelines makes it clear that it was the intent of the Benchers when the Guidelines were passed that the Appeal Panel would have the jurisdiction to award costs. One is hard pressed to believe that in a regulatory regime such as the discipline process administered by the LSA, that it would ever be the intent of the Benchers that there would be situations where a Member was entitled to the benefits of an Appeal if it was successful without being liable in costs if the Appeal was unsuccessful.

125. In conclusion, it is the unanimous opinion of the Appeal Panel that it does have the jurisdiction pursuant to Section 74(5) and (6) of the LPA and Rule 102 of the Rules to award costs of the Appeal and the Appeal Panel hereby exercises its jurisdiction and orders the entire costs of the unsuccessful Appeal against the Member.

PART VIII –CONCLUSION

126. As there was an equality of votes for either allowing or dismissing the appeal, Section 77(2) of the LPA governs and with the result that the finding of the Hearing Committee is deemed to have been confirmed.

127. As a consequence of the decision of the Hearing Committee being confirmed on the issue of the Sanction of a 30 day suspension, the Member's Appeal is deemed to be dismissed.

128. Pursuant to Rule 102 of the Rules, the costs of the Appeal in their entirety are awarded against the Member.

DATED this 15th day of February, 2012.

FIRST COHORT OF THE APPEAL COMMITTEE:	**SECOND COHORT OF THE APPEAL COMMITTEE:**
KEVIN FETH, Q.C.	RONALD J. EVERARD, Q.C. (Chair)
DALE SPACKMAN, Q.C.	JAMES GLASS, Q.C.
AMAL UMAR	WAYNE JACQUES
ANTHONY YOUNG, Q.C.	ADAM LETOURNEAU