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 **ALLAN D. NIELSEN Q.C.**
a Member of The Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULT

1. On February 14, 2012 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Allan D. Nielsen. The Committee was comprised of James Glass Q.C., Chair, Frederica Schutz Q.C. and Dr. Larry Ohlhauser, Lay Bencher. The LSA was represented by Mr. Garner Groome. The Member was present throughout the hearing and was represented by Mr. Patrick Peacock Q.C and his associate Patrick Robinson.

2. The Member faced three citations:

    1. IT IS ALLEGED THAT you rendered service to a client that brought discredit to the profession, and that such conduct is conduct deserving of sanction.

    2. IT IS ALLEGED THAT you authorized a trust cheque payable to cash, and that such conduct is conduct deserving of sanction.

    3. IT IS ALLEGED THAT you failed to obtain a receipt for cash paid to your client, and that such conduct is conduct deserving of sanction.

3. At the commencement of the hearing, counsel for the LSA and Mr. Nielsen presented the Hearing Committee with an Agreed Statement of Facts in relation to all three citations. Further, counsel for the LSA and Mr. Nielsen confirmed that this was **not** an Admission of Guilt and therefore the Hearing Committee did not have to make a ruling pursuant to s. 60 of the Legal Profession Act.

4. On the basis of the Agreed Statement of Facts, the other evidence received at the hearing, and for the reasons that follow, the Hearing Committee finds that none of the Citations were proven and accordingly were dismissed.

JURISDICTION AND PRELIMINARY MATTERS

5. Exhibits J 1-4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Certificate of Exercise of

Discretion was entered as Exhibit J-5. These Exhibits were entered into evidence by consent.

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

7. The entire hearing was conducted in public.

CITATIONS

8. The Member faced three citations:

    1. IT IS ALLEGED THAT you rendered service to a client that brought discredit to the profession, and that such conduct is conduct deserving of sanction.

    2. IT IS ALLEGED THAT you authorized a trust cheque payable to cash, and that such conduct is conduct deserving of sanction.

    3. IT IS ALLEGED THAT you failed to obtain a receipt for cash paid to your client, and that such conduct is conduct deserving of sanction.

EVIDENCE

9. As noted above, Exhibits J 1-5 (the jurisdictional exhibits) were entered into evidence by consent.

10. The Agreed Statement of Facts was marked as Exhibit 1 and entered into evidence by consent. The Agreed Statement of Facts was signed by the Member on February 14, 2012 and the Member acknowledged same.

FACTS

11. The Agreed Statement of Facts (Exhibit 1) is reproduced herein:

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF ALLAN D. NIELSEN, Q.C., A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

INTRODUCTION

1. The Member was admitted to the Bar on June 14, 1973, and practises law in Calgary, Alberta.

2. The Member's primary area of practice is financial services law.

CITATIONS

3. On February 22, 2011, the Conduct Committee referred the following conduct to hearing:

> *1. IT IS ALLEGED THAT you rendered service to a client that brought discredit to the profession, and that such conduct is conduct deserving of sanction.*
>
> *2. IT IS ALLEGED THAT you authorized a trust cheque payable to cash, and that such conduct is conduct deserving of sanction.*
>
> *3. IT IS ALLEGED THAT you failed to obtain a receipt for cash paid to your client, and that such conduct is conduct deserving of sanction.*

FACTS

4. On March 21, 2007, the Law Society commenced a Rule 130 audit on the Member's firm. While the audit was largely uneventful, there was a concern with respect to a client trust ledger card for a client described as X…Inc. The reason for the trust transactions in the X…Inc. ledger card was not apparent. Payments would be received from, for example, a company called Y…Inc. and then paid out to various other companies such as X…Inc. or a company referred to as Z…Inc. The audit also disclosed that a trust cheque had been made payable to cash. At the recommendation of the Manager, Audit & Investigations, an Investigation Order was issued on October 12, 2007 and amended on October 15, 2007.

5. The investigation was completed in July 2010. The investigation was complex as the client had numerous companies and tracking the trust funds was complicated. Three issues were identified: (1) whether the Member assisted his client in an improper purpose; (2) whether the Member authorized and signed a $20,000 trust cheque payable to cash; and (3) whether the Member paid $20,000 to his client without retaining a signed receipt.

6. The investigation and the Member's response disclose the following facts:

6.1 The Member is a senior member of the bar, admitted in 1973. He had been a managing partner of large Alberta firm for a time before that firm merged with four other firms to become a national firm. He sat on the national board of directors for the merged firm for 6 years immediately after the merger. He currently heads the firm's regional financial services group in Calgary, consisting of 16 lawyers;

6.2 The Member has known the principal of the client in question (the "Client"), since the early 1990s, when the Client worked at a recognized insurance company, and where the Client received some industry recognition. The Member's firm provided intermittent legal services to the Client since the early 1990s;

6.3 The Client had a number of companies, two of which were X…Inc. and Y…Inc. Both were described as "financial clubs", which provided education and information on investments. These companies generated income by recruiting people to become members who paid a membership fee, and then a renewal fee in subsequent years. Sales agents for the companies, called "structurists", would do the recruiting and organize seminars;

6.4 In 2003, a non-Albertan financial services regulator issued an ex parte cease trade order against X…Inc., without an opportunity for the Client to address the matter. The cease trade order had nothing to do in relation to the present allegations in this Hearing, or the flow of money into the Member's trust account. The cease trade order was not attacked or appealed by the Client, as the Client viewed it as not having any application and being irrelevant to X… Inc.'s business. The Member and the Client discussed the cease trade order and the Member did not believe that the cease trade order was relevant to his retainer;

6.5 However, the Client felt X…Inc. was "tainted" after the cease trade order, and instructed the Member to set up a new company. As a result, Y...Inc was formed. As far as the Member knew, the two companies had similar business models; Y…Inc. picked up where X…Inc. left off, replacing X…Inc. The Member did not believe Y…Inc. had been incorporated for an improper purpose;

6.6 When Y…Inc. was incorporated in 2003, the Member held shares in trust for the Client, and a Declaration of Trust was executed at that time and placed in the corporate minute book. The Member held all shares in the company on behalf of the Client, who was the Director. There was no attempt or intention to conceal the Client's involvement in Y…Inc., and the Client "was always the face of Y…Inc.";

6.7 In 2004, the Client had an issue with a securities regulator and one of the Member's partners took the file. This file was significant and generated most of the revenue paid to the firm by the Client;

6.8 On or about November, 2004, on an urgent basis the Member arranged to have the shares that were in his name in Y…Inc. transferred to the Client as Y…Inc., as a result of the securities regulator issue. The Client asked that the effective date of the transfer be September 10, 2004, which was not an unusual practice. The Member cannot remember why the transfer itself was dated September 10, 2004. The annual filings reflecting this change were done on November 8, 2004;

6.9 The Member received Y…Inc.'s membership fees for the Client. The members made their cheques payable to the law firm and were deposited to trust and then remitted to Y…Inc. from time to time. From 2003 to 2005, the firm received CAD$1,185,096 and from 2003 to 2006, the firm collected USD$170,005 in membership fees. This money was deposited in the firm's trust account;

6.10 The Member advised that the membership fees were paid into the firm's trust account because the Client wanted to make the membership list subject to solicitor/client privilege to provide the investors with a degree of confidentiality that would be provided to them with the involvement of a law firm, and because Y…Inc. lacked staff to process the paperwork. These were the business purposes explained by the Client to the Member;

6.11 In a memo prepared by the Member, the Client was advised that the fact the firm received the fees would not establish solicitor/client privilege. Even though the Client was told that the membership list would not be protected by solicitor/client privilege, the Client wanted the firm to continue to receive the membership fees, to which the Member acquiesced;

6.12 The Member understood Y…Inc. did not have staff early in the process and could not have received the membership fees directly, but the Member was aware that over time Y…Inc. acquired more staff than it had at the beginning. The Client and the Member never altered the status quo in this regard;

6.13 After the initial influx of funds, most of the funds received were for renewals. In hindsight the Client may have used the good will of the Member's firm and the Client's association with the Member's firm may have provided comfort to members of the public but it did not occur to the Member at the material time that the Client's association with the firm was being used as a selling point in the program;

6.14 The Member had no concern that Y...Inc. was anything but a legitimate investor education program;

6.15 The firm billed Y…Inc. approximately $27,725, over time, for handling the membership fees, although this amount covered other services, as this was a general file. There was no retainer letter on the file, as the Client had been a client of the Firm for approximately ten years;

6.16 Apart from the funds paid into the firm's trust account for membership fees in Y…Inc., beginning in October 2005, the firm also received wired funds from various entities, with the Client instructing the Member on how those funds were to be disbursed. The Member admitted that there was no apparent legal purpose that required the funds to be paid to him in trust. Between October 18, 2005 and February 28, 2007, the firm received and disbursed funds at the instructions of the Client;

6.17 Totals of CAD$5,784,124 and USD$3,176,083 were received in wire transfers and totals of CAD$5,780,968 and USD$3,176,083 were disbursed. Funds came from individuals and entities other than Y…Inc. and were paid out immediately or within a business day to companies or individuals the Member believed to be associated in some way to the Client. The Member stated that he did not give permission to anyone to send these funds to his trust account but took no action to stop the transfers until later;

6.18 The Client suggested to the Member that wire transfers to the firm's trust account would be faster and easier than wiring the funds directly to the bank of the company that was to receive the funds. However this may not actually have been the case. It might have been faster if the funds had gone directly to the company's banks rather than through the firm's trust account and then to the company's banks. Specifically, the firm had to go through a number of steps to issue a trust cheque, such as confirming receipt, obtaining instructions, preparing a cheque requisition and a cheque, having the cheque signed, and then arranging for pick-up or delivery;

6.19 The collection of membership fees and wire transfers overlapped. The Member knew that the Client had problems with the securities regulator as early as 2004 and started receiving and disbursing the wired funds in 2005 while also receiving Y...Inc. membership fees. This raised no concerns for the Member;

6.20 There were no trust conditions imposed on the funds wired into the firm's trust account. The wired funds were not needed for any legal transactions the Member handled on behalf of the Client or his companies. Most of the wired funds came from Y…Inc. and while the Member did not know why the funds were wired to his trust account, he thought that Y…Inc. might be making shareholder loans to other companies controlled by the Client. There was no documentation to support any shareholder loans and

the Member did not issue receipts to Y…Inc. for the funds received, as this was not the Member's or the Firm's usual practice;

6.21 The Member perceived all the funds to be under the control of the Client and, therefore, he believed the Client could use the funds any way he wanted, and that disbursing the funds to several Client companies and other persons was the Client's right;

6.22 The Member did not believe at the time that the funds were improperly diverted investor funds or that he may have been assisting the Client in laundering the funds. He just let the Client make use of the trust account. Receiving wired funds and paying out on instructions without any transaction or legal service involving his firm was not something he had come across at any time in his practice;

6.23 The Member acknowledges he was the individual who completed the trust cheque requisitions for the disbursement of all of the wired funds. He confirms that he was not aware of any specific business or legal purpose for the transactions except for a payment to a construction company for work done on the Client's home, a payment for a hot tub for the Client's home, and a payment for the purchase of 2 motorcycles for the Client and another individual;

6.24 As part of his service to the Client, the Member prepared multiple trust cheques to the same payee (for example X…Inc. and Y…Inc.) on the same date. He did so nine times. The Member did not know the reason for this and he did not take any action to inquire further into the Client's requests in this regard;

6.25 The Member reported that he wanted to stop handling these wired funds because of the workload on his staff caused by the disbursement of the funds, but that he did not have concerns about the transactions themselves. The Member was reluctant to stop handling funds for the Client because he saw it as a customer service issue for a long-standing client and did not want the firm to lose a good client. There was insignificant financial benefit to the Member but the lawyer handling the Client's securities litigation generated significant billings;

6.26 On two separate occasions, members of the firm expressed concerns about the firm's continued involvement with the Client and his companies; once on September 27, 2004, by the lawyer handling the Client's litigation with the securities regulator, who was concerned about the association of the firm with the acceptance of funds which would give the appearance of comfort, drag the firm into the securities regulatory proceedings, and compromise the firm's ability to appear as counsel in those proceedings;

6.27 The Member had a conversation with this lawyer, but the Member and the lawyer do not have clear recollections of exactly what was said, or how that matter was left. While both think that it was at least agreed that the collections issue would be revisited, the collections continued;

6.28 Additionally, on December, 19, 2004, a partner in a different province passed on comments from a private investigator, who was reputed to have worked for a national accounting firm and the RCMP, who described X…Inc.'s business as a giant Ponzi scheme, and that the private investigator also expressed surprise that the Firm, with its stature and reputation, was acting for the Client and his companies. At this time the only services being provided were the collection of fees and the Securities Commission litigation. The Member did not respond to this lawyer, dismissing him as an alarmist;

6.29 The Client was found guilty by a securities regulator of illegal distribution of securities in February 2007 and fined $650,000. The Member immediately determined that he would no longer accept or disburse funds in light of this finding. The Client's appeal of the regulator's decision was handled by the Firm and dismissed;

6.30 Since approximately 2001, the Client and his companies were the subject of investigations by numerous authorities concerning allegations of fraud, false and misleading statements to investors and illegal trading and distribution of securities. During 2008-2009, the Client and an associate were arrested and charged with allegations that include, inter alia, theft, illegal distribution of securities, making misleading statements to investors and fraud, in what is alleged to be a large Ponzi scheme. It is also alleged that the Client and his associate then diverted the funds to their own use. The outcome of these allegations is still pending;

6.31 The Client apparently has not been charged with money laundering under the Criminal Code of Canada. Money laundering is any act or attempted act to disguise the source of money or assets derived from criminal activity. FinCEN (Financial Crimes Enforcement Network) has described the money laundering process as having three phases: placement, layering, and integration. In the placement stage the proceeds of crime are placed in the financial system. In the second phase of laundering, the layering phase, money is moved from company to company, across borders and through as many entities as the launderer can establish while still maintaining control of the money. There is often no business purpose behind the movement of the funds. In the final phase, the integration phase, the money is brought back under the control of the perpetrator and used to purchase assets that appear to be legitimate;

6.32 With the benefit of hindsight, the Member acknowledges he should never have allowed the receipt and disbursement of the Client's funds through the firm's trust account. While he may not have paid enough

attention or devoted enough time to what he was doing for the Client, the Member never considered or suspected that anything the Client was doing was illegal or fraudulent and never suspected that the funds were being laundered;

6.33 The Law Society Rules created on October 3, 2008 with respect to money laundering, including Rules 118.1 - 118.10, and the updated client verification process, were not in effect until approximately 18 months after the material times in question;

6.34 The Law Society Rules prohibiting use of trust accounts for purposes other than in relation to the provision of legal services (now Rule 119.17) were not in effect until after the material times in question;

6.35 The firm's records confirmed that a trust requisition was prepared on April 28, 2006 for a cheque in the amount of $20,000, payable to cash. The requisition was signed by the Member. The trust cheque was prepared and then signed by the Member and another signatory. A staff member contacted the firm's bank and received advice that the bank would cash the cheque. That staff member was asked to personally attend at the bank to pick up the cash, and she did so. The Member accompanied her as she indicated she was nervous about carrying such a large amount of cash. The cash was turned over to the Member when they got back to their office. The Member agreed that he had gone to the bank with the staff member but could not recall whether he gave the cash to the Client or to the Client's spouse. He could not remember if he obtained a receipt from the person to whom he gave the money, but the Member advised that if a receipt was issued, it was misplaced, as it was not on the file. During the investigation, the Client provided investigators a letter acknowledging receipt of the cash;

6.36 The Member did not receive any part of the $20,000, and the Client confirmed in a letter to the Law Society that he had requested the funds for a car purchase, and believed the funds had been delivered to his spouse; and

6.37 The Member advised that he relied on the firm's accounting department to know the Rules of the Law Society, but acknowledged that the breach of the rule was his responsibility. The Member acknowledged that he should not have relied on his staff to know the Rules regarding payments in cash, and he has accepted full responsibility for not being aware of the Rules. The firm's records indicated that this was the only trust cheque ever written to cash.

ADMISSION OF FACTS

7. The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings.

8. The Member does not admit any guilt to any of the citations.

9. This Agreed Statement of Facts is not exhaustive and the Member may lead additional evidence not inconsistent with the stated facts herein.

THIS AGREED STATEMENT OF FACTS IS MADE THIS 14 DAY OF FEBRUARY, 2012.

"Allan Nielsen"
Allan D. Nielsen, Q.C.

12. No other evidence was called by counsel for the LSA.

13. Counsel for the Member called the Member, he was sworn, examined by Mr. Peacock Q.C. and provided the following evidence relevant to the citations:

- X-Inc. was previously incorporated prior to his involvement; he referred the client to counsel in Saskatchewan to deal with the Saskatchewan Securities Commission matters;
- Upon advice received, the client did not pursue any remedies in Saskatchewan;
- The client instructed the Member to Incorporate Y-Inc.
- Y-Inc. operated as an educational club-individuals that purchased a membership in the club would receive certain materials;
- The Member's firm collected membership fees on behalf of Y-Inc. between June 2003 and early 2005;
- It did not occur to the Member that collecting the Membership fees added credibility to Y-Inc.;
- Wire transfers of money began to appear in the Member's trust account in October 2005 without any notice;
- The client provided instructions to the Member to issue cheques to third parties following the receipt of the funds;
- It did not occur to the Member that these deposits and payments had any impropriety attached to them;
- The Member's firm did assist the client with ongoing Alberta securities litigation;
- The monies received by the Member's firm had nothing to do with the Alberta securities litigation;
- The decision in the Alberta securities litigation occurred in February 2007. The Member's firm represented the client in the appeal of his decision. The appeal was unsuccessful (October 2008) and that ended the firm's involvement with Y-Inc.
- The Member's partner that was representing Y-Inc. in the Alberta securities litigation cautioned the Member that the firm should not be collecting the membership fees. The membership fees were petering out at that time. The concern was not over the propriety of receiving the fees but in a potential conflict;
- The collection of the membership fees ceased approximately one year prior to the Alberta securities decision;
- The firm or the Member have not been investigated by the RCMP in relation to dealings with Y-Inc.;

- In regards to citations 2 and 3, the client requested $20,000.00 cash from a deposit made to the Member's account;
- The Member checked with his accounting department to determine if they could do this. They raised no concerns;
- The Member did not check the Rules regarding the propriety of same;
- The cash was given to an assistant of the client;
- The Member thought he obtained a receipt for the cash but was unable to locate it;
- The Member described this as abject ignorance on his behalf. He had never done that before and certainly would never do it again.

14. The Member was then cross-examined by counsel for the LSA and provided the following evidence relevant to the citations:

- Expected the accounting department to know the Rules regarding trust cheques; however, admits that ultimately it is his responsibility;
- The entire matter has been distressing and embarrassing;
- Didn't ignore other partners' concerns. He considered it and agreed that they would revisit the collection of the fees issue;
- Despite comments from others in the Firm, he did not make any independent inquiries;
- He became aware of criminal charges against his client in September 2009 for alleged involvement in a Ponzi scheme.

SUBMISSIONS OF LSA ON CITATIONS

15. The LSA has the onus to prove that the conduct of the Member is such that it is worthy of sanction and must prove this on the balance of probabilities.

16. The Hearing Committee was provided with cases by Counsel for the Member as further referred to herein.

17. In regards to Citation 1, Counsel for the LSA characterized the Citation as one of providing discreditable service. There was no allegation of fraud or that the Member was complicit in any fraudulent dealings with X Inc. The LSA's concern was that the Member's conduct, by permitting the use of his trust account in the manner that it was, resulted in a discredit to the profession. The Member was "blindly" doing what the client instructed him to do without any inquiry or question. There was no legal purpose for the funds to have been paid into trust as admitted by the Member (Exhibit 1, paragraph 6.16).

18. At all material times, there was no Rule prohibiting the use of trust accounts in relation to the provision of legal services, however, Counsel for the LSA submitted that one does not have to have a Rule to be guilty of providing discreditable service.

19. Counsel for the LSA submitted that the burden of proof had been met in relation to Citation 1 by having regard to the following facts:

(a) the Member had knowledge that the client was in trouble with the Saskatchewan Securities Commission;
(b) the Member had been warned by two Members of his own firm about ongoing use of the trust account and that these warnings came before the bulk of the transactions on the trust account. At the very minimum, these warnings should have caused the Member to make inquiries about the transactions, however, he simply ignored them;
(c) the transactions carried on for close to four years;
(d) the Member's admission that he didn't pay attention to what was going on;
(e) the Member's admission to distress and embarrassment regarding these matters and that this distress and embarrassment does get transferred to the profession; and
(f) there is at least an appearance of impropriety by allowing the trust account to be used in the fashion that it was.

20. Counsel for the LSA referred the Hearing Committee to the following provisions of the Professional Code of Conduct:

Interpretation

3 Assessing conduct:

(a) However, the Law Society's primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of an individual to practice law. Disciplinary assessment of conduct will therefore be based on all facts and circumstances as they existed at the time of the conduct. A trivial or technical breach of this Code without significant consequences is unlikely to be sanctioned. A lawyer's intentions and the willfulness of conduct are also relevant.

Chapter 1
Relationship of the Lawyer to Society and the Justice System

1. A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others.

Chapter 2
Competence

C.1 Generally, any involvement of a lawyer will illegal conduct, however indirect, has the potential to encourage public disrespect for the law itself as well as the profession and its members.

Chapter 3
Relationship of the Lawyer to the Profession

1. A lawyer must refrain from person or professional conduct that brings discredit to the profession.

21. In relation to Citations 2 and 3, there are clear Rules prohibiting a trust cheque being written to cash. The Member also failed to obtain a receipt. This is what occurred here. The Member admits that he was not aware of the Rule.

22. The Member received no benefit in participating in this transaction and there was nothing dishonest in his conduct.

23. Counsel for the LSA referred the Hearing Committee to the following sections of the Rules:

Prescribed Financial Records and Clients' Files

122 (2) The financial records required to be maintained under this Rule shall consist of at least the following:

(b) a book of original entry showing all withdrawals of trust money and showing the cheque number, the date of the withdrawal, the name of the payee and identification of the client with respect to whose affairs the withdrawal is made;

Withdrawing and Transferring Trust Money

124 (4) Except as provided in subrules (5), (5.1) and (6), money may be withdrawn from a trust account only be a cheque which must:

(b) not be made payable to cash or bearer;

24. Counsel for the LSA submitted that if the Member was only faced with Citations 2 and 3, that there would likely be no conviction as the breach was technical and trivial. However, given the entirety of the matter and considering the factors noted in paragraph 19 hereof, the Member's conduct was no longer a technical or trivial breach of the Rules.

25. Counsel for the LSA submitted that the distinguishing feature of this case regarding the three cases provided to the Hearing Committee by Counsel for the Member is that in this case the Member permitted the use of his trust account in an inappropriate was repeatedly.

SUBMISSIONS OF MEMBERS COUNSEL ON CITATIONS

26. Counsel for the Member referred the Hearing Committee to the following cases in support of his submission that the Citations had not been made out and should be dismissed:

(a) **LSA v. Hotzel**
In this case the Member received one deposit to his trust account. The Member was suspicious that the funds were tainted by illegality and refused to follow the client's disbursement instructions. The bulk of the funds were forwarded to a second lawyer. The owner of the funds was the victim of a fraud. The Hearing Committee dismissed the charge against the Member as he did not accept the retainer. He was not obligated to determine the source of the funds outside of the instructions he received from the client.

(b) **LSA v. Larson**
The Member received lending documents and monies, which were deposited to his trust account. Upon instructions from the client he paid the trust monies to his client. The trust monies were dealt with inappropriately by the client and had been obtained by the client by fraud. The Hearing Committee dismissed the citation against the Member as there was no requirement to make inquiries of the use of the funds and the Member was entitled to rely upon the client's instructions.

(c) **LSA v. Geisterfer**
The Member received funds and paid them out in accordance with the client's instructions. Unknown to the Member, the funds belonged to a third party. The Rules of the LSA did not prohibit the use of a trust account to facilitate the business of a client, even in circumstances where no legal services are provided. The Hearing Committee dismissed the charge against the Member as he followed the instructions of his client.

The other two decisions were referenced in the Alberta decisions noted above and were provided to the Hearing Committee for further reference.

27. In relation to Citation 1, Counsel for the Member submitted that the Member, with the benefit of hindsight, did two things he should not have done:

(a) He collected Membership Fees on behalf of the client for a period of 18 months between 2003 – 2005. By doing so through the Member's firm, he may have added credibility to the business of the client. Counsel noted that there is no complaint against the Member or his firm by investors in the client's company. This was not improper or discreditable; and
(b) Monies were received and disbursed upon the client's instruction without any real investigation or query by the Member. At the time, there was no Rule prohibiting this, however, with hindsight he should not have done it.

28. Counsel for the Member submits that none of this conduct impugns the credibility of the law firm or the Member. The conduct occurred prior to any LSA Rule prohibiting same and there was no proof of any loss. Accordingly, Counsel submits Citation 1 should be dismissed.

29. In relation to Citation 2, Counsel for the Member submitted that the Member asked his accounting department if one could write a trust cheque to cash and no concern was raised. He acknowledges that he was ultimately responsible to know that there was a Rule prohibiting same and that he shouldn't have done it. It was an unintentional breach and no loss was suffered. Accordingly, Counsel submits Citation 2 should be dismissed.

30. In relation to Citation 3, Counsel for the Member notes that the Member believed he obtained a receipt for the cash, however, that he cannot find it. This is a very technical breach and Counsel for the Member submits that Citation 3 should be dismissed.

DECISION OF HEARING COMMITTEE ON CITATIONS

31. Section 49 of the *Legal Profession Act* defines conduct deserving of sanction:

> 49 (1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that
>
> > (a) is incompatible with the best interests of the public or of the members of the Society, or
> > (b) tends to harm the standing of the legal profession generally,
>
> is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

32. Conduct deserving of sanction need not be disgraceful, dishonourable or reprehensible. ***Brendzan v LSA*** (1997), 52 Alta. L.R. (3d) 64 (Q.B.), at paras 30 - 32. Error of judgment may or may not amount to conduct deserving of sanction. ***Law Society of Alberta v. Oshry***, [2008] L.S.D.D. No. 164; ***Law Society of Alberta v. Ter Hart***, [2004] L.S.D.D. No. 25; ***Law Society of Alberta v. Smeltz***, [1997] L.S.D.D. No. 144.

33. The issue is whether the conduct rises to the level of conduct deserving of sanction. In assessing sanctionable conduct, hearing panels often refer to ***Re Stevens and Law Society of Upper Canada*** (1979), 55 O.R. (2d) 405 (Div. Ct.), at p. 410:

> What constitutes professional misconduct by a lawyer can and should be determined by the discipline committee. Its function in determining what may in each particular circumstance constitute professional conduct ought not to be unduly restricted. No one but a fellow member of the profession can be more keenly aware of the problems and frustrations that confront a practitioner. The discipline committee is certainly in the best position to determine when a solicitor's conduct has crossed the permissible bounds and deteriorated to professional misconduct. Probably no one could approach a complaint against a lawyer with more understanding than a group composed primarily of members of his profession.

34. A variety of factors may be considered. These include: whether a specific rule or duty was breached; whether the Member was acting dishonestly or in bad faith; whether the act was isolated or planned; whether personal gain was involved; the opportunity to reflect before the conduct was undertaken; the results or impact of the conduct on the parties, litigants, profession, administration of justice, or public; any steps to cover up the conduct; and, what steps could have been and were taken to correct any errors.

35. On balance, the Hearing Committee characterizes Citation 1 as a situation where the Member unwittingly permitted the use of the firm's trust account for purposes that may have been illegal (an alleged Ponzi scheme). It is far from clear that the Member ever considered that the client was doing anything illegal or fraudulent at the time of the transactions – in fact the outcome of these allegations against the client are still pending. There were a series of transactions over a number of months, that with the benefit of hindsight, the Member now acknowledges should have raised some concern, however, at the time there were no apparent or obvious issues. The client was well known to the Member and he had no concerns with the client previously. The Hearing Committee is not able to conclude that the Member's conduct deserves sanction.

36. In regards to Citations 2 and 3, the evidence establishes that the Member did breach the Rules regarding the payment of monies out from the firm's trust account, the conduct was so trivial or technical that it did not approach the threshold of conduct unbecoming as defined in s. 49 of the Legal Professional Act.

37. As a result, the Hearing Committee finds that all of the Citations have not been made out and accordingly are dismissed.

CONCLUDING MATTERS

38. The decision and the transcript in this hearing are to be made available to the public with the names of the complainant, clients, third parties or other employees to be redacted.

Dated this 4 day of June, 2012.

James A. Glass, Q.C., Bencher
Chair

Frederica Schutz, Q.C., Bencher

Dr. Larry Ohlhauser, Lay Bencher