

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the “LPA”); and

IN THE MATTER OF a Hearing regarding the conduct of
Stephen Jenuth, a Member of the Law Society of Alberta

INTRODUCTION

[1] On February 19, 2010, a Hearing Committee (the “Committee”) of the Law Society of Alberta (“LSA”) convened at the LSA office in Calgary to inquire into the conduct of Stephen Jenuth, a Member of the LSA (the "Hearing"). The Committee was comprised of Dale Spackman, QC, Chair, Ron Everard, QC, Member and Frederica Schutz, QC, Member. The Hearing was adjourned for the reasons below, reconvened on September 13, 2010, at which time the Hearing was further adjourned, then reconvened on March 4, 2011, at which time the Hearing was completed. The LSA was represented by Garner Groome. The Member was present throughout the Hearing and was not represented by counsel. Also present at the Hearing during his testimony was the Complainant, S.M.

A. February 19, 2010 Proceedings

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

[2] The Chair introduced the Committee and asked the Member and Counsel for the Law Society whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.

[3] Counsel for the LSA indicated that the Complainant in this matter had been contacted and indicated he would not attend this Hearing, but requested that his name be redacted from the Report of the Committee and any other materials made available to the public, which was ordered by the Committee.

[4] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member established jurisdiction of the Committee and were entered as Exhibits in the Hearing with the consent of Counsel for the LSA and the Member.

[5] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the Rules of the LSA pursuant to which the Director, Lawyer Conduct determined that the Complainant was to be served with a Private Hearing Application Notice was entered as Exhibit 5 in

the Hearing with the consent of Counsel for the LSA and the Member. Counsel for the LSA advised that the LSA did not receive any application request for a private hearing. The Chair confirmed that no private hearing application was proposed at the Hearing and, accordingly, directed that the Hearing be held in public.

- [6] Exhibit 6 consisting of an Agreed Statement of Facts, including an Admission of Guilt by the Member (the “ASF”) was tendered to the Committee, but after argument, the Committee refused to accept the ASF into evidence.

CITATIONS

- [7] The Member faced the following Citation as set out in the Notice to Solicitor:

IT IS ALLEGED that you failed to keep your client S.M. informed and that you failed to ensure that your client S.M. understood your advice and recommendations, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

- [8] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee found that the Citation against the Member was not proved and the Citation was dismissed.

SUMMARY OF FACTS

- [9] Those facts that are not in dispute are that the Member was retained by the Complainant with respect to a wrongful dismissal dispute with his former employer, the Calgary Police Service (“CPS”). A Statement of Claim was filed and served on several Defendants, including the CPS, the Calgary Police Association (“CPA”), and two individuals. A parallel proceeding was also commenced with the Alberta Labour Relations Board. The CPA made a formal offer of judgement in the civil action, which was rejected by the Complainant, after which the CPA applied to have the action against it dismissed. The Member was successful in defending that application at the Queen’s Bench level and the CPA appealed to the Court of Appeal. The appeal was allowed and double costs were awarded against the Complainant. The CPA enforced payment of its costs by filing a writ of enforcement against a property jointly owned by the Complainant and his wife and received payment when the property was sold.

SUBMISSIONS ON AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT

- [10] Counsel for the LSA advised the Committee that the ASF was prepared based on materials before the LSA in connection with this matter and discussions with the Member and the Complainant in October 2009. Counsel advised that he had been contacted recently by the Complainant, who took exception to the reference to “11 days” in paragraph 6 of the ASF and suggested it should rather read 11 or 12 months. Counsel advised the Committee that he did not feel this time line was determinative of the matters before the Committee and that the Member had confirmed to him his position that the reference is accurate. It was also clarified that the request by the Complainant for his file

from the Member as referred to in the last sentence of paragraph 6 of the ASF occurred after the decision of the Court of Appeal and the settlement of the Bill of Costs.

- [11] Counsel for the LSA advised that acceptance of the ASF would avoid having to go through a full hearing process in this matter. He contended that whether the correct time period is 11 days or 11 months in paragraph 6 of the ASF, the issue of the Member failing to keep his client adequately informed still exists and the “consequence is the same”.
- [12] Counsel for the LSA queried whether if one client only is harmed, does this bring the profession in general into disrepute and invoke Chapter 9, Rules 12 and 14 of the *Code of Professional Conduct* (the “Code”). Counsel submitted that the client in this matter (the Complainant) was not adequately apprised of the consequences and options available. Counsel advised that, if a finding of guilt were made in this matter, he would be asking for an order of the Committee referring the Member to the Practice Review Committee and costs in addition to any sanction imposed.
- [13] The Member advised the Committee that he does not feel he properly served his client and reiterated his Guilt. The offer of judgment made by one of the Defendants in the litigation giving rise to this matter was \$4,000 when his client (the Complainant) sought much higher damages. The Member incorrectly thought that the costs that would be awarded in the Court of Appeal proceedings would be far less if he made written submissions, as was done. As a result, he was in error in advising his client of the potential quantum of costs in the proceedings. The Member advised that a second proceeding had been commenced before the Labour Relations Board. He felt he should have dealt more carefully with the Offer of Judgment tendered by one of the Defendants.
- [14] Ms. Schutz inquired of the Member as to how long he has been practising in the litigation area and the Member responded since 1986. The Member indicated that it has always been his practise to inform any client of a formal Offer of Judgment. However, in this case he did not keep a copy of his file and could not confirm that this was done. The Member remembered discussing with the Complainant the decision of the Court of Appeal and providing an estimate of costs in March or April and approving the costs by correspondence in September.
- [15] Counsel for the LSA advised that the Complainant was provided with “excerpts that applied to him” from the ASF, being paragraphs 3 to 10 thereof. The Complainant was not informed of the Admission of Guilt by the Member until the conversation he had with LSA counsel just prior to the date of this Hearing.
- [16] Mr. Everard referred to paragraph 11 of the ASF and the reference to the Complainant having “law related training” and sought further clarification. The Member advised that the Complainant was a police officer and that his spouse was not a police officer but a “sworn employee of some sort”. Mr. Everard inquired as to why the Member had entered an Admission of Guilt when he may have an arguable defence in this matter. The Member responded that he was concerned and embarrassed with his conduct and not confident that he had given sufficient advice to the Complainant. He felt that in

attempting to explain the Offer of Judgment he may have been too cavalier and careless in suggesting a written argument in the Court of Appeal; that he should have looked at the scheduled costs and would realize they would be the same.

- [17] **The Hearing was adjourned to allow the Committee to consider acceptance of the Agreed Statement of Facts and Admission of Guilt.**
- [18] The hearing was reconvened and the Chair advised that the Committee was not prepared to accept the ASF and accordingly it was not considered as part of the evidence in the Hearing.
- [19] Counsel for the LSA indicated that this Hearing could go forward at a future date, but that it would be the decision of the Member as to whether to proceed with this Committee or insist on a new Hearing Committee due to fairness as this Committee has heard the submissions of the Member on his Guilt. The Member indicated that he would have no objection to this Committee proceeding in this matter. Counsel for the LSA indicated that he would set a new Hearing date.
- [20] **The Hearing was adjourned**

B. September 13, 2010 Proceedings

SUBMISSIONS OF COUNSEL FOR THE LSA AND THE MEMBER

- [21] Counsel for the LSA advised that the Complainant, S.M., was now present at the Hearing, that the Member had provided additional disclosure and that he would be seeking a further adjournment of the Hearing to consider the material before him and to give the Complainant an opportunity to consider the material and call additional witnesses, if appropriate. Counsel advised that if the Hearing were further adjourned, the LSA would be seeking costs of \$500 in respect of the adjournment.
- [22] The Member advised the Committee that he had conducted certain searches at the Land Titles Office and found documents that may be germane to the proceedings and timing of events in this matter. He does not object to the adjournment, apologized for the late disclosure, and asked that the cost issue be dealt with at the reconvened hearing.
- [23] The procedure record from the Court of Appeal and the Court of Queen's Bench were provided, and also the Statement of Claim and Statement of Defence had been provided by the Member to Counsel for the LSA and it only occurred recently to him to conduct the Land Titles Office search.
- [24] Counsel for the LSA indicated that the LSA did not do a Land Titles Office search, as they were not aware that it would disclose any information germane to the issues at the time of the investigation.
- [25] The Member advised that he had just obtained the documents from the Land Titles Office last week, which were reviewed by him on the weekend. Ms. Schutz indicated that the

Committee would require further disclosure to give guidance on the time lines in respect of this matter (including the court documents and procedure cards, etc.) and the Member indicated that he would attempt to obtain further materials including his written submissions on costs, records from his file and accounting records, etc. However, the Member was no longer in possession of his file.

- [26] Counsel for the LSA indicated that the issue of the location of the file is “a bit of a mystery”. Neither the Complainant nor the Member claims to have the file. Attempts will be made to locate the file, but the onus is on the Member to do this.
- [27] Mr. Everard expressed concern about the comments on the availability of the file and Counsel for the LSA confirmed his understanding that the Complainant had only picked up the material that he had provided to the Member and not the entire file. The Complainant confirmed this and indicated that he was only in possession of the material produced in the course of the proceedings by him and does not have the Member’s file.
- [28] Counsel for the LSA indicated that he might introduce a revised Statement of Facts and Admission of Guilt at the reconvened hearing if the requested adjournment is granted.
- [29] **The Hearing was adjourned to allow the Committee to consider the request for a further adjournment.**
- [30] The Committee granted the application for adjournment of the Hearing. However the adjournment was granted on the condition that the Committee obtain further disclosure, including the documents requested by Ms. Schutz, within 30 days, together with a revised Exhibit Book 14 days thereafter. The Committee anticipated that the rescheduled hearing would occur sometime in December of 2011. The Committee was not prepared to award costs of the adjournment against the Member at this time.
- [31] The Member indicated that he would attempt to locate his file and produce any materials, including any electronic records that are still in his possession. The Member reiterated his recollection that the file was in the box of materials given to the Complainant; the Complainant confirmed his previous advice that he did not have the Member’s file. Counsel for the LSA indicated that he would determine what materials The Alberta Lawyers Insurance Association may be in possession of in respect of this matter.
- [32] **The Hearing was adjourned.**

C. March 4, 2011 Proceedings

- [33] Counsel for the LSA introduced new Exhibits 7 through 32 including Exhibit 7, being an audio recording to be played later in the Hearing. Counsel advised that an additional entry should be added to the diary entries of the Member contained at Exhibit 9 being “1pm M File – no calls”. In addition, counsel requested the removal of all of Exhibit 9 other than the first page, which was agreed to by the Member.

- [34] The Member stated that he had understood there would be a revised Statement of Facts and Admission of Guilt introduced at the reconvened Hearing. Counsel for the LSA indicated that a revised document had been provided to the Member. However, the position of Counsel for the LSA was that the Committee had accepted the Statement of Facts other than paragraph 6 based on the advice of the Committee received after the September 13, 2010 proceedings. Therefore, Exhibit 6 in the Exhibit Binders had been left intentionally blank.
- [35] Exhibits 7 to 32 were introduced as evidence in the Hearing with the consent of Counsel for the LSA, the Member and the Committee.
- [36] The Chair confirmed that there was no new private hearing application, but that the names of the parties would be redacted from the Hearing Report and transcripts of the Hearing to preserve privilege.

EVIDENCE

Evidence Of Complainant

- [37] Counsel for the LSA indicated that he would call the Complainant, S.M., to provide evidence.
- [38] The Chair inquired as to the Land Titles documents that had been referred to at the reconvened Hearing held on September 13, 2010 and the Member advised the Committee that he was not proceeding on that line of argument.
- [39] The Complainant, S.M., was called by Counsel for the LSA to testify and was administered the oath by the Chair.
- [40] The Complainant testified that he entered the Armed Forces after high school, was a commissioned officer and provided his work history. He is currently a fraud investigator with the Government of Canada investigating Employment Insurance fraud.
- [41] The Complainant testified that his former employment with the CPS gave rise to the complaint at issue in this Hearing. An incident occurred involving an armed standoff where he had a dispute with a superior officer. He was asked to resign and he did. The Complainant then applied for employment in Manitoba. The matter giving rise to his resignation from the CPS was raised with his prospective employer in Manitoba and he did not obtain the employment. The Complainant retained the Member to commence a civil action for wrongful/constructive dismissal against the CPS and the CPA. The Complainant thought he had signed a Contingency Agreement with the Member. The Member prepared a Statement of Claim and the Complainant arranged service to save costs. The Member was successful at the initial hearing of the matter and the CPA appealed.
- [42] Counsel for the LSA referred the Complainant to Exhibit 12 (the draft Statement of Claim). The Complainant testified that he thinks he received a copy of the draft but was

not sure. Counsel referred the Member to Exhibit 13 (the final Statement of Claim). The Complainant reiterated that he had received this document (Exhibit 14) and had arranged service.

- [43] Counsel asked the Complainant what, in his understanding, the Court of Appeal hearing entailed. The Complainant testified that he understood he had “won something” that was being appealed. He understood there was a dispute as to whether the case would go forward which he “won” and that was appealed.
- [44] Counsel referred to Exhibit 16 (Amended Statement of Claim). The Complainant did not remember seeing this document and does not remember whether the Member told him that the Statement of Claim would be amended. He also did not recall how the amount of the damage claimed in the Amended Statement of Claim was determined. The Complainant thought that the amount in paragraph 21 of the Amended Statement of Claim was agreed to between himself and the Member. However, he does not know where the amount of \$196,000 in paragraph 20 came from. The Complainant testified that the Member did not explain why he made amendments to the Statement of Claim. However he does remember discussions with the Member to add “John Doe” as a party to the proceedings, but nothing further.
- [45] The Complainant testified that the Member did not provide regular reporting and he had to call him repeatedly. The Complainant could not remember if he arranged service of the Amended Statement of Claim, as he may not have been in Calgary at this time.
- [46] Counsel referred the Complainant to Exhibit 17 (Affidavit of Records), which the Complainant thought had been signed as part of a Disclosure package. The Complainant understood that one or more Defendants had applied to strike the claim. The Complainant testified that he had no involvement with responding to this application. The Complainant referred repeatedly to the “appeal” and remembers being advised that he could proceed by written submissions or appearance and that he requested the latter.
- [47] The Complainant testified that the Member was not sending letters with reports on his case, he always had to contact the Member for updates, and he never received any documentation. The Complainant understood there was an appeal. He was working up North and never received anything by way of reports and was always of the impression that the action would be proceeded with. The Complainant testified that he was not provided with a copy of the Notice of Appeal or copies of correspondence. Further, the Complainant testified that he was not provided with or asked to provide input into Exhibit 19 (Factum of Appellant), Exhibit 20 (Factum of Respondent), Exhibit 21 (Written Submissions), and he was always of the understanding that a hearing of the matter would be held at the Court of Appeal. The Complainant testified that he was not provided with Exhibits 22, 23, 24, 25, 26 or 27. The Decision of the Court of Appeal (Exhibit 26) was not discussed with the Complainant until after he learned of the Writ of Enforcement (Exhibit 27) from his wife. The Complainant testified that this was the first he knew of any judgment against him, that he was “losing it”, and was “very emotionally distraught”. The Complainant phoned the Member and asked “what the hell was going on?”. He was advised that he had lost at the Court of Appeal, that the Member had consented to the

Court costs which should have been \$10,000 and that the Member would “make phone calls”. The Complainant testified that he had sold property in High Prairie and the amount of the Writ of Enforcement was paid out of the proceeds of sale. The Complainant testified that he was not aware that he was incurring any legal costs as a result of the Court of Appeal proceedings and thought that the matter was going to a hearing. The Member had sent him a copy of the Judgment and he had a meeting with the Member (he thinks sometime around the end of 2006) when the Member explained what had happened and the Complainant asked the Member “why he didn’t know anything about it”. He was advised by the Member that the “case was thrown out because they didn’t respond”. He asked why and the Member advised him that he thought this was not necessary but that, in hindsight, it may have been a mistake. Counsel for the LSA pointed out to the Complainant that in his complaint he indicated that he had learned of the Court of Appeal decision in March of 2005. The Complainant testified that this was a typo and should have read 2006, although he could not recall the exact month. The Complainant testified that the Member told him the time to appeal the Court of Appeal decision had elapsed and the Member said he was not prepared to continue with the case. Thereafter, the Complainant picked up his file from the Member. The Complainant recalls being informed of an Offer of Judgment to settle for \$2,500, which he rejected. The Complainant testified that the Member did not explain the significance of the offer or the potential consequences of not accepting it.

[48] The Complainant testified that at the same time as the Member launched the lawsuit against the CPS and the CPA, he initiated a Labour Board complaint, which the Complainant understood he had to do as a prerequisite to commence the civil suit. The Complainant testified that he provided several binders and understood that the Member was pursuing some kind of wrongful/constructive dismissal judgment. The Complainant testified that he has never paid the Member for anything (including disbursements) and remembers signing a Contingency Agreement in respect of the civil suit. The Complainant testified that the Member advised him that after the Statement of Claim in the civil suit was filed he had determined that he had to file a claim with the Labour Relations Board. The Complainant was not provided with a copy of Exhibit 29 (letter dated June 10, 2005 from Member to Alberta Labour Relations Board enclosing claim) and had no input into this document. Counsel for the LSA referred the Member to Exhibit 30 (Letter from Labour Relations Board addressed, among others, to the Complainant). The Complainant recalls receiving this letter and testified that he called the Member and understood that the Member was dealing with it. Counsel referred the Complainant to Exhibit 31 (Reply to Request for Details from Labour Relations Board), which the Complainant does not recall seeing before. Counsel referred the Complainant to Exhibit 32 (Decision of the Labour Relations Board dismissing the complaint). Again, the Complainant testified that he does not recall receiving this letter and thought it was “tied into why we were going to the Court of Appeal...hearing that was supposed to happen”. The Complainant testified that he did not receive any correspondence from the Member regarding the Labour Relations Board hearing, including Exhibit 30.

[49] The Complainant testified that he understood on appeal he had a choice of written or oral evidence and he told the Member he wanted a hearing. The Member did advise the Complainant that the other side wanted to proceed by written submissions. However, the

Complainant testified that he only learned that the appeal was proceeded with by written submissions when informed of the Judgment/Writ of Enforcement for costs.

- [50] The Complainant testified that it was after his meeting with the Member that he terminated his services and picked up a box of documents he had provided to the Member. The Complainant asked for “all relevant documents” in his telephone conversation with the Member and attended at his office with a tape recorder. The Complainant testified that the box he received had materials/documents not belonging to him or his file, which he removed and returned to the Member.
- [51] Counsel referred the Complainant to Exhibit 8 (transcript of tape recording) provided by the Complainant. He advised that the word “CEO” at the bottom of page 3 should read “Seal”.
- [52] The Complainant testified that he received legal advice on what he should do with the materials he received from the Member, although he can’t remember exactly when he retrieved the box. The Complainant thinks he recorded this information but it is not discernible. The Complainant testified that this would have happened after he learned of the Writ of Enforcement and met with the Member. The Complainant reiterated that the box he received from the Member contained documents he provided and correspondence to the Member regarding his case. The Chair inquired of the Complainant as to whether he still has the box of materials and the answer was in the affirmative. He was asked whether he provided it to the LSA and the answer was also in the affirmative.
- [53] The Complainant testified that he has now resolved matters with the CPS and been offered new employment. The Complainant testified that he has filed a civil claim against the Member; however, his current counsel has advised him that he has changed his practise and will not proceed with this action. The Complainant is in the process of attempting to retain alternative counsel. He has talked to 12 lawyers.

Cross Examination of Complainant By Member

- [54] The Member inquired of the Complainant whether they first met in May of 2002. The Complainant responded that he could not recall, but acknowledged that it was after he resigned from the CPS and that prior to that he was a “Probationary Constable” and was advised by the CPS that if he resigned they would not proceed with a hearing into his alleged misconduct and would not make adverse comments to prospective employers.
- [55] The Member suggested he met with the Complainant in December of 2002 and provided the Complainant with a draft Statement of Claim. The Member suggested that there was a change from the initial draft concerning the Complainant’s place of employment and suggested he had a couple of meetings with the Complainant to discuss defences to the Statement of Claim, which meetings the Complainant did not recall. The Member suggested that the Complainant called him and authorized the filing of the Statement of Claim, which again the Complainant did not recall. The Complainant further testified that no documents were sent by mail. The Member suggested that the original Statement of Claim was never served. The Complainant wasn’t sure. The Member suggested that

he met with the Complainant a number of times and suggested he retain a labour lawyer but that the Complainant insisted on proceeding in civil court. The Complainant confirmed that he had provided instructions to the Member to proceed with a civil claim. The Member suggested that the Complainant attended at his office in December of 2002 when the Member learned that the Complainant had investigated potential counsel, which was discussed, as well as the amount of damages to be claimed. The Complainant did not recall that meeting.

- [56] The Complainant confirmed that he picked up “one set of documents” at the Member’s office and arranged for service on the CPS the Chief of Police and an individual. The Complainant further confirmed that he was advised by the Member of the settlement offer. The Member suggested that he told the Complainant he could face costs if he did not accept the settlement offer. However, the Complainant did not recall this advice. The Member stated that he told the Complainant the Defendants were applying to strike the action and that the Member felt he could be successful in the law suit. The Complainant acknowledged this and that he was advised of the likelihood of success. The Member suggested that he explained the offer of settlement again to the Complainant. However, again the Complainant did not recall and felt it was a “dead issue”.
- [57] The Complainant confirms that the Member told him about the appeal. The Member suggests that the Complainant wanted witnesses called at the Court of Appeal and that he advised the Complainant that could not occur. The Member suggested he advised the Complainant that written arguments at the Court of Appeal might reduce costs. The Member further suggests that he told the Complainant about the result of the appeal in March of 2006 and provided him with an estimate of costs of \$10,000. The Complainant denies that this advice was given.
- [58] The Member suggested there were a series of meetings and discussions between him and the Complainant throughout where he gave the Complainant advice. However, the Complainant denies that most if not all of these meetings occurred.
- [59] The Member suggested that the proper forum in respect of the dispute between the Complainant and his former employer may have been the Labour Relations Board and that he told the Complainant that there was a danger in proceeding in both that forum and the civil courts. The Complainant testified that he understood this was merely a “procedural matter”. The Member suggested that no Contingency Agreement had been entered into between himself and the Complainant. The Complainant testified that he understood that the Member would receive 30% of any damages awarded and that the Member was “not doing it out of the goodness of his heart”. The Member suggested that this is exactly what he was doing.
- [60] Mr. Everard referred to Exhibit 9 and the diary entries in the Member’s records in respect of his meetings with the Complainant. The Complainant confirmed that he didn’t make notes of meetings with the Member and that he does not know if these are entries in respect of meetings and telephone conversations or merely the times when the Member worked on the file. The Complainant confirmed that he has no independent records of

meetings with the Member. The Complainant understood that his case was strong and that the Member would not have taken the case on a contingency if he did not share that view, so he did not inquire about what would happen if he was unsuccessful in the case. The Complainant wanted two individuals called as witnesses and Discoveries held.

Examination Of Member By Counsel For The LSA

- [61] The Member was called as a witness by Counsel for the LSA and the Chair administered the oath.
- [62] The Member testified that he met the Complainant in May of 2002. The Member referred to Exhibit 9 and the entries in his day timer and advised that these would only include prescheduled meetings with the Complainant or time records, not phone calls.
- [63] The Member testified that in December of 2000 the Complainant received a letter from the Chief of Police indicating that if he did not resign, he would face disciplinary action and that an agreement was reached that the Member would resign. After the initial meeting in May, the Member next met the Complainant in June of 2002. In December of 2002, the Member noted a limitation date coming up in the matter and met the Complainant again on December 23, 2002 as evidenced in Exhibit 9. The Member testified that he provided the Complainant with a draft Statement of Claim on December 24 and subsequently received instructions and information to complete the Statement of Claim, which was filed on January 2, 2003. The Member reiterated that when he first met with the Complainant he indicated to him that this may be a matter better dealt with by the Labour Relations Board if he could demonstrate that the CPA misrepresented his agreement with the CPS regarding disclosure. The Member testified that subsequent to this, the employment situation of the Complainant changed and the Statement of Claim was amended. The Complainant had also provided him with “figures”. The Member testified that it was his understanding that the Complainant served the CPA and K with the Statement of Claim.
- [64] The Member received an offer of judgment (settlement offer) in February of 2003 from the CPA and advised the Complainant of same, which was rejected by the Complainant. The Member testified that he advised the Complainant that he could have costs awarded against him if he did not accept the offer of judgment but he did not mention double costs as being a possibility. The Member admits that he failed to file an Affidavit of Records, but was waiting for details of the defence of the CPS. An application was made to dismiss the action by the CPA and K and the Member testified that he advised the Complainant of this and succeeded in the application (that is, the dismissal was not allowed) and that he expected an appeal. An appeal was filed and he and the Complainant had a number of discussions. At this time, the member was made aware by the Complainant of potential witnesses and he advised the Complainant that he would have to wait until the result of the appeal was determined to discuss potential witnesses if the action was to proceed.
- [65] The Member testified that he thought it appropriate to conduct the appeal in writing. The Complainant wanted evidence heard on the appeal and the Member explained to the

Complainant that no evidence could be heard, as the appeal was only to deal with a specific issue of law. The appeal was allowed and the action dismissed. The Member testified that he advised the Complainant of this and, erroneously, that costs would be approximately \$10,000.

- [66] The Member testified that at the time the appeal was heard in the Court of Appeal, the matter was still before the Labour Relations Board (a decision was rendered on April 3, 2006). After the Court of Appeal decision, the Member testified that he met with the Complainant on approximately April 24 and advised the Complainant that he should perhaps seek a labour lawyer if he wanted to proceed with the matter. The member testified that at this time his retainer was terminated and the Complainant picked up his box of documents. The Member was not provided with notice of any enforcement proceedings to recover costs against the Complainant. Throughout the matter, there had been very limited written correspondence between the Member and the Complainant. The Member testified that he believed he gave advice to the Complainant as matters progressed and that the Complainant accepted his advice.
- [67] Counsel for the LSA submitted that the Committee has no evidence to support the Member's version of events, as he has been unable to produce his file or any notes from that file. Counsel submitted that the Member does not have an exact independent recollection of the alleged meetings with the Complainant other than the meeting when he discussed with the Complainant the costs award in the Court of Appeal proceedings and the meeting where he was instructed on the amount of damages to be claimed in the civil action of \$1.3 million. The Member admitted that his diary entries do not reflect phone calls.
- [68] Counsel for the LSA referred the Member to the Queen's Bench procedure card in respect of the civil action with reference to the Member's testimony as to when he advised the Complainant of the result of the Queen's Bench action. The Member referred to this as having been done at a meeting on April 24, 2002. However, the reasons for judgment were filed on May 13 and the hearing held on May 11.
- [69] The Member testified that the Complainant was told of the Court of Appeal decision and at the same time he discussed the proceedings with the Labour Relations Board. The Member told the Complainant about the amount of costs award at the Court of Appeal at this time. The Member testified that he met with the Complainant shortly after the Labour Relations Board decision was given and advised that the action against the CPS was still outstanding. The Member feels he would have given the Complainant his copy of the decision at that time.
- [70] Counsel for the LSA introduced Exhibit 33 (response letter to the Complaint dated July 30, 2007 from the Member to the LSA) and Exhibit 34 (letter dated January 10, 2008 from the Member to the LSA adopting his previous response). The Exhibits were entered as evidence in the Hearing with the consent of Counsel for the LSA and the Member.
- [71] The Member testified that the Complainant had arrived at his office to remove his box of materials without an appointment and the Member had not yet had a chance to organize

his file. The Member was contacted when out of the office and the Member agreed to allow the Complainant to take the box. The Member has searched for his file and is unable to locate it. The lawsuit by the Complainant against the Member has been referred to the Alberta Lawyers Insurance Association.

- [72] The Member testified that he did not enter into a contingency agreement and that if the matter had been successful he would have billed the Complainant, which he has not done to date. The Member claimed he took instructions on how to proceed from the Complainant and proceeded on the facts and subject to exercising his professional judgment.
- [73] Mr. Everard queried whether this was a “unique” file. The Member felt that the client was quite intelligent and seemed to have more faith in the Court process than the Labour Relations Board. There were times when the Member disagreed with the instructions he received from the Complainant (for example, the \$1.3 million damage amount) but reluctantly agreed. Counsel for the LSA suggested that the \$1.3 million damage award was based on advice given to the Member by the Complainant.

Submissions On Guilt

- [74] Counsel for the LSA submitted that there are conflicting versions of events given by the Complainant and the Member and that the Committee should choose one witnesses version over the other and look at the totality of evidence after weighing the testimony and determining if the Member properly represented the Complainant. Counsel also referred to Chapter 9, Rules 12 and 14 of the Code and submitted that the outcome of the matter in question is not relevant and the client must be kept fully informed.
- [75] Although the Member deeply regrets how things have worked out for the Complainant, he submitted that he did keep the client informed, gave advice, sought his input on decisions and took his instructions.
- [76] **The Hearing was adjourned to allow the Committee to consider Guilt.**

Analysis And Decision

- [77] It was clear to the Committee from the testimony of the Complainant and the Member that they each had very different recollections of the communications that occurred between them in the course of the Member’s representation of the Complainant. Although the Member was clear regarding many of the communications he had with the Complainant and the advice he provided, the Member was unable to produce any tangible evidence of such communications due to his inability to produce his file.
- [78] Based on the testimony of the Complainant, it was clear that he was confused as to the nature of the proceedings before the Court of Appeal. The application by certain of the Defendants to have the original action in the Court of Queen’s Bench struck was dismissed and as set out in the response of the Member to the LSA (Exhibit 33), the appeal to the Court of Appeal was by the CPA and involved a determination of whether

the Court of Queen's Bench had jurisdiction to hear the action against that association, which appeal was allowed with costs. It is not clear why the action did not then proceed against the CPS and other defendants. The Court of Appeal awarded double costs against the Complainant based on his failure to accept the Offer of Judgment served by the CPA and the Member approved the Bill of Costs as he was obliged to do as counsel for a party. The CPA then sought to enforce its costs by filing a Writ against a property owned by the Complainant and his wife.

- [79] Although the Member was in error as to the advice he gave the Complainant regarding the anticipated costs, the Complainant was aware from at least the time the Offer of Judgment was reviewed with him, that he faced an exposure to costs should his action be unsuccessful.
- [80] In short, it was the increased quantum of costs for which the Complainant was personally responsible, plus the fact that he was actually responsible for those costs which was the burden imposed on the Complainant as a result of his unsuccessful litigation. Nothing said or done by the Member caused harm to the Complainant, even though the Member's estimate of costs turned out to be inordinately low.
- [81] It is the considered view of this Committee that the Member did not fail in his duty to ensure that the Complainant was informed and that he understood the Member's advice. Accordingly, the Citation is dismissed.
- [82] The Committee ordered that the Exhibits be made available to the public with all client and party names redacted.

DATED this 15th day of August, 2011.

Dale Spackman, QC (Chair)

Ron Everard, QC (Member)

Frederica Schutz, QC (Member)