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 PETER STEWART
a Member of The Law Society of Alberta

INTRODUCTION

1. A Hearing Committee (the "Committee") of the Law Society of Alberta convened at the Law Society offices in Calgary from May 16 – 18, 2011 to inquire into the conduct of the Member, Peter Stewart. The Committee was comprised of Carsten Jensen, Q.C., Chair, and Ronald J. Everard, Q.C.

2. The Committee had initially included John Higgerty, Q.C., until his appointment to the Provincial Court bench. The Committee continued without Mr. Higgerty's participation pursuant to ss. 23 of the *Legal Profession Act*.

3. The Committee had previously convened to consider a preliminary application made on behalf of Mr. Stewart pursuant to ss. 62(2) of the *Legal Profession Act* that the proceedings against Mr. Stewart be discontinued or stayed. Mr. Stewart argued that the LSA's investigation was tainted, and therefore that the citations against him were tainted, because of the LSA's reliance, during its investigation, upon examination for discovery transcripts generated from a related civil proceeding without a Court Order addressing the implied undertaking of confidentiality that protects such transcripts from improper collateral use. That application was dismissed, with detailed written reasons provided.

4. The May 16-18, 2011 proceedings were convened to hear evidence on the citations issued against Mr. Stewart. The LSA was represented by Garner Groome. Mr. Stewart was represented by his counsel, James B. Rooney, Q.C. Mr. Stewart was present throughout.

JURISDICTION AND PRELIMINARY MATTERS

5. Jurisdiction was established when the Committee heard the preliminary application. At that application, Exhibits 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, were entered by consent, as was Exhibit 5, being the Certificate of Exercise of Discretion.

6. Additional Exhibits, marked 6 – 22 were marked entered during the course of the proceedings.

7. There was no objection by Mr. Stewart's counsel, or counsel for the LSA regarding the constitution of the Committee, or the continuation of the Committee after Mr. Higgerty's appointment.

8. The proceedings were conducted in public.

CITATIONS AND BACKGROUND

9. The Citations against Mr. Stewart are as follows:

> *1. IT IS ALLEGED that you were in a conflict or potential conflict of interest in the matter of your representation of WC..., and that such conduct is conduct deserving of sanction.*
> *2. IT IS ALLEGED that you were incompetent in the handling of the transactions of your clients EE, AG, AB, TB, FB, SE, PK, B..., DF, OV, YAG, GL, CL, BS, ES, MG, YEG, Y..., MP and MS, and that such conduct is conduct deserving of sanction.*

10. The citations arise from Mr. Stewart's representation of investors in a condominium project known as Project A. The investors had received receipts suggesting that the value of their deposits was covered by Corporation A in the event that Project A was not completed. Unknown to Mr. Stewart and the investors, Project A was not enrolled with Corporation A. Project A was sold in foreclosure, and the investors lost their deposits.

MOTION TO DEAL WITH EVIDENCE TAKEN IN A CIVIL ACTION

11. At the opening of the May, 2011 hearing on the merits, counsel for the LSA made an application to deal with the evidence of EG, a central figure in the transactions in question. The LSA had been unable to secure the voluntary attendance of EG at the hearing, and was reluctant to seek to compel his attendance as that would likely result in a delay of the hearing. EG had apparently indicated that if compelled to attend, he would not be able to remember anything at all.

12. Instead, the LSA sought to admit into evidence, under ss. 68 of the *Legal Profession Act*, a transcript of a discovery of EG which took place in a parallel civil action brought by a number of the investors as against Mr. Stewart, into which EG was third-partied. The transcript arose from questioning conducted by counsel for the investors, and we were told that the questioning covered a number of the same matters that EG would be asked in these proceedings. Counsel for the LSA argued that any concerns that we had regarding the evidence could be addressed in the weight that we might decide to put on that evidence.

13. The EG discovery transcript was one of the transcripts received and relied upon by the LSA during its investigation, which had lead to the preliminary application by Mr. Stewart for a stay of the LSA proceedings against him. As described earlier, that preliminary application was dismissed. The LSA application now sought to bring the EG transcript into evidence in the LSA proceedings.

14. Counsel for Mr. Stewart opposed this application, and he noted that this kind of use of a discovery transcript of a witness would not be permitted at a trial in the civil courts. We were told that this was a "sweet-heart" cross examination where counsel for the plaintiff was seeking admissions from the third party, EG, that could then be used by the plaintiffs to prove their claim against Mr. Stewart, in circumstances where Mr. Stewart's counsel

had no control and no ability to object. Counsel for Mr. Stewart also asked us to consider how we could place any reliance on such a transcript given that it was generated by questioning of a witness who now refused to attend this hearing, and who threatened to develop amnesia if compelled.

15. Section 68 of the *Legal Profession Act* provides:

> **68(1)** In proceedings under this Division, a Hearing Committee, the Practice Review Committee or the Appeal Committee
>
> (a) may hear, receive and examine evidence in any manner it considers proper, and
>
> (b) is not bound by any rules of law concerning evidence in judicial proceedings.

16. While the Committee is not bound by the rules of law concerning evidence in judicial proceedings, and had a statutory basis to receive the transcript of the questioning conducted of EG in any manner it considered "proper", the application of the LSA with respect to the admission of this transcript was dismissed.

17. The Committee concluded that ss. 68 does provide us with a broad power to hear, receive and examine evidence in any manner we consider proper, but we must at all times proceed in a manner that is fair to all parties before us. We could not conceive of a use that we could make of EG's examination for discovery transcript in these proceedings that would be consistent of our duty of fairness to Mr. Stewart. We were told that the discovery was a "sweet-heart" examination, which was not seriously contested by the LSA, and that EG would not now voluntarily attend these proceedings and was threatening amnesia if compelled to attend. In those circumstances, the earlier transcript would be essentially useless to the LSA, and admitting it into evidence could not possibly be seen as being fair to Mr. Stewart.

MOTION TO DEAL WITH EVIDENCE TAKEN BY A LSA INVESTIGATOR

18. The LSA had an additional witness problem with DF, one of the clients referenced in citation 2. Apparently, DF was away from Calgary during the hearing, and was not willing to change his plans, and he was unwilling to attend by telephone. In this case, the LSA had a transcript arising from an interview conducted by an LSA investigator, and the LSA sought to have that admitted into evidence under ss. 68 of the *Legal Profession Act*.

19. Counsel for Mr. Stewart objected on the basis that the interview included many leading questions, and was not conducted under oath. In addition, Mr. Stewart did not have an opportunity to cross examine DF.

20. The Committee did note that there were numerous admissions of fact made by Mr. Stewart, and agreed documents as well, all dealing with the DF transaction.

21. The application by the LSA to admit the DF transcript into evidence was dismissed by the Committee for reasons of fairness. The Committee recognized that this was not the

same as the application dealing with the EG transcript, and there may well be circumstances where a transcript of this kind could and should be received by a Hearing Committee. However, in the circumstances of this case, where one of the transactions at issue directly involved the missing witness DF who was simply not willing to attend the Hearing, and where the LSA was apparently not willing to seek to compel his attendance, the Committee concluded that it would not be proper to admit this transcript into evidence.

THE EVIDENCE

22. A very detailed Statement of Facts was signed by Mr. Stewart, and entered as Exhibit 8. In addition, 6 investors appeared as LSA witnesses, as did JM of Corporation A. Mr. Stewart and his legal assistant at the relevant time also both testified.

23. As noted above, this matter arises from the failed Project A condominium project. The investors, being clients of Mr. Stewart's, had received receipts suggesting that the value of their deposits was covered by Corporation A in the event that the project was not completed. This turned out to be untrue, although Mr. Stewart did not know that at the time.

24. The Purchase Agreements for the various investors were very similar. One of the important provisions included a Schedule that provided to the vendor, WC, the right to sell the condominium units to a third party at an equal or greater price than that stated in the Purchase Agreements, or to otherwise terminate the Purchase Agreements, and in that event the investors would receive a refund of the deposit plus interest. WC's intention, as stated to the investors, was to sell the units to others at a higher price, as the price agreed by the investors was considered to be too favourable to them. In short, they were using the Purchase Agreements with the investors to finance the project, with the investors expecting to receive interest, and also expecting that their investments were secured by Corporation A.

25. In the LSA's characterization of the evidence, the transactions were effectively loans by the investors to WC, disguised as purchase contracts, in order to obtain Corporation A protection for "deposits".

26. The investor FB testified as a LSA witness. FB was 17 or 18 years old at the time in question, and she was the daughter of the investor AB, who has since passed away. She recalled feeling secure in the investment because the deposits were protected by Corporation A. FB recalled her investment being $80,000, and she expected to receive interest on that money. FB was unclear on how her funds were ultimately to be repaid, and whether steps were taken to raise the funds that would have been needed to actually complete the purchase of the subject condominium units.

27. TB also testified. TB is FB's mother, and was the wife of AB. TB recalled becoming involved in the WC investment through friends in the community. She recalled being promised a very favourable interest rate on the deposits, and indicated an intention to rent out the condominium units once they were completed. TB described signing the

Purchase Agreements at Mr. Stewart's office, and her expectation that he would look after their legal interests. She also understood that Mr. Stewart would be doing some work for WC. On cross examination, TB recalled that her husband had done some due diligence about the issue of Corporation A protection, having gone so far as to contact Corporation A about that issue, although that was apparently after the investment was made.

28. The investor MG testified as an LSA witness. MG had previously used Mr. Stewart as his legal counsel on other matters, and viewed Mr. Stewart as his lawyer. MG had loaned money to WC, through an investment corporation, with Mr. Stewart's assistance. Eventually MG decided to become involved in Project A, with EG's encouragement. MG viewed EG as an agent of WC. MG did not intend to actually purchase any condominium units, and he viewed the transaction as essentially a secure loan on which he would earn a favourable rate of interest. MG testified that he trusted and relied upon Mr. Stewart in these matters, and he did not think that Mr. Stewart was also acting for WC. In addition, MG's cousin was the investor AB, and he knew that AB had made some inquiries about Corporation A coverage for the deposits.

29. The investor BS testified as an LSA witness. He and his wife ES had initially invested $40,000, and then $200,000 more, in Project A, and he understood the investment as being "like a loan", and as collateral WC would provide various units for sale. BS understood that his investment was totally safe based on the Corporation A coverage in place for the deposits, and he was attracted to the high rate of interest being paid by WC. BS understood that Mr. Stewart was acting for the investors only, and not representing WC. BS had made some efforts to contact Corporation A to verify the insurance on the deposits, and while the information received was somewhat confusing and contradictory, he was satisfied that coverage was in place. He recalled Mr. Stewart reassuring him about this coverage as well, and he recalled seeing a letter, purportedly from Corporation A, regarding WC's registration with the program.

30. ES, the wife of BS, also testified. ES recalled that she became aware of the investment opportunity with WC through EG's mother, who was a friend of a friend. ES stated that all paperwork was signed in Mr. Stewart's office, and she expected him to be her lawyer regarding this investment, but she could not recall much about discussions with him. ES did recall Mr. Stewart telling her about the Corporation A insurance on the deposits. ES's intention regarding the investment was to earn interest on the deposits, and she did not really intend to take possession of the condominium units. On cross-examination, ES recalled that Mr. Stewart had accepted her cheque and signed papers on the basis that they would be held, and not used, until BS had contacted Corporation A regarding the insurance issue. ES further recalled that her husband had spoken with Corporation A and satisfied himself accordingly.

31. EE testified as a LSA witness. EE had been introduced to WC by EG, who had offered him an investment opportunity where he could earn a high rate of interest, with the investment being guaranteed by Corporation A. EE purchased 10 units and paid deposits totalling $200,000. EE went to see Mr. Stewart at EG's suggestion, and he was reassured about the Corporation A coverage due to the involvement of a lawyer in the transaction.

EE expected that he would be able to close the purchase of condominium units when Project A was complete, if he wished, or he could get his deposit money back. He did not actually intend to purchase any condominium units, and so his investment was made to earn interest on the deposits. On cross-examination, EE agreed that he might have been required to close the purchase on the 10 units if WC had not located other buyers. After Project A collapsed, EE learned through his litigation counsel that the project had not been enrolled with Corporation A, and even if it had been, the maximum coverage would have been for one deposit (not 10).

32. JM, an employee of Corporation A, testified as an LSA witness. JM explained that the Alberta *Condominium Act* requires that building deposits must be underwritten by a warranty program before they can be released to a developer. On being approached by a builder regarding a project, Corporation A would undertake an underwriting assessment of the project and the builder. If coverage is extended, it would protect the project from defects, and also protect purchasers' deposits. JM indicated that Project A was never registered with Corporation A. There were a few documents on file with Corporation A regarding Project A, but the registration of the project was not completed. Regarding the number of deposits that could be protected if a project was registered, Mr. Martin testified that the intention was to cover one deposit per purchaser, and not to extend coverage to investors, but the Corporation A policies were to some extent unclear on this.

33. Ms. Amber McComb testified on behalf of Mr. Stewart. At the time in question, Ms. McComb was a young legal assistant in Mr. Stewart's office. Ms. McComb recalled that Mr. Stewart worked for purchasers of condominium units from WC, and she assisted him with that. Ms. McComb understood EG to be a broker, and he was always involved in making appointments for the clients on WC matters.

34. Mr. Stewart testified on his own behalf. At the relevant time, Mr. Stewart did some real estate conveyancing work, but most such work was handled by another lawyer in the office. Mr. Stewart testified that he was familiar with the requirement in the *Condominium Property Act* for warranty coverage to be in place before a builder could receive a deposit.

35. Mr. Stewart was introduced to Project A by EG, and Mr. Stewart agreed to represent purchasers in that project. Mr. Stewart's expectation was that he would be paid by WC, through deductions to be made as against the deposits. Mr. Stewart attended a presentation on the Project A, and was provided with a sample purchase agreement, and was told that the project was enrolled or registered with Corporation A. Mr. Stewart's impression was that it was obvious to everyone that he was acting for the purchasers, and not for WC.

36. Mr. Stewart testified that he made some changes to the Schedule to the Purchase Agreement dealing with WC's rights to resell the units to others. Specifically, he added a right for the purchaser to acquire the property if it was not sold to a third party within a specific time. In exchange for this, WC added a provision permitting WC to simply terminate the agreement and refund the deposits. Mr. Stewart viewed these changes as improvements made for the benefit of the purchasers. In addition, Mr. Stewart removed a

form of promissory note from the agreements, as that was, in his view, inconsistent with the transaction being a sale rather than a loan.

37. Mr. Stewart recalled his dealings with the investor AB, and specifically that AB had checked with the Corporation A program about coverage for Project A. AB was initially told that there was no coverage, and was apparently then told that coverage was in place. Mr. Stewart relayed this information to other investors, and in particular to MG.

38. Mr. Stewart recalled assuring the investor BS that he was representing the investors, and not WC. He also recalled having BS sign his purchase documents, to be held and not used, while BS undertook his own review of the Corporation A coverage issue. Mr. Stewart testified that he subsequently spoke with BS, who indicated that he had spoken with Corporation A and believed coverage to be in place. Mr. Stewart did not consider that he should be making this inquiry of Corporation A himself, and he was content to leave this to the investors themselves. In hindsight, Mr. Stewart believes that the "verification" of coverage with Corporation A may have been staged by WC in some fashion.

39. With respect to conflict issues, Mr. Stewart's position was that he was acting for the investors, but also facilitating the transactions and the process. He said: "I felt that I owed a duty to WC and to the purchasers, both of them, that I get it correct. That I document it correctly, and that I do my job facilitating this process. WC, who is not my client, is in my office, and I did feel that I was – owed them a duty to make sure I did it right." However, Mr. Stewart did not see any adverse interests as between WC and the purchasers.

40. Mr. Stewart recalled the investor EE, who had entered into his agreement directly with WC. EE then came to Mr. Stewart, apparently at EG's urging, to redo the documents with the help of a lawyer.

41. Mr. Stewart denied providing business advice to the investors, and he was adamant that the purchasers were aware that they were agreeing to buy condominium units (not just to loan money), subject to the right of WC to "take them out".

42. On cross-examination, Mr. Stewart's evidence was that his intention throughout was to ensure that his purchaser clients had a valid and enforceable agreement. He strongly disagreed with the assertion that his clients were primarily interested in Project A as a vehicle to earn interest on deposits, and suggested that this version of events was made up after the fact. Mr. Stewart's view at the time was that the Purchase Agreements represented bona fide real estate transactions. Mr. Stewart denied that he had acted for WC, even though he had indicated that he felt he owed WC a duty. Mr. Stewart acknowledged that he had advised some investors that their deposits were protected by Corporation A, as would be explained to them by WC.

43. In retrospect, Mr. Stewart acknowledged being "bamboozled" by WC, particularly by the fact that Project A was not registered with Corporation A.

ANALYSIS

(a) Was Mr. Stewart in a Potential or Actual Conflict?

44. The LSA's position that Mr. Stewart was in an actual or potential conflict is based on a number of factors. Mr. Stewart was introduced to Project A by WC, but his clients were to be the investors, and WC did not have its own counsel with respect to these transactions. By Mr. Stewart's own admission, he felt that he had some form of duty to WC, being a duty to "get it right". The LSA also argued that the changes made to the loan documents by Mr. Stewart were for the benefit of WC, not the investors, and that Mr. Stewart should have known that his involvement would lend an air of safety to the transactions, creating a greater need for him to avoid any potential or actual conflict.

45. Counsel for Mr. Stewart argued that Mr. Stewart had provided legal services in good faith, on the basis of a well reasoned theory of how the transactions would work in a *bona fide* way. With respect to the "dual duty" issue, it was argued that this was as a "scrivener" only, where there was in fact a common interest. On the balance of the issues, it was argued that there was no evidence that Mr. Stewart acted on instructions from WC, or for WC's benefit.

46. After considering the evidence and the arguments, the Committee dismissed Citation 1. The Committee concluded that Mr. Stewart did act in good faith, on the basis of a theory of how the transactions would work for the benefit of the investors, and he did not take instructions from WC or act for WC's benefit. It is true that some things could have been done better. There could and should have been a clearer delineation of Mr. Stewart's responsibilities, so as to avoid any possible confusion with the investors. However, we have concluded that Mr. Stewart's conduct in this regard is not conduct deserving of sanction, and so Citation 1 was dismissed.

(b) Was Mr. Stewart Transactionally Incompetent?

47. The LSA argued that Mr. Stewart was "transactionally incompetent" in a manner that is deserving of sanction. The LSA did not argue that Mr. Stewart was generally incompetent, but rather that he handled these transactions so badly that his conduct is conduct deserving of sanction.

48. In support of this position, the LSA noted that Mr. Stewart had either positively stated that the deposits were secure, or had remained silent while others made that statement, without verifying it. The LSA noted that reasonably simple due diligence by Mr. Stewart would have disclosed the problems with Project A. Further, the confusion surrounding the nature of the investments (were they loans or deposits?) was raised by the LSA. The LSA also noted that Mr. Stewart's changes to the loan documents really amounted to a benefit for WC, and not for his clients.

49. After considering the evidence and the arguments, The Committee dismissed Citation 2. The Committee concluded that Mr. Stewart had acted throughout on the basis of a good faith and reasoned theory of how the transactions would work. Mr. Stewart was wrong, and there were steps that he could have taken for the benefit of his clients (such as direct

verification of the existence and terms of Corporation A coverage). However, we cannot conclude that Mr. Stewarts' handling of these matters amounts to transactional incompetence, or is conduct deserving of sanction.

50. In general terms, the disciplinary cases involving incompetence involve patterns or habits of incompetence which reach the level that sanction is appropriate; see for example *Reddy v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [2000] BCJ No. 538 (BCSC). In this case, while we conclude that Mr. Stewart made errors, we do not find that he was transactionally incompetent.

CONCLUSION

51. Both citations are dismissed.

52. The Exhibits are public, subject to redaction of client names and identifying information, and privileged materials.

53. At the conclusion of the hearing, both parties were advised of the Committee's decision to dismiss the Citations and that these written reasons would follow. In rendering its decision, the Committee specifically stated that, notwithstanding the dismissal of the Citations, the Committee did not approve of the manner in which the transactions were handled.

Dated this 13th day of October, 2011.

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Carsten Jensen, Q.C., Bencher, Chair

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Ronald J. Everard, Q.C., Bencher