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
ROY ELANDER
a Member of the Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULT

1. On February 22 – 25, 2011 a Hearing Committee of the Law Society of Alberta (**LSA**) convened at the Law Society office in Calgary to inquire into the conduct of the Member, Roy Elander. The Hearing Committee was comprised of Sarah Jane King-D'Souza, Q.C. Chair, Rose Carter, Q.C., Bencher, and Amal Umar, Lay Bencher. The LSA was represented by Lindsay MacDonald, Q.C. The Member was represented by Dennis McDermott, Q.C.

2. The Member faced twelve (12) citations:

RE: *S. B.*

1. IT IS ALLEGED THAT you failed to provide your client S.B.'s undertakings to opposing counsel to the prejudice of your client, failed to transfer her file on a timely basis, and failed to respond to her communications on a timely basis and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED THAT you failed to keep S.B. informed as to the progress of her matter and that such conduct is conduct deserving of sanction.

3. IT IS ALLEGED THAT you failed to respond to the LSA on a timely basis with regard to S.B.'s complaint and that such conduct is conduct deserving of sanction.

RE: Law Society Audit

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

RE: RM

5. IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments made to your client, R.M., and failed to respond on a timely basis to communications from him that contemplated a reply and that such conduct is conduct deserving of sanction.

6. IT IS ALLEGED THAT you misled or attempted to mislead certain individuals and that such conduct is conduct deserving of sanction.

7. IT IS ALLEGED THAT you failed to keep R. M. informed as to the progress of the matter and that such conduct is conduct deserving of sanction.

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

RE: Stuart Blyth

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

10. IT IS ALLEGED THAT you failed to honour an undertaking given to another lawyer and that such conduct is conduct deserving of sanction.

RE: Devinder Shory

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

12. IT IS ALLEGED THAT you failed to honour an undertaking and that such conduct is conduct deserving of sanction.

3. On the basis of the evidence received at the Hearing and for the reasons that follow the Hearing committee found as follows:

   A. Citations 1, 2 and 3 were dismissed.

   B. Citation 4 is proven and the Member is guilty of conduct deserving of sanction.

   C. Citations 5 and 7 are combined into one citation reading as follows:

"IT IS ALLEGED that the Member failed to keep R. M. informed as to the progress of the matter, failed to be punctual in fulfilling commitments made to the client. M., and failed to respond on a timely basis to communications from him that contemplated a reply, and that such conduct is deserving of sanction."

That combined new citation is proven and the Member is guilty of conduct deserving of sanction.

D. Citation 6 is proven and the Member is guilty of conduct deserving of sanction.

E. Citation 10 is proven and the Member is guilty of conduct deserving of sanction.

F. Citation 12 is proven and the Member is guilty of conduct deserving of sanction.

G. Citations 9 and 11 are combined into one citation reading as follows:

"IT IS ALLEGED that the Member failed in relation to the Stuart Blyth and Devinder Shory matters to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society that contemplated a reply and that such conduct is conduct deserving of sanction."

That combined new citation is proven and the Member is guilty of conduct deserving of sanction.

JURISDICTION AND PRELIMINARY MATTERS

4. For the purpose of establishing jurisdiction Counsel for the Law Society submitted the following Exhibits:

    a. Exhibit "J-1" – Letter of appointment.
    b. Exhibit "J-2" – Notice to Solicitor
    c. Exhibit "J-3" – Notice to Attend and Private Hearing Application
    d. Exhibit "J-4" – Certificate of Standing of Member
    e. Exhibit "J-5" – Certificate of Exercise of Discretion.

There was no objection by either Counsel regarding the constitution of the Hearing Committee. The entire Hearing was conducted in public. The Member was present.

PRELIMINARY APPLICATION

5. Counsel for the Member made a preliminary application for a stay of the proceedings due to the Member having declared Bankruptcy.

6. Section 69.3(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 provides that:

"Stays of proceedings – bankruptcies

69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

End of stay

(1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged."

7. Section 121.(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 provides that:

"Claims provable

***121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."*

8. Counsel for the LSA provided the Hearing committee with the case of Hover (Re) [2005] A.J. No.220 and argued that there was no operational conflict between the Bankruptcy and Insolvency Act and the Legal Profession Act in this situation. The Member did not owe any monies to the LSA at this time. If as a result of the hearing, the Member had costs awarded against him; the impact of failure to pay same would be whether or not the Member would be permitted, upon his re-application, to become a Member of the Law Society in future. This was for another day and could be addressed if and when it occurred.

9. The Hearing committee refused to stay the Hearing. No specific conflict was alleged by counsel for the Member. Counsel for the LSA identified a potential costs issue. There is also a potential fines issue, were the Member to be fined for a matter on which at the Hearing he was found guilty. However, the goal of these disciplinary proceedings is not to ensure that the LSA is able to collect fines or costs, but rather, the protection of the public and on that basis there is no operational conflict between the statutes and a legitimate purpose in proceeding.

EXHIBITS

10. Exhibits A-1 Tabs 1 to 8; A-2; A-3; B-1 to B- 4 Tabs 1 to 4; B-5 to B- 8 Tabs 1 and 2; B-9; C-1 Tabs 1 and 2; C-2 to C-5, Tabs 1 to 3; C-6 Tabs 1 and 2; C-7 to C-9 Tabs 1 to 6; D-1 Tabs 1 to 4; D-2 Tab 1; D-3 Tabs 1 and 2; D-4; E-1 to E-7 were all entered into evidence during the course of the proceedings.

DISCONTINUANCE OF CITATIONS 1, 2 AND 3

11. Counsel for the LSA advised the Hearing committee that he sought discontinuance of Citations 1, 2, and 3, as the complainant S.B. had not produced the contents of her file. Counsel for the LSA indicated that the LSA had no evidence to call in relation to the three citations and thus the threshold test that there was a reasonable prospect of conviction could not be met.

12. Section 32(a) of the Threshold Guide provides that a discontinuance application may be entertained where counsel for the LSA takes the position that the threshold test is not met. In such cases, the position of Counsel for the LSA is entitled to great deference. On the basis of representations by Counsel for the LSA the Hearing committee discontinued Citations 1 through 3.

LSA OPENING STATEMENTS AND EVIDENCE

13. Counsel for the LSA advised that the LSA would be calling five LSA personnel as witnesses, another lawyer and the complainant R.M. Counsel for the LSA indicated that the complainant Devinder Shory was out of the country and would not be called but that the LSA was proceeding on those citations.

Citation #5, 6, 7 and 8 – Evidence of R.M.

14. Counsel for the LSA called R.M. In 2003 R.M., an Edmonton home builder, purchased a lot in the S. Estates, 27 km east of S., Alberta (Lot -). It was a well

designed lot with a slope and lake view. RM's original intentions were to build his own home on the lot. There was a Restrictive Covenant (RC) on title to relating to the lot, as the lot had been designated for a water treatment plant and a social club for the development.

15. R.M. was advised by the developer's representative J.D. that there was city water through the development and the lot was no longer needed for a treatment plant so it was available for purchase. J.D. indicated to R.M. that the RC would be removed and R.M. gave J.D. a deposit. R.M. came to know of the Member through J.D. who indicated that it would be easier if both of them used the same lawyer to clear up the Restrictive Covenant.

16. R.M. never met the Member when he bought the Lot in 2003 but believed the Member had acted for him on the purchase. R.M. received a Certified Copy of Title in the mail along with a Statement of Adjustments from the Member's offices, at which time he noticed that the Restrictive Covenant was still registered on title. R.M. called the Member's offices and was advised by the Member's assistant that it was being worked out. J.D. assured R. M. that he could build on the lot anytime. R.M. went to the County offices and concluded from his various inquiries that there would be no difficulty with building a house on the lot.

17. R.M. later received a copy of a letter dated February 18, 2005 sent by the Member to the owners of three properties adjacent to his Lot. The letter was worded such that R.M. understood from it that title had been cleared.

18. In 2006 R.M. was approached to sell the Lot. Two weeks later the buyer informed R.M. that the Restrictive Covenant was still on Title and had to be removed. R.M. called the Member repeatedly finally reaching him in person on a Saturday. The Member indicated he would deal with it and get hold of R.M. but never did. R.M. followed up, reaching the Member by phone after business hours. The Member was with a client, said he would call back, and did so.

19. In or around June, 2006 R.M. traveled to Lacombe, Alberta to meet with the Member at 7:00 a.m. at a golf club. He signed an Affidavit in support of a Court Application to have the Restrictive Covenant removed. R. M. did not hear from the Member thereafter.

20. R.M. lost the sale and hired another lawyer to have the RC removed. The new lawyer obtained a Court Order removing the RC without notifying the neighbors.

21. R.M. tried to put the lot up for sale again. The Realtor advised that the owners adjacent to the lot were interfering with the showings and had told the realtor that they would not sign anything that permitted the Lot to be sold as a residential Lot.

22. R.M. contacted his new lawyer who indicated that there would have to be another hearing with the owners notified this time. At that hearing the previous decision was reversed and that is how the matter stands to this day. R.M. complained to the LSA on August 7, 2007.

Cross-Examination

23. R.M. agreed that he knew now that J.D.'s wife or girlfriend, S.F. was the developer and J.D. was acting as her agent, selling the lots. In 2001 R.M. had purchased two lots from J.D. in the development and had built houses on them for sale to others. J.D. then approached him to buy Lot 37. R.M. had sold one of the properties he had built on and was trying to sell the other acreage. R.M. bought two more lots from J.D. thinking he could work on them while waiting for Lot 37 to become free to build on. However, in the end, R.M. forfeited those two deposits as the acreage did not sell and he did not have the financing to proceed.

24. R.M. confirmed that he had spoken to the Member's assistant several times and been told not to worry about anything. When he received the offer to purchase Lot 37 he had spoken to the Member who promised to clear off the RC. J.D. had told R.M. that it needed a majority of the neighbors to agree to removal of the RC and at the time, he believed that J.D. was the owner of the majority of the Lots.

25. The Member told R.M. that everything would be looked after right away. It was not until the meeting at the Golf Course that R.M. became aware that a Court application was needed. It was also at that meeting he learned that J.D.'s wife or girlfriend was a principal owner of the development and her signature was needed on the documents. He did not hear about any opposition to the application from the Member. The Member said there would be "no problem".

26. R.M. indicated that overall he had met once with the Member. He believed that he had used the Member for the initial purchase of the Lot as he had agreed with J.D. to do so and share the costs.

Citation #5, 6, 7 and 8 - Evidence of Pam Sugimoto

27. Pam Sugimoto worked at the LSA as a complaints resolution officer in 2007. Pam Sugimoto indicated that she had sent a letter to the Member on August 7, 2007 asking that he respond to the complaint of R.M. by August 22, 2007. Pam Sugimoto identified R.M.'s complaint "About My Lawyer" and identified the Member's response to her of August 27, 2007 and related attachment. Pam Sugimoto identified a letter from her to the Member dated September 5, 2007 wherein she requested four

pieces of additional information from the Member in relation to R.M.'s complaint. Pam Sugimoto identified a letter from her to the Member dated September 19, 2007 as having been faxed by her in follow up.

28. Pam Sugimoto indicated that she did not receive responses to the September 5 or 19, 2007 letters from the Member. Pam Sugimoto identified a letter dated September 28, 2007 from herself to R.M. wherein she indicated that the matter would be referred to the Manager of Complaints.

29. Under cross-examination Pam Sugimoto indicated that generally she would speak to a complainant however she had not spoken to R.M. She had wanted to obtain clarification from the Member on the four items before responding to R.M. and when she was unable to reach R.M. by telephone she put her queries in a letter.

Citations #9 and 10 – Evidence of Stuart Blyth

30. Stuart Blyth practices law in Calgary, Alberta in the area of commercial real-estate planning, subdivision, leasing and acquisitions. In December 2007 Stuart Blyth's client SLSC purchased two parcels of land from BLL in the town of Sylvan Lake, Alberta. The Member represented BLL.

31. On December 5, 2007 Stuart Blyth sent an email to the Member advising that the Member:

"would need to undertake to discharge all other caveats and instruments that are not permitted encumbrances and provide us [Stuart Blyth.] with an updated CC of T [Certified Copy of Title] to each parcel showing the discharges within a reasonable period of time following the closing date.'

32. On December 5, 2007 the Member faxed a letter to Stuart Blyth stating as follows:

"As discussed, the encumbrances not accepted by the purchaser are hereby undertaken to be discharged in this matter"

33. The Member's letter was written on BLL letter head, indicating the legal department, telephone number and fax number, the Member's email address. The signature portion of the letter stated underneath his name that the Member was "Legal Counsel".

34. On August 28, 2008, Stuart Blyth wrote to the Member advising that the Member had defaulted in his undertaking to discharge a Caveat and Utility Right of Way, despite "numerous reminders" and that Stuart Blyth would be reporting the matter to the LSA.

35. Stuart Blyth's evidence was that the Caveat to be discharged was ultimately replaced by a new Development Agreement so that issue resolved itself, in a way. With respect to the Utility Right of Way, Stuart Blyth advised that his client had to relocate the URW at its cost and grant a new right of way to the municipality.

Cross-Examination

36. Under cross-examination Stuart Blyth indicated that he was not initially aware the Member had ceased practicing law at the end of December 2007. He became aware of this later. The Member had sent Stuart Blyth an email that he was in British Columbia and thinking of retiring. Stuart Blyth followed up on the Undertaking into 2008. He did not recall the Member advising that he would forward Stuart Blyth's correspondence to the principal of B.LL. to be dealt with. It was possible that the principal of SLLC, might have communicated directly with BLL with respect to the extent of the hold-back. Stuart Blyth did not suggest to his client that he take up the issue of the undertakings with the principal of BLL. Stuart Blyth relied on the solicitor's undertaking made by the Member.

Citation #4 – Law Society Audit – Evidence of Glen Arnston

37. Glen Arnston has been a Charted Accountant since 1991; he commenced employment with the LSA in 1993 as a Senior Auditor. In 2007 he became the Manager of Audit and Investigations. His current title is Manager of Trust Safety.

38. Glen Arnston advised that from August to September 2006 a Rule 130 audit was performed at the Member's Lacombe office. The Member was not present at the time. The Audit could not be completed due to certain documents not being available in the office. On February 5, 2007, having reviewed the Auditor's work, Glen Arnston wrote to the Member requesting 9 items and attaching a GST authorization form to be signed.

39. On February 11, 2007 the Member wrote Glen Arnston a letter responding to 5 of the 9 items. On April 2, 2007 Glen Arnston wrote to the Member requesting 6 items comprised of the 4 outstanding items plus 2 additional items. On April 23, 2007 a follow up letter was sent to the Member by Glen Arnston.

40. On June 2, 2007 the Member wrote to Glen Arnston and responded to the 2 additional items requested in the April 2, 2007 letter. With respect to other documents requested the Member wrote*:" I am still waiting for the attendance of a Revenue Canada auditor to come and view the GST payable for the year 2006 in accordance with the arrangements, which I made with my contact person at Revenue Canada. If your [sic] wish to attend upon my home office and review same,*

you are welcome anytime but I must advise that I am currently in an AEUB hearing at Rimbey which sits each day from 9:00 a.m. until 5:00 p.m. and as such my time here is limited also."

41. On June 19, 2007 the audit report issued to the Member with the 4 outstanding items noted. In addition, Glen Arnston again enclosed a GST authorization form to be returned by July 3, 2007.

42. On September 20, 2007, Lisa Atkins a staff Member with the audit department called the Member and left a message regarding the outstanding items. On September 21, 2007 Lisa Atkins left a second message giving the Member a 2 week extension. On October 19, 2007, Lisa Atkins sent a fax to the Member requesting a written response to the outstanding items no later than October 31, 2007 failing which the matter would be referred to the complaints department. The remaining outstanding items requested on October 19, 2007 were as follows:

    A. A copy of the latest GST return filed;
    B. Signed GST authorization form;
    C. General bank statements, negotiated general cheques, general deposit books and general journals for the period January 2006 – December 2006;
    D. An accounts receivable listing as at December 31, 2006;
    E. The Member's Form T for yearend December 31, 2006, which was 202 days late.

43. In an internal Memo to the Manager of Complaints, dated November 15, 207, Glen Arnston recommended citing the Member for failing to respond to the law Society.

Cross-Examination

44. In cross examination Glen Arnston indicated that all of the requested items should have been readily available. He agreed that the Member was put on a tight deadline by him in his letter of February 2007 but pointed out the Audit had been in August and September 2006. Glen Arnston indicated that a Rule 130 audit pertains to the entire law practice and both general and trust accounts are examined. Due to the Member failing to provide the information requested to the auditor, Glen Arnston would have reviewed the materials once received by the Member in February and this took some time. Glen Arnston wanted the GST authorization because he had not received the Member's latest GST return. The LSA does expect to get 100% compliance on an audit as they are performing compliance audits.

Citation #4 - Evidence of Lisa Atkins

45. The LSA called Lisa Atkins who in 2007 was an Audit Technician with LSA. She now is the Trust Safety Coordinator. Her duty was to follow up with the Member on the

outstanding items. She called the Member on September 20, 2007. On September 21, 2007 she provided him with a 2 week extension at the suggestion of her supervisor. When the Member the October 19, 2007 letter she obtained that fax number from his letterhead.

Citations # 5, 6, 7, 8, 9, 10, 11, 12 - Evidence of Katherine Whitburn

46. In 2007, Katherine Whitburn was (and remains) the Manager of Complaints for the LSA. On November 15, 2007 Katherine Whitburn received an internal memo from Glen Arnston respecting the Member's Rule 130 audit. On November 26, 2007, she sent a registered mail letter to the Member enclosing the materials from the Rule 130 audit, advising that this information was to be considered a formal complaint and requesting a response within 14 days. Katherine Whitburn did not get a response and sent a follow up letter on December 21, 2007.

47. Katherine Whitburn was also made aware of the R.M. complaint which had been referred to her by Pam Sugimoto. On October 2, 2007 Katherine Whitburn couriered a letter to the Member informing him of the complaint and requesting a response within 14 days. On November 1, 2007 Katherine Whitburn couriered to the Member a reminder letter to which she received no response.

48. On March 4, 2009 Katherine Whitburn sent a letter to the Member at his address in Summerland, B.C., enclosing the complaint materials from Stuart Blyth and requesting a written response to the complaint within 14 days. This letter was sent by registered mail. On April 8, 2009 Katherine Whitburn wrote a follow up request and indicated that the matter would go to the Conduct Committee Panel if there was no response.

49. On March 4, 2009 Katherine Whitburn sent a registered mail letter to the Member at his Summerland, B.C., address enclosing materials from the complainant Devinder Shory and requesting a response to the complaint within 14 days of the letter. On April 8, 2009 Katherine Whitburn sent a reminder letter to the Member but heard nothing further from him.

Cross-Examination

50. Under cross examination Katherine Whitburn advised that when a matter is referred to a formal process the first step is to send a Member a registered letter to respond pursuant to section 53 of the *Legal Profession Act.* A complaints officer can do it in other ways but at the point Katherine Whitburn becomes involved her task is to gather the information to determine if the matter should proceed in the discipline process. The Member never called or responded to her.

Citations#9, 10, 11, 12 - Evidence of Doug Morris

51. Doug Morris has been with the LSA since April 2005 and is a Complaints Resolution Officer. Doug Morris was involved in the complaint by Shory. His role is to determine whether a matter can be resolved or whether there is merit to it going to a formal level. On December 29, 2008 he wrote to the Member at his Summerland, B.C. address advising of Stuart Blyth's complaint and requesting a response by January 16, 2009. He did not hear back from the Member and the matter was referred by him to Katherine Whitburn.

52. Doug Morris also received the complaint of Devinder Shory against the Member. On December 19, 2008 he wrote to the Member at his Summerland, B.C. address informing the Member of the complaint and requesting a response by January 16, 2009. Failing to hear from the Member, Doug Morris referred the matter on to Katherine Whitburn.

Cross-Examination

53. Under cross-examination Doug Morris indicated he was aware that the Member had been suspended by the time of the Devinder Shory and Stuart Blyth complaints. He did not recall if he had mentioned that to Stuart Blyth. He had called the Lacombe lawyer Kenneth Cruickshank as to his role and to inquire if Kenneth Cruickshank had the file. Kenneth Cruickshant said he was storing the Member's files but was unable to locate the file. He called the Member on December 2, 2008. The fulfillment of the Undertaking to Stuart Blyth was a professional and ethical obligation of the Member's. If the Member had responded to him and indicated that he was prepared to comply with the undertaking and apologize the matter could have possibly been resolved although the LSA position has changed since then. Doug Morris referred Stuart Blyth to ALIA.

54. On the Devinder Shory complaint Doug Morris might have advised Devinder Shory that Kenneth Cruickshank was custodian for the Member's files. He had told Devinder Shory's offices that he had put in a call to the Member on an unrelated matter and was not optimistic of a response on this matter. He referred Devinder Shory's assistant to ALIA. The property in question had been re-sold and Devinder Shory was acting for both sides. He was not aware that the mortgagee had a lawyer nor did it matter to him. He did not ask whether the funds had gone to the mortgagee. That is why he asks the Member for a response.

This concluded the evidence for the LSA.

MEMBER'S OPENING STATEMENT AND EVIDENCE

55. Counsel for the Member made an opening statement.

Evidence of the Member Roy Elander.

56. The Member indicated that he first met R.M. in 2005. With respect to the purchase of Lot 37 in 2003 the Member was confused by R.M.'s version of events because if his assistant at the time handled the matter there would have been a reporting letter with an account attached. The Member was aware of the transaction as within a week or two of the closing his assistant advised him of the Restrictive Covenant (RC). The Member spoke to J.D. and S.F. who said everything was taken care of so he was not concerned about it. S.F. was the principal of the development company and J.D. was her husband and partner who operated the development for her while she ran a restaurant in Red Deer.

57. In 2005, the Member received a call from R.M. and spoke to S.F. and J.D. again about the RC and was advised there was a problem, not with the municipality but with some neighbors. The Member asked S.F. for the names of the neighbors and sent out the letter of February 18, 2005. The purpose of the letter was to find out the neighbors' positions with respect to removal of the RC and the Member was unable to explain the content of the first paragraph of the letter which stated:"*This correspondence is to advise that pursuant to clause 20 of the Development agreement, the development agreement is amended by way of deletion of clause 22."* It should have stated*: "An application is to be made to amend…"* The Member had handwritten the letter to be typed up by an assistant and had carelessly signed it.

58. The Member expressed amazement as to the letter contents and indicated that he did not know now on whose behalf he wrote the letter because it was dated February 2005 and R.M'.s complaint to the LSA states that he retained the Member in February 2006. The Member knew this would be a fairly involved application because the adjacent neighbors wanted the lot to remain a park although they had town water. The Member knew legitimate objections would be raised by the neighboring property owners and would not have guaranteed an outcome to anyone nor said it would be easy. He received no reply to the letter from the neighbors.

59. With respect to lack of communication with R.M. the Member advised that by 2005/ 2006 his long term assistant was no longer with him. He did not recall being advised by new staff of any telephone calls from R.M. but could not dispute R.M.s evidence in this regard. The Member confirmed that he and R.M. met in June 2006 at 7:00 a.m. at the Lacombe Golf Course adjacent to Highway 2. The Member accepted R.M.'s evidence that he swore an Affidavit that day.

60. The Member indicated that in February 2007 he was subject of a Law Society disciplinary hearing that left him destroyed and burnt out. He decided on the trip home from Edmonton that he was done with practice and contacted Kenneth

Cruickshant, a lawyer with an office in Lacombe, Alberta, asking whether the firm would take over his practice. The Member entered into an agreement with the Kenneth Cruickshank Law Office to take over his active files if clients were agreeable and to store his close files. This arrangement was completed by the end of February 2007. The Member retained his Oil and Gas files, files for a company named CALL, files for BLL and any real-estate files where reporting had not been completed. The Member had arranged to work as inside Counsel with BLL and to act as project manager on a development for BLL.

61. In September or October 2007 the Member moved his closed files to the Kenneth Cruickshank Law Offices and he expected them to deal with his closed files as per a written agreement. The Member sent that written agreement to the LSA in December, 2007 or January, 2008 when he transferred to the non-practicing list and the LSA wanted to know what had happened to his files.

62. The Member indicated that the application to remove the RC from Lot 37 did not get done. The file traveled with him extensively between B.C. and Alberta and he had the best of intentions. The Member indicated that he had gone through practice review in 2007. He was carrying 200 – 250 open files and practice review recommended that he not take on more work. By 2007 he reduced his file load to about half but was worn out and hard to reach.

63. He had advised R.M. that a court application and Affidavits from R.M. and J.D. were needed. There had been some discussions about J.D. and S.F. buying back the lot from R.M. The Member indicated that he responded to the LSA on August 27, 2007.

64. With respect to Pam Sugimoto's letter to him of September 7, 2007, the Member could not remember if he had responded. The Member did not know why he had not responded to the letter. He had numerous complaints in the past to which he would respond if not to the first letter then to the second. On the audit and R.M. matters the Member responded initially but then did not.

65. With respect to the Stuart Blyth complaint the Member indicated that his employment with BLL was terminated on January 10, 2008 because due to his move to B.C. he was unable to carry out his day to day functions for BLL. He considered the undertaking to be BLL's undertaking and acknowledged that his view on this may have been incorrect. He had left BLL with the Solicitor's undertaking still outstanding. He and the principals of BLL had met with their new lawyer to discuss files but he was unable to remember if this was one of them.

66. The Member thought he had received an email from Stuart Blyth in the first 2 weeks of January, 2008 asking about the discharges and that he advised Stuart Blyth that he was no longer with BLL and had passed the information on to the principals, who

had a new lawyer in St. Albert. The Member left the BLL files with BLL. The Member later found out that BLL had not passed on the file to the new lawyer.

67. The situation was that Stuart Blyth's client was buying portions of land on a quarter section in an industrial area where the subdivision was not yet completed. Stuart Blyth's client redid the plan, and moved the utility line. When Land Titles registered the plan of subdivision through error easements were registered against Stuart Blyth's client's Lots that related to other pieces of land. It was a question of getting the Town to discharge them with a signature. The discharges were not received by the Member by time he left BLL. From the evidence of Stuart Blyth, the Member assumed that the town must have discharged them later.

68. The Member did not receive the August 28, 2008 letter from Stuart Blyth. The Member did not recall receiving or responding to the December 19, 2008 letter from Doug Morris. The Member indicated that Exhibit C-6-2 looked like his acknowledgement of receipt of Katherine Whitburn's March 4, 2009 registered mail letter to him, but he had no memory of receiving this letter or the April 8, 2009 follow up letter from LSA and it was beyond him as to why he did not respond because he did have an explanation. The Member indicated that he was facing another serious complaint and was under intense pressure, he recognizes that he had issues of depression that were not being treated.

69. On the Devinder Shory matter the Member advised that the situation was that there had been a second mortgage on the home with a private lender. The Member obtained a payout statement for the mortgage from the C.H. Law Firm and paid the mortgage out to the C.H. Law Firm in trust that he was to receive confirmation of discharge of the mortgage but never did receive the discharge. The Member probably contacted the C.H. Law Firm 3 or 4 times. The Member heard nothing further on the matter until sometime in 2010 when ALIA called for the file. The Member had no recollection of Doug Morris' correspondence to him of October 29, 2007, all he could say is that he tried to get the discharge from C.H. Law Office but short of going to the LSA was not sure what else he could have done.

70. With respect to the audit, the Member recalled an audit and that he was not at the office that day and so the auditor could not get certain information. The general account information was located in his home office and the auditors had attended his Red Deer offices. When he provided his responses to the LSA on February 11, 2007 he personally drove to Edmonton to deliver them. With respect to the LSA letter of April 2, 2007 requesting the 6 additional items the Member replied respecting 2 of them on June 2, 2007 but indicated that he was waiting for the GST auditor to arrive and needed the other documents there for the auditor.

71. The Member explained that he had made arrangements with Revenue Canada that an auditor would come to his offices and do a single return for each year. He would

simply write the cheque as soon as the auditor indicated the GST amount. This had been the process from 2003 – 2006. The Member did not want to disrupt the process so he indicated in his June 2, 2007 letter to the LSA that their auditor could attend at his residence to review any materials, which he thought was a fair compromise.

72. The Member did not understand why he was being asked for the GST documents and the General account information as he had never been asked for these things before. He was not satisfied with Glen Arnston's response that it was something the LSA was entitled to under the Rule 130 audit process. The Member did not want Glen Arnston requesting anything from the GST people with whom he had an arrangement. He did not advise Glen Arnston of his position in writing at any time. The Member did not recall seeing the paragraph at the top of page 4 of the Rule 130 Audit letter dated June 19, 2007 (requesting him to sign, date and return the GST authorization form by July 3, 2007) and even if he had read it he would not have given the authorization.

73. The Member did not recall receiving Exhibits A-2 or A-3 from Katherine Whitburn and whether he did receive them or not, he did not respond to them. The Member advised that his schedule when attending the AEUB hearing in Rimbey was such that he was on site for his project manager job by 6 a.m., in Rimbey for the day, working on BLL matters in the evening and would not get home until 9:00 p.m.

74. The Member indicated that he had not practiced law after December 31, 2007. He did assist a Lacombe lawyer with respect to preparation and conduct of oil and gas hearing. Currently he works fulltime with a construction company in B.C. and owns a small fruit orchard. The Member indicated that he has applied for bureaucrat positions within the legal process but nothing that would constitute practicing law again. The Member indicated that he declared bankruptcy in July 2010 following a review audit by Revenue Canada which disallowed $800,000.00 in write-offs for bad accounts for the past 8 years.

Cross Examination

75. The Member indicated that with respect to the R.M. matter he could not recall acting for R.M. with respect to the 2003 purchase although he acted for the vendor. He was unable to say if money even went through his trust accounts with respect to this matter but by 2006/2007 it appears he was representing both parties. He was unclear how he could have acted for R.M. earlier, yet never met him.

76. On the Stuart Blyth matter the Member indicated that he did not realize at the time he gave the undertaking that they were personal undertakings. He had told the principals of BLL that it had to be taken care of. The Member was unable to advise

what happened with the letters from the LSA that were sent to him with respect to this complaint.

77. With respect to the audit matter the Member knew he was required to maintain a General Account but had not realized that the LSA had a right to inspect the General Account. He felt that he was accommodating the LSA by offering that they come to his home.

78. On the Devinder Shory matter he acknowledged that he made the undertaking and made two telephone calls with respect to discharge of the mortgage but that the matter then slid away from him. He did send one letter to follow up with C.H. Law Firm.

SUBMISSIONS ON CITATIONS

Submissions of LSA Counsel

79. Counsel for the LSA provided a list of the Exhibits in chronological Order.

80. With respect to the R.M. matter counsel for the LSA took the position that R.M. was a client of the Member's from 2003. He had received the Statement of Adjustments for the closing as well as the CCT. He and J.D. had agreed to share the costs. The nature of the transaction was that if the RC came off it would be a good building lot. If it did not the lot was useless. R.M. was aware of the RC but believed that it would be removed. R.M. tried to make inquiries of the Member's office after 2003.

81. In May 2005 R.M. received a letter from the Member's offices containing a very clear representation that the RC had been removed. The other paragraphs of the letter built on that premise. Relying on the letter R.M. sold the lands and then learned that the RC was still registered. R.M. called the Member in February 2006 and they spoke for the first time. The Member indicated that he would get the RC removed. In June 2006 R.M. met with the Member at 7:00 am at a golf course in Lacombe to sign an Affidavit but nothing happened thereafter.

82. Counsel for the LSA agreed that citations 5 and 7 could be one omnibus citation.

83. On the Stuart Blyth matter, the encumbrances were noted as not permitted on the transaction documents and the Member undertook to discharge the encumbrances. This was clearly a personal undertaking which the Member turned over to his clients when he left practice.

84. Regarding the Devinder Shory complaint the Member undertook to discharge two mortgages, but one was not discharged. The Member made some half hearted efforts but by December 2008, 2 years later, the mortgage was still not discharged.

85. Counsel for the LSA argued that the chronological chart was informative because the Member was practicing in Alberta until January 2008 and his home address from 2002 was always the same. With respect to failing to respond to the Law Society, the Member in evidence indicated it was his practice not to respond to the first registered letter. In January 2008 the Member changed his address to one in B.C. Stuart Blyth's letter of August 28, 2008 reached the Member there because it was attached to a letter from Doug Morris. The Member signed for the registered letters, and there is no explanation for his lack of response.

86. Regarding the Audit matter, the Member did not believe the LSA was entitled to see his general accounts records, but it is entitled, and furthermore the Member did not even look up the Rule. He made his own mind up. Counsel for the LSA characterized the Member's letter to LSA inviting him to attend at his home to review the materials as arrogant and not a serious offer that the Member wanted accepted. He would not even have been at home after 5 P.M. due to the schedule he advised of.

87. With respect to Citation 6, counsel for the LSA argued that it would be hard to believe that the Member was not attempting to mislead, on the balance of probabilities. The letter sent to the neighbors dated February 18, 2005 was an intentional sending of information that misstated the facts.

88. Counsel for the LSA agreed that citations 9 and 10 could be one omnibus citation.

Submissions for the Member

89. Counsel for the Member argued that the Member had bared his soul to the panel, making some of the citations convenient to establish.

90. Counsel for the Member acknowledged that Citation 5 had been made out.

91. With respect to Citation 6, Member's counsel agreed that there had to be an element of intent to mislead on the part of the person cited and that this was not the Member's intention. The Member had, in fact, acknowledged in his letter of response to the R.M. complaint that the February 18, 2006 letter was incorrect and he could not understand why it was done. Furthermore, the letter was sent out to the neighbors not R.M. It is not clear how R.M. got the February 18, 2006 letter and this supports more his being negligently misled by the letter.

92. Counsel for the Member suggested that Citations 5, 7 and 8 might all be combined into one citation.

93. With respect to the Stuart Blyth matter counsel for the Member suggested that the parties had agreed in a contract as to what was to be done and so when the Member turned the undertaking over to BLL, BLL had an obligation to remove the non-permitted encumbrances due to signing the Offer to Purchase and Agreement for Sale. Counsel also agreed that the Member had given the undertaking. The Member had ceased to practice law by January 15, 2008 and having left practice, although still a Member of the Law Society was prevented from performing lawyerly functions. i.e complying with his undertakings. The file had been left with BLL. BLL knew they had to deal with all the matters the Member had been conducting for the corporation.

94. With respect to the Devinder Shory matter, Member's Counsel agreed that the Member had given an undertaking to Devinder Shory. He did advise Devinder Shory of the difficulty he was having with the discharge. The Member did all he could. It was an extenuating circumstance that Devinder Shory wrote to the Member only in October 2007 and the Member did not receive the letter because he was not at that address at the time. Again, the Member was unable to fulfill the trust conditions due to having left the practice of law.

95. On the Audit matter, the Member was responsive to the February 5, 2007 letter from Glen Arnston. He provided additional information to Glen Arnston on June 2, 2007. The invitation for an auditor to come to his home was also responsive. Counsel for the Member argued that other than satisfying it that a general account is being maintained, the LSA is not entitled to request the records and even if the LSA is entitled to do so, the Member was of the genuine belief that he did not have to provide it. The GST information and accounts receivable listing are beyond what the LSA is entitled to request.

96. Counsel for the Member suggested that the Member was prepared to make available at his offices, but not provide to the LSA, the general accounting records. He was not prepared to let them see the GST documentation. The Member responded in a complete and appropriate manner. The Member also attended the hearing, travelling from B.C. and testified with candor.

Rebuttal

97. Counsel for the LSA advised the Hearing Committee that the interpretation section of the Code of Conduct speaks to intention. The Hearing Committee must find that the Member was attempting to mislead or that he was not. This was for the Hearing Committee to decide on the balance of probabilities. Counsel for the LSA provided case law on the meaning of "the balance of probabilities". Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

98. With respect to the Devinder Shory undertaking, it did not matter whether the Member was practicing or not, he made no effort at any time to comply with his undertaking. Some effort is required.

99. On the Rule 130 audit, it is not up to the Member to say what the LSA cannot see. Kathy Whitburn's request was pursuant to section 53 which clearly states that the Executive Director may in the course of a review under section 53(1): "*require the complainant or the Member to answer any inquiries or to furnish any records that the Executive Director considers relevant for the purpose of the review."*

DECISION

Citation 4 RE: Law Society Audit

100. **The relevant Rules of the Law Society of Alberta are as follows:**
Practicing with Prescribed Financial Records; Form U(5-3)

120 (2) A law firm shall maintain all its prescribed financial records at its offices in Alberta except that any of those records may be removed from those offices for the purposes of permitting an accounting firm to prepare an Accountant's Report in Form T (5-2)or For U (5-3) relating to those records.

…

Operating Trust Accounts and General Accounts

121 (1) every law firm shall maintain:

a) At least one operating trust account; and

b) At least one general account.

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:

…

e) A book of original entry showing the date of receipt, method by which money is received and source of all money received other than trust money;

f) A book of original entry showing all payments of money other than trust money and showing, with respect to each of those payments, the cheque number (if applicable), the date of the payment and the name of the payee;

g) Either a chronological file of copies of statements of accounts rendered to clients, or a journal showing all fees and charges to clients, the dates of the statement of account for those fees and charges and the names of the clients;

h) A fees and disbursements receivable ledger or other suitable system to record the law firm-client positions on all transactions, other than trust transactions, with respect to which a billing for fees or disbursements has been rendered;

i)Bank statements or passbooks, negotiated cheques, transfers between accounts and detailed duplicate deposit slips for all trust accounts and general accounts;

Examination, Review, Audit or Investigation of Financial Records

130 (1) The Benchers may at any time direct that an examination, review, audit, investigation or completion of the financial records as are necessary be made by a particular person designated by the Bencher, either by a general or particular designation, of the financial records and other records of any Member or law firm that in any way relate to the Member's or the firm's practice of law for the purposes of ascertaining and advising as to whether the provisions of the Act and the Rules have been and are being compiled with by the Member or law firm.

(2) The powers conferred by subrule (1) on the Benchers may also be exercised by:

a) The President of the Society;
b) The President –Elect of the Society;
c) The Chair of the Conduct Committee;
d) The Chair of the Financial Committee;
e) The Executive Director; or
f) The Director of Audit of the Society.

(3) Where a person conducts an examination, review, audit or investigation under this Rule:

a) A Member shall produce all records and supporting documentation that that person may require for the examination, review, audit or investigation; and

b) *The examination, review, audit or investigation shall, where practicable, be held in the office of the Member or law firm whose financial records and other records are the subject of the examination, review, audit or investigation.*

101. "Financial records" are defined in Rule 122(2) to include the items requested by Glen Arnston being the Member's General bank statements, negotiated general cheques, general deposit books and general journals for the period January 2006 – December 2006, and his accounts receivable listing as at December 31, 2006.

102. *Rule 122 f) "A book of original entry showing all payments of money other than trust money and showing, with respect to each of those payments, the cheque number (if applicable), the date of the payment and the name of the payee; "*and

Rule 122 h) "A fees and disbursements receivable ledger or other suitable system to record the law firm-client positions on all transactions, other than trust transactions, with respect to which a billing for fees or disbursements has been rendered;

captures the need to provide to LSA copies of Cheques written to Revenue Canada in payment of G.S.T.

103. Glen Arnston 's request for a copy of the latest GST return filed by the Member is covered under Section 53(1) of the Legal Profession Act RSA 2000 Section 54 Chapter L-8 which states as follows that:

Review by Executive Director

"53(3) *The Executive Director, in the course of a review under subsection (1), may do either or both of the following:*
(a) require the complainant or the Member concerned to answer any inquiries or to furnish any records that the Executive Director considers relevant for the purpose of the review;…"

104. The requirement for the Member to execute at Glen Arnston's request the GST authorization form is part of the "completion of records" provided for under *Rule 130)(1)* which states that: " *the Benchers may at any time direct that an examination, review, audit, investigation* <u>*or completion of the financial records as are necessary*</u> [emphasis added] *be made by a particular person designated by the Bencher, either by a general or particular designation, of the financial records and other records of*

any Member or law firm that in any way relate to the Member's or the firm's practice of law for the purposes of ascertaining and advising as to whether the provisions of the Act and the Rules have been and are being compiled with by the Member or law firm."

105. Glen Arnston's request was made for the above purpose. G.S.T. filings and remittances are clearly part of a practice of law and are required to be made quarterly (usually). Failure to remit G.S.T., Income Taxes, or employer/employee remittances for EI or CPP to the Government of Canada can be signs of a law practice that is at risk and that puts the public at risk. An evaluation of the financial health of a law firm requires that financial records be complete and up to date. One way of verifying that is to obtain confirmation by way of authorization from others where the Member is unable to provide the information directly.

106. In this instance, the Member was opposed to providing the authorization to Glen Arnston because he feared disrupting comfortable arrangements he had set up with Canada Revenue Agency for calculation and payment of G.S.T. The Member did not explain to Glen Arnston his need for sensitivity on this request. He made his own judgment call on the issue, not even reviewing the relevant legislation, and he was incorrect.

***Citations* 5 and 7, RE: R.M.**

107. There are some peculiar aspects to this set of facts, relating to when the Member was actually first retained by R.M. From the evidence, it is clear that R.M. considered himself to be a client of the Member's from 2003. R.M. thought that he and J.D. were sharing a lawyer. He never met the Member at that point and he was not billed directly. On the other hand, he did receive a Certified Copy of Title, he did receive the statement of adjustments, and his evidence was that he regularly called the Member's office as soon as he saw that the RC was still on title, and he was advised by staff that it would be taken care of.

108. The Member thought that how the title and Statement of Adjustments had been received by R.M. was not consistent with his then assistant's rigorous practice, and he had no recall of anyone advising him that R.M. had called. It appeared from his evidence that there was some question in his mind as to whether R.M. was a client in 2003.

109. R.M. somehow received a copy of the Member's letter to the neighbors in 2005. It was not "cced" to him so it is unclear how he came to have it in his possession.

110. On the other hand, in his letter to the LSA of August 27, 2007 the Member stated: *"My office acted on behalf of the Vendor, 1 Alberta Ltd. and R.M. our understanding at the time was that he* and *the principal of the vendor, J.D. were both knowledgeable of the restrictive covenant against the property and that the covenant would be removed by way of application to amend the Development agreement to the agreement of the County of S.…*

I did not receive instructions from any party at the time to bring the application to amend the development agreement to obtain the deletion of the restrictive covenant."

111. The Member himself having acknowledged that R.M. was a client from 2003, the question becomes whether the Member failed to do anything about the RC from 2003 onwards or from around 2006 and onwards.

112. The Member sent a letter to the neighbors in February 2005. In his letter to Pam Sugimoto he states: *"to be quite frank, I cannot understand why this letter would have been done…"*

113. It was done, likely on S.F. and J.D.'s instructions as the Member wrote to S.F. on February 14, 2005 and enclosed the RC in the letter. R.M. never met with or spoke to the Member until 2006.

114. R.M. in his Complaint about My Lawyer dated July 21, 2007 paragraph 3(c) indicates that he retained the lawyer in February 2006.

115. On the balance of probabilities the Hearing committee finds that the time at which R.M. had definitely retained the Member to remove the RC was around February 2006 when R.M. had committed to sell the lot and had been advised by the buyer that the RC was still on the title and had to be removed. R.M. called the Member who indicated he would have the RC removed. It was at that time R.M. called the Member repeatedly. R.M. also drove to the Member's Red Deer offices in an effort to try and reach him. R.M. eventually reached the Member by telephone after hours. R.M. and the Member then met in June 2006 at the golf course to sign papers and

the matter went no further. The Member knew that R.M. had the Lot sold, yet did not take steps to get the matter into court.

116. As a result R.M. lost the sale. At the time R.M. wrote to the LSA in 2007 he stated: "*I have not heard from him since, which is about one year later. August 2007."* There is no doubt, from the evidence, that the Member failed to keep R. M. informed as to the progress of the matter, failed to be punctual in fulfilling commitments made to the client. R.M., and failed to respond on a timely basis to communications from him that contemplated a reply.

Citation 6 RE: R.M.

117. On February 18, 2005 the Member wrote to the owners of three properties adjacent to R.M.'s lot. The letter said four things:

i. "that pursuant to clause 20 of the Development Agreement , the development agreement is amended by deletion of clause 22."
ii. That …"B. County has consented to the amendment."
iii. That "the developer has received consent to the change from the overwhelming majority of the land owners involved."
iv. That the properly had been sold and the new owner had the consent of the country to develop the same."

118. The clear communication in the letter was to inform the reader that the agreement had been amended, with the consent of the County and majority of interested landowners, sold and development approved by the County. It was a "done deal" to use the vernacular. Member's counsel argued that R.M. was not intended to get the letter so the fact that he was misled was collateral, and those who had been misled had not come forward. The Member's evidence was that he did not even recall why the letter had been written and that it was incorrect.

119. Section 3 (c) of the Interpretation section of the Code of Conduct states as follows: *"Although the world "knowingly" does not generally appear in the rules, a lawyer's intentions and the willfulness or deliberateness of the conduct are relevant to whether a breach of this Code will be sanctioned.*

120. The Hearing committee finds that the letter was written by the member to the neighbors in order to convince them that the development agreement had been amended and that any objection to same was too late and not in line with the desire

of other neighbors and the County. The intent was to discourage any opposition to an application that the member needed to make for the developers to rectify the R.M. situation.

121. The facts also show that: R.W. was the Member's client, he received a copy of this misleading letter from someone, the contents of the letter referred specifically to his Lot and to his legal concern, and he was misled.

Citation 8 RE: R.M.

122. Pam Sugimoto sent a letter to the Member on August 7, 2007 and he responded on August 27, 2007. Having reviewed the response Pam Sugimoto had more questions so on September 5, 2007 she requested additional information from the Member in relation to R.M.'s complaint. She sent a follow up letter on September 19, 2007 Pam Sugimoto indicated that she did not receive responses to the September 5 or 19, 2007 letters so on September 28, 2007 she wrote to R.M. advising that the matter would be referred to the Manager of Complaints.

123. The Member's argument is that Pam Sugimoto should have sent his response to R.M. and not written back to him for clarification on issues before doing so. It is clear to the hearing committee that Pam Sugimoto was trying to be fair to the Member. There was no point sending a response to R.M., a member of the public, that Pam Sugimoto a complaint officer with the LSA, was not entirely clear on. It was entirely reasonable and within her job description to ask the Member to clarify his letter, so she understood his position clearly and could provide a clear explanation to R.M., in an effort to resolve the matter informally. That was her role.

Combined Citations 9 and 11 RE: Stuart Blyth and Devinder Shory and failure to provide timely response to LSA communications

124. Stuart Blyth's complaint to LSA was made on August 18, 2008. Doug Morris wrote to the Member on December 19, 2008. In the absence of a reply, the matter was referred to Katherine Whitburn who wrote to the Member on March 4, 2009, via registered mail. A follow up letter was sent by Katherine Whitburn to the Member on April 8, 2009.

125. Devinder Shory's complaint to LSA was made on December 16, 2008. Doug Morris wrote to the Member on December 19, 2008. In the absence of a reply, the matter was referred to Katherine Whitburn who wrote to the Member on March 4,

2009, via registered mail. A follow up letter was sent by Katherine Whitburn to the Member on April 8, 2009.

126. The Member's evidence was that he had no memory of receiving any of Doug Morris or Katherine Whitburn's letters over the relevant time period, although he also acknowledged that the signature on the deliveries of two registered letters from Katherine Whitburn was his. There was another very serious complaint against him that had been made by someone in Red Deer. He was under intense pressure, and depressed. He blocked out receiving the letters.

127. It is a duplication to have two citations in relation to the same set of events. The letters related to different complaints, sent at exactly the same time, to which the Member has one explanation.

Citation 10 RE Stuart Blyth and Citation 12 RE: Devinder Shory and Breaches of Undertakings

128. Chapter 4 Rule 11(k) of the Code of Conduct , Relationship of the Lawyer to Other Lawyers provides that :

"11. The following rules govern the use of trust conditions:
A lawyer who has agreed, expressly or impliedly, to trust conditions or amendments is bound by them, whether or not they have been recorded in writing as required by this rule, and whether the lawyer is dealing with another lawyer or with a third party."

The *commentary* to that Rule states that:

"C.11.1 General: The use of trust conditions is a mechanism that enables lawyers to implement a transaction agreed upon by their respective clients. If a transaction is jeopardized because the lawyers are unable to agree on trust conditions, the clients' opinion of those lawyers in particular and the profession in general will be adversely affected."

129. In the Stuart Blyth matter, counsel for the Member suggested that despite the Member having given an undertaking, that the Member's client and Stuart Blyth's client had agreed in a contract as to what was to be done and so when the Member turned the undertaking over to BLL, BLL had an obligation to remove the non-permitted encumbrances .

130. In Carling Development Inc. v. Aurora River Tower Inc., 2005 ABCA 267**,** paragraphs 56-59 The Honourable Mr. Justice Côté says as follows that:

"[*56] One rule about solicitors' trust conditions is very clear in Alberta and British Columbia. They bind the recipient solicitor fully, and are in no way qualified by whatever rights, powers or immunities his client has or claims to have. In particular, it is no defence to a claim under the trust conditions that those conditions go beyond, or contradict, the sale contract. Such a defence might be valid in Manitoba: Milburn v. Dueck reflex, [1992] 6 W.W.R. 497, 81 Man. R. (2d) 266 (C.A.). But it is not a defence in Alberta, where the trust condition must be unconditionally obeyed if the documents are not returned: Witten, Vogel v. Leung, supra, at pp. 54-5 (A.R.); Minsos, McLeod v. Wedekind [1988] A.U.D. 772, [1988] A.J. # 447, Edm. 8703-0801 (C.A.); Field & Field v. Parlee McLaws, supra, at 132-33 (A.R.); McCarthy Tetrault v. Lawson, Lundell reflex, (1991) 58 B.C.L.R. (2d) 310; cf. Law Society of Alberta Code of Professional Conduct, supra, R. 11(e).*

[57] The respondents admit that

> *"the court has an inherent jurisdiction to compel compliance with trust conditions. . . In the appropriate circumstances enforcement of such conditions can occur regardless of the contract between the parties whom the solicitors are representing; enforcement occurs against the solicitor, not the party he represents."*
>
> *(factum, para. 21(a))*

[58] Still less is it a defence to a suit for breach of such a trust condition, that imposing that trust condition, or its terms, was unreasonable or otherwise violated Law Society Rules. The argument that the entrustor might be disciplined by the Law Society because the trust conditions went beyond the contract of sale, in substance is another attempt to make the sale contract an excuse for breach of the trust conditions. As noted, that is fundamentally mistaken.

[59] That rule barring set-offs and arguments about the contract of sale between the clients is founded on more than precedent. It is a corollary of the fact that trust conditions between solicitors are really a trust, and that the recipient solicitor holds the document entrusted as a trustee for the entrusting solicitor, not as the agent or trustee of the recipient's client. Without such rules, trust conditions would be largely useless. If they merely gave a right to sue on the sale contract, or

were overridden by the sale contract, then they would add nothing to the sale contract, and would be a mere trap for those sending documents or money on trust."

131. At paragraph 69 the The Honourable Mr. Justice Côté states that:
"[69] To use documents sent on trust conditions, is to accept the trust conditions. To do so and not perform them is a clear breach of trust. Almost invariably, the person so entrusted is the solicitor (not his client). Then the solicitor is personally liable for the breach of trust. In some circumstances, his client may be liable for the breach of trust also. The solicitor *is never a party to any pre-existing sale contract, and so he or she presumably does not have any set-off rights under it."*

132. There was no evidence provided by the Member as to what specific provisions in the Agreement for sale and purchase of the lands might have created a trust between the parties. This was a significant transaction. The lands were being purchased for over $6M. It is inconceivable that Stuart Blyth as counsel for the buyers would have relied on or understood the trust conditions to be accepted by anyone other than counsel for the vendor. It is inconceivable that the Member could have considered devolving the acceptance of Stuart Blyth's trust conditions upon his client.

133. The explanation given, that having gone inactive, the Member could not perform the trust conditions, and that this left no other options, is not reasonable. The Member and his client met with BLL's new counsel in St Albert to discuss files on which the lawyer would represent BLL. The Member could not recall whether this file was one of them. It was the Member's duty, and he had an opportunity, to ensure that he reviewed his active files, noted matters where he was under trust obligations and arranged for new counsel to assume responsibility for the trust conditions.

134. There was a disagreement in the evidence in relation to the ultimate "value" or "significance" of the undertakings. Stuart Blyth indicated that his client had to relocate the URW and that the issue of the caveat resolved itself in a way due to a new Development Agreement, but not while he had the file. The Member was of the view that the caveat and URW were on the title by error in the first place and not a huge issue to remove. The Member also stated that Stuart Blyth's client redid the plan and moved the URW, suggesting something voluntarily done. The issue was not explored well enough nor sufficient evidence provided to clarify the situation in a way that might assist the Member in some kind of defense.

135. With respect to the Devinder Shory matter counsel suggested that the Member had no option when counsel for the private lender failed to provide the discharge of mortgage, short of advising the LSA.

136. The Member had been practicing real estate law for years. He knew a court application was needed to remove the RC from R.M.'s property. It is difficult to believe that he would not know that he needed to apply to the court for discharge of the mortgage under section 106(1) of the Land Titles Act, R.S.A. 2000, c. L-4. It was a question of not wanting to make the effort as opposed to having no remedy available to him.

137. The short answer to the issue is succinctly articulated by McDonald J. in Witten V. Leung [1983] A.J. No. 883 at paragraph 18 where he states: "*There being no doubt as to the clarity of the trust conditions, the obligation of the receiving solicitors to comply with them was absolute."*

Where a lawyer makes an undertaking, drafted in their own words, and the undertaking is clear, the obligation to comply is absolute.

SUBMISSIONS ON SANCTION

138. Counsel for LSA indicated that a portion of the costs included preparation for the 3 citations that were dismissed and estimated that at 25% or $1,972.03. Counsel proposed that the Member have up to 2 years to pay and if the Member wishes to raise arguments respecting non-collection as a result of bankruptcy he can address this at the time the collection attempt is made. Counsel for the LSA suggested that a short suspension is in order. A review of the Member's record shows similar convictions in the past. His conduct raised several issues including governability, his health, and practice management generally.

139. Counsel for the Member suggested that the Member was approachable and popular with clients. He had a high volume practice and did charity work and the result was that many people came to see him. He was a lawyer in a rural area and was a person who fulfilled the legal needs of the small centers in central Alberta. The outcome was that he became overwhelmed and burnt-out. Counsel for the Member also supported a suspension of not too lengthy a duration and provided the Hearing committee with a case wherein a Member of the LSA.in 2007 had been

found guilty of a citation that she had misled or attempted to mislead the Court and received a reprimand and fine of $2500.00.

140. In determining an appropriate sanction, the Hearing Committee is guided by a purposeful approach, which seeks to ensure that the public is protected, that high professional standards are preserved, and that the public maintains confidence in the legal profession. Those factors which relate most closely to the fundamental purposes outlined above will be weighted more heavily than other factors. The final sanction must be consistent with the fundamental purposes of the sanction process. [Hearing Guide, pages 9 and 10.]

141. In this case, the Hearing committee took into account general factors such as :

A. the need to maintain the public's confidence in the integrity of the profession and the ability of the profession to effectively govern its own members;
B. specific deterrence of the member;
C. that the member had been administratively suspended since March 31, 2008;
D. denunciation of the conduct;
E. avoiding undue disparity with sanctions imposed in other cases.

142. Specific factors that the Hearing Committee took into account were:

A. the need to protect the public and maintain public confidence in the legal profession;
B. the member's level of intent;
C. the impact of the conduct;
D. the potential injury caused by the conduct;
E. that some of the conduct involved breaches of trust.

143. The Hearing Committee considered the member's prior disciplinary record which included similar conduct to that which he was cited for by this Hearing committee, that he did not enter an admission of guilt, his lack of acceptance of much responsibility, and his depression and inability to cope with the events in his life of 2007/2008.

144. Having regard to the sanctioning principles outlined above, the Hearing committee was satisfied that the public interest would be served by making the following Orders:

A. a global sanction for all of the citations on which the Member had been found guilty, of 4 months suspension to commence immediately,

B. That the Member shall pay the actual costs of the hearing less the amount of $1,972.03 reflecting a 25% reduction of costs of preparation time for Counsel for the LSA in relation to the 3 discontinued citations.

C. Costs are payable within 2 years or sooner, in the event that the Member applies for reinstatement with LSA.

D. A Notice to the Profession is required as a result of the suspension Order.

E. There is no requirement for a referral to the Attorney General.

F. The Exhibits entered in the Hearing shall be available for public inspection with the proviso that any information that may identify a client is to be redacted.

DATED this 15th day of June, 2011 at the City of Calgary in the Province of Alberta.

Per:

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SARAH KING D'SOUZA, Q.C.

Per:

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AMAL UMAR

Per:

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ROSE M. CARTER, Q.C.