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 K. FRASER McCONNELL,
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

1. On March 17 and 18, 2014, a Hearing Committee (the "Committee") of the Law Society of Alberta (the "LSA") convened at the offices of the LSA in Calgary, Alberta, to conduct a hearing regarding three citations that had been asserted by the LSA against the Member, Mr. K. Fraser McConnell. The Committee included Brett Code, Q.C., as Chair of the Committee, and Dr. Miriam Carey, Ph.D., and Mr. Fred Fenwick, Q.C., as members of the Committee. The LSA was represented by Mr. Gregory D. Sim, and the Member was represented by Mr. L. J. Thornborough, Q.C.

Citations

2. The Member faced three very serious citations, and the hearing had been set to last for ten days. Specifically, it was alleged:

    a) That the Member enabled others to achieve an improper purpose and that such conduct is conduct deserving of sanction;
    b) That the Member deliberately or recklessly engaged in conduct to deceive the lenders and that such conduct is conduct deserving of sanction; and
    c) That the Member engaged in conduct that placed the Member in a conflict of interest and that such conduct is conduct deserving of sanction.

3. Mr. McConnell was given notice of those 3 citations on September 24, 2012, and understood them to be the end result of an investigation into his conduct that began in June of 2007. The citations were made public on or about September of 2012.

4. At the opening of the hearing, Mr. Sim advised that the LSA was withdrawing Citation 2 and Citation 3 and that the LSA proposed, by agreement with the Member, to amend Citation 1. Mr. Sim stated the following:

> [T]he Law Society has determined that although three citations were referred to the hearing, upon closer inspection and review of the evidence, it found that Citations 2 and 3 do not appear to meet the

> threshold test for matters to be referred to hearing. And as a result of that, we will be calling no evidence in relation to those citations and, in fact, exercising discretion to withdraw those citations.

5. No evidence was called on those citations. They were withdrawn. Reference was made to those two citations only to the extent that their existence and their publication affected sanction, as discussed further below.

6. Counsel then jointly proposed an amendment to Citation 1. It was then alleged:

> That the Member ***unwittingly*** enabled others to achieve an improper purpose and that such conduct is conduct deserving of sanction.

The only change was the addition of the word "unwittingly" as highlighted above.

7. Counsel jointly then provided the Hearing Committee with an Agreed Statement of Facts. That document contained the facts that were agreed by both the Member and the Law Society. It also contained an admission of guilt to the amended Citation 1. It was marked as Exhibit "A" for Identification.

8. The Hearing Committee adjourned and took time to review and discuss Exhibit "A".

9. Pursuant to Section 60 of the *Legal Profession Act*, a statement of admission of guilt such as Exhibit "A" cannot be acted upon until it is in a form acceptable to the Hearing Committee. Exhibit "A" was not acceptable to the Committee. Submissions from counsel were heard, and two amendments were effected, namely:

   a) Citation 1 was returned to its original form, that is, the word "unwittingly" was removed; and

   b) The admission of guilt contained in the Agreed Statement of Facts was amended to accord with that Citation 1, that is, the word "unwittingly" was removed.

That amended Agreed Statement of Facts, including that amended admission of guilt, was acceptable to the Hearing Committee and was entered as Exhibit 1.

Finding of Guilt

10. The hearing proceeded on Citation 1, which alleged:

> That the Member enabled others to achieve an improper purpose and that such conduct is conduct deserving of sanction.

11. The Member admitted the facts set out in Exhibit 1. The LSA agreed with those facts. The Member admitted guilt to Citation 1.

12. The Hearing Committee found Mr. McConnell guilty of Citation 1.

Facts

13. In December of 2005, Bank A filed a complaint against M.L. and P.W., both members of the LSA. During the course of the investigation into that complaint, the LSA discovered that Mr. McConnell was involved in disbursing $708,000 in trust funds for the two Edmonton projects that were the subject of the Bank A complaint.

14. On June 12, 2007, an Investigation Order was issued directing an investigation into Mr. McConnell's conduct.

15. Mr. McConnell, who did not believe that he had been involved in any kind of fraudulent activity but, to the contrary, believed that he had played a minor, and legal, role in two complicated real estate projects, participated willingly in the LSA investigation and provided as much assistance as he could to the LSA and its investigators.

16. Mr. McConnell had never been involved in the kind of transaction that occurred on the two projects at issue.

17. In 2000, P.W. asked Mr. McConnell to act as an independent trustee for certain Buy Back Option payments held by investors in the projects. P.W. told him that M.L. would provide the details of Mr. McConnell's responsibilities.

18. M.L. did so. He explained that Mr. McConnell would be collecting Buy Back Option documents from investors and that he would be provided with funds to distribute to the investors in exchange for signed versions of those documents.

19. Mr. McConnell knew who had retained M.L., but he did not know for whom P.W. acted. While Mr. McConnell was to be a trustee for the above-described transaction, he never knew who represented the investors. He made no inquiries to determine who was representing them, and he never recommended that any of them seek independent legal advice.

20. P.W. and M.L. completed various transactions, as described further in the Agreed Statement of Facts, and Mr. McConnell fulfilled his role. For his effort, Mr. McConnell received minimal compensation.

21. As to his involvement, Mr. McConnell:

    a) Had no involvement in preparing documents, in recruiting investors, in representing Bank A, or in any of the conveyancing involved in the projects;

b) Was aware that the investors had obtained conventional mortgage financing but that they were not occupying or intending to retain any ownership of the condominium units;

c) Was aware that the investors had not invested any actual money to purchase the condominium units and, instead, that the deposits and cash to close their condominium purchases were covered by a certain form of promissory note;

d) Made no inquiries to ascertain whether the mortgage lenders were aware of the true nature of the transactions and in particular whether they were aware of the promissory notes or the Buy Back Options;

e) Was aware that the funds M.L. required to close the purchase came from the same mortgage advances obtained through the investors;

f) Was aware that the funds for the Buy Back Option payments came from the same mortgage advances obtained through the investors;

g) Did not make any inquiries to understand exactly why he had been instructed to do what he did, although he knew it was unusual for a vendor of real estate to immediately pay back proceeds of sale to the purchaser post-closing; and

h) Omitted to make inquiries to understand the true nature of the transactions, although he knew it was incumbent upon him as a lawyer to understand why he was receiving and then disbursing large amounts of money to other parties.

Sanction

22. Exhibit 2 is a certification that Mr. McConnell previously had no discipline record over his 39-year long career as a member of the LSA.

23. Exhibit 3 is an Estimated Statement of Costs showing total estimated investigation and hearing costs of $70,449.33.

24. Mr. Sim provided written submissions on sanction as well as a series of cases, all supplemented with oral submissions. Mr. Thornborough responded orally.

25. The LSA sought:

    a) A 3-month suspension; and

    b) Costs to be calculated as follows:

        i. 1/3 of the investigation costs, less 25% to account for delay (which would be $8,897.33);

ii. 1/3 of the legal preparation costs, less 25% to account for delay (which would be $4,003.13);
iii. 1/3 of actual hearing costs, less 25% to account for delay (not calculated for us).
iv. All adding up to what we were told by LSA counsel was a total of approximately $13,000.

26. Mr. Thornborough sought a Reprimand and minimal or no costs.

27. Our decision, pronounced orally on March 18, was that Mr. McConnell would not be suspended but would pay a fine in the amount of $5,000 and pay costs in the amount of $13,000. That total amount of $18,000 was to be paid within six months of delivery of these written reasons to Mr. Thornborough.

28. The LSA made no submissions in support of a fine as an alternative to suspension.

29. Reference was made to disbarment, but not on the facts as agreed. Rather, it was suggested that disbarment would be a suitable sanction for one whose moral blameworthiness had been proved to be knowing, intentional, reckless, or wilfully blind. To prove Citation 2, the LSA would likely have had to prove such a level of blameworthiness on a balance of probabilities. Instead, the LSA withdrew that citation. Thus, disbarment was mentioned only to describe the high end of the range.

30. The LSA's recommendation of a suspension arose in large part from its assessment of blameworthiness. The LSA's view was that Mr. McConnell was extremely careless and extremely inattentive, but that he was not reckless or wilfully blind. The LSA appears to think that the case is one where it seems incredible that Mr. McConnell did not at least appreciate that he may be enabling a fraudulent scheme. Simultaneously, LSA seemed to allow that the facts admitted could equally be found by us to be consistent with a conclusion that Mr. McConnell did not turn his mind to what was going on and that he just did not consider the larger projects and the importance of his role in them.

31. The LSA's submission focussed further on the requirement that the Hearing Committee make a determination of blameworthiness, that it assess the evidence, and come to its own conclusion. The evidence that we had is entirely contained in Exhibit 1. As discussed above, the original presentation to the Hearing Committee was of a citation that included the word "unwittingly" and of an admission of "unwitting" guilt.

32. As described above, we disagreed with "unwitting" as an available characterization of the facts admitted by Mr. McConnell. Mr. McConnell knew many things, turned his mind to some, did not turn his mind to others, and, in certain circumstances, turned his mind away from what he knew, as an experienced real estate lawyer, to be unusual practices and

what he knew to be standard practices, all as described above and in the Agreed Statement of Facts.

33. He most certainly was not an unwitting dupe. He was not duped at all. He failed to conduct himself as a lawyer should – omitted to explore the nature of his retainer, omitted to ask important questions, omitted to employ his experience when he ought to have done so. He fulfilled the role asked of him by M.L. and P.W., as though they were his clients, and as though he needed to do no more than to produce the paper they designed and to fulfill their requests.

34. Despite those failures as a lawyer, the LSA was willing to have that conduct characterized as "unwitting". We disagreed, and that term was dropped. It is difficult for us, however, to see how the LSA can now argue for some higher level of blameworthiness than "unwitting", the facts that led to that characterization being the very facts ***agreed to*** by the LSA prior to the appearance before us.[1]

35. Despite its prior agreement to an unwitting level of blameworthiness, the LSA argued for what its counsel described as "moderate blameworthiness", that terminology flowing naturally from the argument set out above.

36. Based upon the principles of sanctioning and applying the various criteria arising from case law and from the Hearing Guide, the LSA then suggested that moderate blameworthiness should lead us to impose a sanction described by its counsel as a "moderately severe suspension". The LSA suggested that the range of suspension available to us was from 3 to 6 months but that the LSA recommended a 3-month suspension.

37. The LSA does not suggest that, in 2000 and the beginning of 2001, Mr. McConnell should have been fully cognizant of the possibility that he was facilitating a mortgage

[1] It is worth noting that the LSA signed Exhibit 1, permitting it to be described as an "agreed" statement of facts. Such a description is not necessary. A document containing an admission of guilt could be described with title asserting less authority and less certainly such as, for example, a "Statement of Admitted Facts", which might be a compendium of no more than the facts that the Member was willing to admit. The LSA could then assert that, while many of those facts concurred with what had been obtained by the investigation, the LSA knew there to be more facts or different facts that might have been led at a hearing, but that, despite that reality, the LSA was willing, in the spirit of compromise, efficiency or whatever other valid purpose, to proceed to hearing relying on no more than the Member's statement of admitted facts. To go the next step and agree to the Member's statement of facts permits third parties who see the Agreed facts, including the Hearing Committee, to conclude that the facts are correct, complete, clear, or final. Such conclusions are particularly justified when those parties or that Hearing Committee know that the agreement was made by a person, in this case the LSA, who conducted a detailed investigation over years and years.

fraud scheme. Far from it. The LSA acknowledges that mortgage fraud issues were not "on the radar" in Alberta at that time. It does suggest, however, that Mr. McConnell should be sanctioned on the basis, among other things, of the responsibility of lawyers to be careful that they are not being dragged into fraudulent schemes.

38. In addition to its notion of moderate blameworthiness, the LSA elicits general deterrence as the prime factor in support of a suspension. The LSA asserts that this factor is extraordinarily important because the membership as a whole needs to understand that, even though this happened a long time ago, members have an obligation, then as well as now, to be on guard to make sure they are not dragged into schemes that could have a fraudulent purpose, even when they are not given all the information and even when they are not fully aware of what is really going on behind the scenes. It is incumbent on a lawyer to be vigilant to make sure that he or she understands what it is that is being done and why certain instructions are being given.

39. Counsel for the Member simply disagreed with the importance of general deterrence, opining that a suspension in 2014 for conduct that occurred 13 to 14 years ago would have almost no deterrent value.

40. We agree with the statements made by the LSA regarding the need for vigilance, diligence, care, and competence, and we speak about the principles underlying those in more detail below. We agree that members of the LSA must be conscious of the possibility of being used in various ways to legitimize various illegal or improper schemes. We do not agree that Mr. McConnell, on the agreed facts, should personally have to suffer a suspension in order to cause other members of the bar to become conscious of that possibility. Arguing for a 3- to 6-month suspension of Mr. McConnell under the banner of general deterrence misunderstands and misapplies that concept, stepping into the realm of specific deterrence in a way that is unjustified. Mr. McConnell should not have to suffer the ignominy of suspension from membership in order to assist the LSA in teaching those lessons to members of the bar generally.

41. Another position strongly asserted by the LSA is the need to assure, by way of a moderately severe sanction, the public that the Law Society treats these types of cases very seriously. Again, we agree with the principle. Unfortunately, from our point of view, asking the Hearing Committee to suspend for 3 to 6 months in support of that principle is a simultaneous request that the Hearing Committee overlook evidence that the Law Society does not appear to have taken this particular case very seriously. The investigation of the complaints began nine years ago, in 2005. The investigation into the conduct of Mr. McConnell began seven years ago, in 2007. Fully 5 years later, very serious citations, alleging deceit, were issued. Two more years later, the hearing into the very serious allegations finally began, but the serious allegations were withdrawn, and the hearing was run on allegations that Mr. McConnell unwittingly enabled the scheme

designed and implemented by others. We do not think that suspending Mr. McConnell for 3 to 6 months would give the public the message suggested by the LSA.

42. We do agree with the factors highlighted by the LSA as they concern mitigation, that:

    a) There is no evidence of simultaneous ethical or other breaches;

    b) Mr. McConnell's financial gain was marginal;

    c) There is no evidence of negative impact, from Mr. McConnell's conduct, on Mr. McConnell's clients or on others;

    d) The misconduct ultimately alleged was admitted, eliminating the need for proof and saving the LSA an estimated 9 days of hearing time;

    e) Mr. McConnell has no prior disciplinary record;

    f) The conduct appears to be out of character for him or isolated.

43. The LSA submits that there is no need for specific deterrence, yet asserts that a suspension would have the positive sanctioning impacts of denunciation and incapacitation. We were not provided with reasons why those purposes need be satisfied here, and we do not believe that they should be.

44. Mr. Thornborough focussed on time, namely:

    a) On the length of Mr. McConnell's service (39 years) as a member of the bar, both as a public prosecutor and Assistant Chief Prosecutor and later as a practicing lawyer;

    b) On the absence of any disciplinary record in all of those 39 years; and

    c) On what he described as the unreasonable length of time – a length of time that, in other circumstances might result in a stay of the proceedings for abuse of process - from investigation beginning in 2007, to public citation in 2012, to hearing in 2014, particularly in light of the frank admission by the LSA that none of that delay was caused by Mr. McConnell himself, who participated willingly and in a forthright way from beginning to end.

45. Mr. Thornborough also focussed on the marginal nature of Mr. McConnell's participation, its lack of importance in the bigger picture of the projects designed and implemented by others, and his lack of intent to cause harm or to profit personally.

46. Emphasized, too, was the fact of the existence for many, many months of the very serious allegations against him, allegations that he could not admit, since they were incorrect, and

allegations that stood as a cloud on his very high reputation for honesty and integrity every day of their publication.

47. As soon as the LSA was able to admit that it could not prove the very serious allegations it had made, Mr. McConnell appears to have tasked Mr. Thornborough with working towards a resolution with the LSA. A resolution was obtained, and the hearing was, in very large part, avoided on agreed facts.

48. Having adjourned to consider and discuss the submissions of counsel, the Hearing Committee came to a different view and, as set out above, imposed a fine and costs.

49. The admitted misconduct of Mr. McConnell was not unwitting. Even as long ago as 2000, Mr. McConnell was a very experienced member of the LSA. He should have known, and likely did know, that it was improper of him:

    a) Not to make inquiries to understand the true nature of the transactions and to understand why he was receiving and then disbursing large amounts of money;

    b) Not make inquiries to understand exactly why he had been instructed by M.L. to do what he did, particularly when he knew, as a consequence of his legal experience, that it was unusual for a vendor of real estate to repay proceeds of sale to the purchaser immediately on closing;

    c) Not to make inquiries to discover by whom P.W. was retained;

    d) Not to make inquiries both as to the nature of his role as trustee and as to who was representing the investors for whom he was the trustee;

    e) Not to make inquiries sufficient to determine whether he should recommend to the investors that they obtain independent legal advice;

    f) Not to make inquiries to ascertain whether the mortgage lenders were aware of the true nature of the transactions and in particular whether they were aware of the promissory notes or the Buy Back Options;

    g) Not to make inquiries when he became aware that the investors had obtained conventional mortgage financing but that they were not occupying or intending to retain any ownership of the condominium units;

    h) Not to make inquiries when he became aware that the investors had not invested any actual money to purchase the condominium units and, instead, that the deposits and cash to close their condominium purchases were covered by the promissory notes devised for these schemes;

i) Not to make inquiries when he became aware that the funds M.L. required to close the purchase came from the same mortgage advances obtained through the investors; and

j) Not to make inquiries when he became aware that the funds for the Buy Back Option payments came from the same mortgage advances obtained through the investors.

50. As an adjective, "unwitting" has two distinct meanings, both of which, when analyzed from the point of view of a competent member of the LSA, reveal the scope of the misconduct of Mr. McConnell on the agreed facts. Unwitting means "unaware of the full facts" and it means "not done on purpose, unintentional". An unwitting act is unintentional, and therefore blameless, when it was done without awareness of the full facts, the underlying assumption being that the person involved would not have done what he or she did had he or she known the full facts. The notion that one who acts unwittingly is also blameless is true only when nothing required that that person make further inquiries, before acting as he or she did, in order to become aware of the full facts.

51. In some circumstances, such as those of the mythical King Oedipus, for example, unwitting can mean innocent or blameless. Oedipus married his mother and murdered his father but only because he was truly, honestly, and innocently unaware of the full facts. Had he been aware of the facts, neither of those events would have occurred.[2] Being so unaware, what he did was also truly unintentional and therefore lacked blameworthiness.

52. Unlike a member of the LSA, Oedipus had no duty to make inquiries when confronted with red flags, no obligation to ensure that he took steps to become aware of the full facts, and no requirement to learn or understand the importance of his role in the grander scheme of things so as to ensure that he did not unintentionally participate in some unknown wrongful act.

53. Mr. McConnell had all of those obligations and failed to fulfill them. Mr. McConnell is obviously full of both honesty and integrity and obviously conducts his practice competently and in accordance with the high expectations properly held by his clients, by the LSA, and by the public generally. Unfortunately for him, for his clients, and for the public, something caused Mr. McConnell to let down his guard when it came to fulfilling the tasks he was asked to fulfill by M.L. with the involvement of P.W.

[2] Oedipus might still have committed the murder, but he would not have fulfilled the fateful prophecy and killed his father, as he did not know that the man he killed was his father. He was unwitting as to that fact.

54. We will never know what caused him to act the way he did; the agreed facts do not speak to the reasons, and no evidence was tendered on the subject. We know only that a competent lawyer in the circumstances faced by Mr. McConnell makes inquiries. Such a lawyer is not permitted to remain unwitting, in the first sense used above. A lawyer in such circumstances has a positive obligation to make the necessary inquiries, to assess the meaning or the existence of the red flags, and to follow up if those inquiries reveal anything that is not fully above board – and ***known*** by the lawyer to be fully above board. Once such inquiries are made, the lawyer is no longer unaware of the full facts, no longer unwitting, such that there is very little risk that the lawyer will participate or will cause his clients to participate, unintentionally, in some fraudulent or otherwise improper scheme.

55. The positive obligation of inquiry may sometimes present difficulties and may indeed be very difficult to accomplish. The public interest requires that members of the LSA fulfill that obligation and conduct those inquiries.

56. Mr. McConnell's failure to inquire, which might be described as "intentional ignorance" in the face of a positive obligation to inquire, is a serious failing by a member of the LSA and one that cannot be countenanced, even when it occurred many, many years ago.

57. In our opinion, such a failure, even on the agreed facts, could well give rise to a suspension. What caused us to substitute a fine for a suspension is the passage of time. Had the LSA investigated and prosecuted the matter more quickly, we might have suspended Mr. McConnell.

58. The overall delay, which amounts to close to 7 years from the time of the Investigation Order to the time of the hearing, is wholly attributable to the LSA. With a delay of that length, the LSA's prosecution was at serious risk of being stayed by a court on the basis of abuse of process. As Mr. Thornborough pointed out to us, Mr. McConnell chose not to pursue that route in order to come to terms with his regulator and to admit to that conduct of his which was sanctionable. It is obvious to us, however, that Mr. McConnell could not come to such terms with the LSA as long as the LSA was pursuing, albeit slowly, the extremely serious allegation in Citation 2, that he had participated deliberately or recklessly in a scheme designed to deceive lenders.

59. That those apparently unprovable, public allegations hung over Mr. McConnell's head for many months also constitutes an important part of our reasoning in imposing a fine rather than a suspension. Mr. McConnell has suffered the embarrassment of what can

now, in light of the agreed facts, only be characterized as false or exaggerated public allegations. Suspension in the face of these facts would be unconscionable, in our view.[3]

60. That said, Mr. McConnell's intentional ignorance caused harm, possibly to his clients, but most assuredly to the standing of the legal profession and to the public interest. For that harm, Mr. McConnell must pay a fine in the amount of $5,000 and costs in the amount of $13,000.

61. The total amount of $18,000 must be paid within 6 months of the delivery to his counsel of this written report.

62. There shall be no Notice to the Profession.

63. The Exhibits shall be made available to the public in accordance with the normal practice, that is, that client and other names shall be removed for the protection of privilege. In that context, there is no need for the removal of the names of P.W. and M.L., whose conduct was admitted and agreed by the parties here.

Dated at Calgary, Alberta, the 11th day of June, 2014

W. E. Brett Code, Q.C.,
Chair

Fred Fenwick, Q.C.

Miriam Carey, Ph.D.

[3] We wish to make it clear that Mr. Sim, LSA counsel, was retained to conduct this prosecution rather late in the day. None of the delay is attributable to him, and it is likely that he personally deserves much of the credit for the decision to withdraw the unprovable Citations 2 and 3, which decision then obviously permitted the discussions to occur that resulted in the Agreed Statement of Facts and the admission of guilt to Citation 1. We commend Mr. Sim for that contribution and thank him for it.