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 DAVID WESTRA, a Member of the Law Society of Alberta

INTRODUCTION

1. On October 25, 28 and 29, 2010, a Hearing Committee of the Benchers convened at the Law Society office in Edmonton to inquire into the conduct of David Westra (the "Member"). The Committee was Kevin S. Feth QC, Chair, James Eamon QC, Bencher, and Scott Watson QC, Bencher. The Law Society of Alberta (the "LSA") was represented by Lindsay MacDonald QC. The Member was present for the Hearing and was represented by Stewart Baker QC.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1, 2, 3, 4 and 5, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Private Hearing Application Notice, the Certificate of Status of the Member, and the Certificate of Exercise of Discretion by the Director, Lawyer Conduct, established the jurisdiction of the Committee.

3. The Parties had no objections to the composition and jurisdiction of the Hearing Committee.

4. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Neither the LSA nor the Lawyer requested a private hearing; consequently, the Hearing was held in public.

CITATIONS

5. The Member faced the following citations:

   CITATION 1: IT IS ALLEGED that you assisted your vendor client or your purchaser client, or both of them, to achieve an improper purpose, and that such conduct is conduct deserving of sanction.

CITATION 2: IT IS ALLEGED that you deliberately or recklessly failed in your obligation to your lender client to disclose the existence of the addendum, and that such conduct is conduct deserving of sanction.

CITATION 3: IT IS ALLEGED that you failed to disclose to your purchaser client that the vendor of the property was in a fact a realtor, and that such conduct is conduct deserving of sanction.

CITATION 4: IT IS ALLEGED that you failed to serve your clients in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.

CITATION 5: IT IS ALLEGED that you failed to follow the instructions of your lender client, and that such conduct is conduct deserving of sanction.

CITATION 6: IT IS ALLEGED that you commissioned an Affidavit knowing it to be false, and that such conduct is conduct deserving of sanction.

CITATION 7: IT IS ALLEGED that you sought to deceive the Law Society in your response to the complaint, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

6. The Hearing Committee dismissed all of the citations, except Citation 4. Citation 5 was found to be established on the evidence, but subsumed within Citation 4, and therefore was dismissed due to the redundancy.

7. The Hearing Committee ordered the following sanctions and costs award:

    a. a reprimand;

    b. a direction that the Member be referred to Practice Review and that he cooperate with the Practice Review Committee and satisfy any reasonable conditions imposed on him by that committee for a period of 12 months or such other period of time as directed by the Practice Review Committee;

    c. a direction that the Member pay one half of the actual costs of the Hearing.

8. The Member was granted 6 months from receipt of the Statement of Actual Costs of the Hearing to pay the costs award.

SUMMARY OF EVIDENCE

9. A Binder containing Agreed Exhibits numbered 1 – 35 was entered by consent of the parties at the start of the Hearing.

10. During the course of the Hearing, Exhibits 36 to 40 were received into evidence, including the disciplinary history of the Member, which showed that the Member had no prior disciplinary record.

11. The LSA called five witnesses, and the Member testified on his own behalf. A credibility contest arose between some of the witnesses, and between the Member and two of the witnesses.

a) Facts

12. The Member has been a lawyer in the LSA since 2002. The citations arose from a residential real estate file in which the Member acted for the purchaser, the vendor, and the lender. The most serious allegation was that the Member knowingly participated in a mortgage fraud.

13. The Member began his career by practicing personal injury litigation, but in 2006, started his own firm and transitioned his practice into real estate law. Around that time, he also acquired a license as a real estate agent.

14. In May 2007, a husband and wife (described here as "CG" and "RG", respectively) entered into a Residential Real Estate Purchase Contract (the "Contract") dated May 16, 2007 to purchase their first house, located in Edmonton. They utilized the services of a real estate agent, described here as "SS" (the "Realtor"), to assist them in finding the house and negotiating the Contract.

15. The real estate market in Edmonton was "hot", with residential property values increasing dramatically. They felt pressured to buy before prices rose even more.

16. The Contract initially described the vendor as "c/o LB", which the Realtor explained to the purchasers meant that the sale was care of the listing broker. CG and RG claimed that they did not know the identity of the vendor when the Contract was signed. In fact, and apparently unknown to the purchasers at the time, the vendor was the Realtor.

17. The Contract contemplated a purchase price of $405,000, including an initial deposit of $2000, new financing of $364,500, and a balance owing of $38,500.

18. An Addendum to the Contract dated May 1, 2007 (the "Addendum"), but apparently executed shortly after the Contract was signed, stipulated that the vendor would give the purchasers a $40,000 credit on the possession date for renovations to the basement.

19. The purchasers arranged for mortgage financing through someone they understood to be a mortgage broker, Sujata Sahgal. In fact, Ms. Sahgal was a mortgage associate, working on becoming a broker. Ms. Sahgal arranged the financing with a trust company (described here as "RTC"), which agreed to be the lender.

20. The purchasers did not communicate directly with the lender. All communications about the financing were between Ms. Sahgal and the lender.

21. The basic loan amount was $364,500, plus proceeds for an insurance premium of $9,477, resulting in a total loan of $373,977.

22. In early June 2007, on the recommendation of the Realtor, the purchasers contacted the Member to represent them in the real estate transaction for the property. The transaction was scheduled to close on June 30, 2007.

23. The Member had a busy real estate practice at that time, and relied on a legal assistant for the preparation of certain documents and initial communications with some clients.

24. The purchasers' documents arrived at the Member's office on approximately June 5, 2007, including the Contract and the Addendum. He briefly reviewed the documents for the closing date, directed that a file be opened, and left the preparation of the initial closing documents to his assistant.

25. By letter dated June 26, 2007, the lender communicated to the Member that it wished to retain him to act on behalf of the lender with regard to the transaction, and provided specific instructions to the Member. Those instructions included the following provision:

> "14. We require your written confirmation that the sale is closing according to the terms presented to us in the Agreement for Purchase and Sale and that you have/will review the land transfer tax affidavit (if applicable) to ensure that the sale price and land transfer tax are identical and confirm the following terms:
>
> Sale Price: $405,000.00 Our 1st Mortgage: $373,977.00
> Down payment: $40,500.00"

26. The Member accepted a retainer with the lender on the terms stipulated in the letter.

27. The Member did not provide a copy of the Addendum to the lender.

28. On June 27, 2007, the Member met with the purchasers and arranged for the execution of various closing documents necessary for the real estate transaction. The documents included a conflict disclosure letter, which stated that he was acting for both the vendor and the purchasers.

29. According to the Member, handwritten near the top of the conflict disclosure letter was the following text: "Re: Sale/Purchase of: [residential address] from [SS]". SS was identified by his last name. CG denied that the last name of the Realtor appeared on the letter when he signed it.

30. During the meeting, the Member arranged for CG to swear an Affidavit of Transferee which deposed that the "true consideration paid" for the property was $405,000, and that the "current value of the land in my opinion is $405,000".

31. On June 27, 2007, the Member completed a Preliminary Report on Title and Request for Mortgage Funds, which he submitted to the lender. That report included an assurance, required by the lender before advancing mortgage proceeds, that the Member was "satisfied that the terms of sale are as presented to you in the Agreement for Purchase and Sale and no changes have been made." The Member's report did not mention the $40,000 renovation credit.

32. On June 27, 2007, the lender replied to the Member with a letter requesting a copy of the registration or title insurance at least two days before the closing date for the transaction.

33. On June 28, 2007, the Member received confirmation of title insurance from First Canadian Title, which was, in turn, relayed to the lender. Mortgage proceeds were then advanced by the lender to complete the transaction.

34. The transaction closed on June 30, 2007.

35. By letter dated July 4, 2007, the Member reported to the purchasers about the completion of the transaction and included a Statement of Adjustments. The Statement of Adjustments reported that the sale price was $405,000, and noted a deposit of $2000 and a "Basement Reno credit" of $40,000". The documents provided with the Member's report identified SS as the vendor.

36. On November 23, 2007, by way of a letter from CG to the LSA, CG complained to the LSA that the Member failed to disclose to the purchasers prior to closing that the vendor was the Realtor. CG contended that the Member and the Realtor were friends, the Member had acted for the benefit of the Realtor, and the Member might be part of a "mortgage fraud ring".

37. At some point, the lender complained to the LSA that the Member failed to disclose the existence of the Addendum about the renovation credit of $40,000, which had the effect of reducing the purchase price by that amount. The lender apparently complained that the effect of not disclosing the renovation credit was that the lender was advancing funds against an inflated property value, and essentially funding the entire purchase price. That exposed the lender to additional risk in the event of default.

38. The LSA investigated the complaints. During the investigation, the LSA obtained records from the Land Titles Office, which indicated that the Realtor had transferred the property into his own name on January 10, 2007 for a stated consideration of $265,000.

39. As part of the investigation, the Member provided a letter to the LSA in March 2008, which incorrectly stated that he had provided a copy of the Addendum to the lender before the financing was advanced.

b) Hearing Testimony

40. During the Hearing, Jim Stamatakos, a compliance analyst with RTC, testified that the Addendum was not received by the lender, and RTC was not aware of the renovation credit, prior to advancing funds.

41. The LSA and the Member stipulated that the Addendum was not sent by the Member to the lender during the time that the Member's file was active.

42. Mr. Stamatakos stated that when lending money for a residential purchase, RTC did not communicate directly with the mortgagor, but rather with a mortgage broker. The role of the mortgage broker included providing RTC with a copy of the offer to purchase and any addendums or attachments to the offer. For this particular transaction, the lender dealt with Ms. Sahgal.

43. The decision to approve funding for the purchasers was made without identifying for the Member the documents the lender had received and upon which it relied in approving the financing.

44. Mr. Stamatakos testified that if the lender had been made aware of the renovation credit, it would have subtracted that amount from the value of the property and resubmitted the application for title insurance. The reduction in the value of the property potentially changed the lender's risk. It also had the potential to affect whether RTC proceeded with the loan, and the value of the interest rate charged to the purchasers.

45. During the Hearing, CG testified that he and his wife arranged for preapproved mortgage financing through Ms. Sahgal of approximately $405,000. To qualify for that amount of financing, CG misrepresented his income to the mortgage broker, inflating his actual income level by approximately $15,000. He also forged a letter from his employer attesting to the false information about his income level.

46. CG also understood that in order to qualify for the mortgage, he had to be in a position to provide a cash deposit or down payment of approximately $40,000. He arranged for that through his parents, but misrepresented the source of that money to Ms. Sahgal. He identified the source as his grandparents because he was under the mistaken impression that his father would be taxed on the deposit if identified as the source.

47. CG testified that the Realtor showed him the house that the purchasers eventually bought, and pressured them to buy quickly. CG stated that he would not have purchased the house if he had known that his own realtor was the vendor. The Realtor would have been acting in his own interests, not those of CG and his wife.

48. The Realtor introduced CG and his wife to Ms. Sahgal. The Realtor also told them that he had a lawyer who would be able to assist them, so that they wouldn't have to waste their time looking for someone. The Realtor referred them to the Member.

49. CG confirmed signing the Contract, but testified that the current version was altered after he signed it, without his knowledge. He asserted that the Contract he signed identified the vendor as "c/o LB". It was subsequently altered by crossing out the "c/o LB" and inserting the name of SS.

50. CG testified that when he signed the Contract, on May 16, 2007, it was likely not initialed by the vendor. The Contract tendered as an Exhibit at the Hearing was initialed on each page by the vendor.

51. On or about May 17, 2007, CG and his wife signed an Amendment to the Contract by which the possession date was changed to June 30, 2007. CG testified that the vendor was identified on the document as "c/o LB". The document tendered as an Exhibit at the Hearing had the "c/o LB" crossed out, and the name of SS inserted in its place. CG initially testified that the reference to SS was "definitely not there" when he signed the document. He subsequently testified: "I don't quite remember this document, to be honest".

52. CG confirmed that he also signed the Addendum dated May 1, 2007, which contained the reference to the renovation credit of $40,000. The vendor was also described on that document as "c/o LB". He couldn't recall the date on which the document was actually signed. However, the credit was obtained through the Realtor because CG was concerned that the price on the house didn't seem like a great deal since "lots of renovations" were required. The Realtor agreed to negotiate a credit with the vendor, resulting in the Addendum.

53. CG understood that the renovation credit would be taken out of his account, along with the mortgage proceeds, and that he would receive a cheque from his lawyer.

54. CG testified that he spoke with Ms. Sahgal about the renovation credit. He wanted her to know about it, so "we didn't jeopardize anything". She assured him that such credits were "common practice" and not an issue.

55. CG stated that he signed the Affidavit of Transferee on June 15, 2007, which attested that the "true consideration paid" by him and his opinion of the "current value of the land" were $405,000. He maintained that he believed that to be correct when he swore the affidavit. He swore the affidavit in the Member's office.

56. CG initially testified that he and his wife visited the Member's office only once, on June 15, 2007, and signed all of the closing documents at that time, including the Affidavit of Transferee (which stated that it was sworn on June 15, 2007) and the conflict disclosure letter dated June 27, 2007. He asserted that the reference line stating that the purchase was "from SS" did not appear on the letter when he signed it, and that the letter was not dated at that time.

57. CG said that the first time he saw the altered Contract, bearing the name of SS, was after the transaction was completed, when the Member mailed the final reporting letter dated July 4, 2007 and the enclosed closing documents.

58. Under cross-examination, CG acknowledged that he signed the mortgage dated June 27, 2007. That mortgage would not have been provided to the Member until June 26, 2007, who in turn provided it to CG for signature. At that point, CG conceded that he didn't know when he signed the Affidavit of Transferee.

59. CG denied that he ever asked the Member about how he would get the keys to the house he was purchasing. He denied that the Member told him that the keys would be obtained from the vendor, SS.

60. CG acknowledged that he knew the Member was acting for both the purchasers and the vendor. He was okay with that.

61. CG stated under cross-examination that when he attended at the Member's office to sign the closing documents, he was presented with a "stack" of four or five papers, which he essentially signed without reading. He then couldn't recall whether the reference line stating "from SS" appeared at the top of the conflict disclosure letter.

62. CG denied that he was presented with a Statement of Adjustments during the meeting with the Member. He and his wife were "in and out of Mr. Westra's office in about five minutes if not less".

63. CG also couldn't recall whether the Member explained what a conflict of interest might be. He didn't recall ever asking the Member for the identity of the vendor.

64. CG testified that after receiving the final closing documents (which would have arrived after July 4, 2007), he tried to get out of the purchase because he then knew that SS was the vendor.

65. The Member's former legal assistant, Stephanie Eastaugh testified that she prepared the handwritten portions of the Affidavit of Transferee, which was dated June 15, 2007, the Transfer of Land, which was also dated June 15, 2007, and the Dower Act consent and Certificate of Acknowledgment, which were dated June 15, 2007. The Transfer of Land expressly identified the vendor as SS.

66. RG testified that she was not directly involved in the legalities of the purchase, other than signing legal documents. After the passage of more than three years, she could not recall the specific documents she signed, nor how the vendor was described on any of the documents. She testified that she did not know that SS was the vendor before she and her husband bought the house.

67. RG did not have any discussions with the Member about who owned the property.

68. Sujata Sahgal testified in direct examination that in 2007 she worked as a mortgage associate for a bank, not having yet received her mortgage broker designation. She worked with SS and the purchasers in arranging for the mortgage financing. She testified that she was not made aware of the $40,000 renovation credit before the financing took place, and had not seen a copy of the Addendum.

69. Ms. Sahgal was cross-examined about the whereabouts of the purchasers' file, which might have indicated whether the Addendum was ever provided to her. She testified that she had destroyed several files in approximately February 2008, at the direction of her manager, before leaving the bank. She asserted that the file for these purchasers was not among them, but didn't know what had become of that file. She acknowledged that it "felt a little bit odd" to be destroying files.

70. Ms. Sahgal initially testified that she was certain that she was not told about the renovation credit because the financing would not have been approved if the lender had been made aware of it.

71. She testified that she asked CG whether he had supplied her with all of the documents related to the purchase, and he confirmed that he had. She maintained that he did not provide her with the Addendum, which would have disclosed the renovation credit, and that he therefore lied to her.

72. She denied CG's claim that he told her about the renovation credit.

73. She testified that the purchase contract was originally provided to her with the vendor identified as "c/o LB". The bank would not accept that description, so the purchase contract was revised to insert "SS" for "c/o LB". An amendment to the purchase contract with the name "SS" on it was faxed to her by CG. She knew of no reason why CG would have been unaware of the name of the vendor when he faxed the amendment to her.

74. Under further cross-examination, Ms. Sahgal testified that the Member called her in late June 2007 and asked whether she had faxed to him the Addendum. He mentioned a $40,000 credit for a basement renovation. She told him that she knew nothing about it, and said that he better check with the bank.

75. During the Member's testimony, he stated that he met SS through another realtor in early 2007. Between February and June 2007, the Member handled six or seven real estate transactions on referrals from the Realtor's brokerage.

76. CG and RG were referred to him by SS, who indicated that he would fax the Contract to the Member. The Contract was faxed on approximately June 5, 2007.

77. The Member did not recall whether the Realtor identified himself as the vendor. However, SS indicated that the Member would be asked to represent the purchasers and the vendor.

78. The Member received both the Contract and the Addendum, and opened a new file. He noted the possession date, but did not review the documents at that time.

79. As the possession date approached, the Member contacted Ms. Sahgal, as he had not yet received the mortgage instructions. The mortgage instructions arrived on June 26, 2007, but the Member did not review them carefully as he was very busy. The Member prepared the conflict disclosure letter and the Statement of Adjustments.

80. The Member understood that Ms. Sahgal was his contact with the lender and would be the one to facilitate the financing.

81. The Member recalled speaking with Ms. Sahgal about the credit and that she said everything was fine. He volunteered that he could not recall the exact words spoken by each of them. However, he left the conversation feeling that she knew about the credit and that the lender therefore knew about the credit, and that he was free to proceed with the closing. The Member made a contemporaneous notation in his calendar following the call with Ms. Saghal, which states "Called Sajata re: [G] credit" (Exhibit 22, Tab 1).

82. The Member testified that the Transfer of Land was prepared by his legal assistant, and that the Dower Act consent and Certificate of Acknowledgment, Affidavit of Execution, and Affidavit of Transferee would have been stapled together. That was his invariable practice at the time. All four documents were required by the Land Titles Office to register a transfer of land. When CG swore to the contents of the Affidavit of Transferee, the Transfer of Land would have been attached to it. The Transfer disclosed the identity of the vendor as SS.

83. The Member testified that his practice at the time would have been to review with the purchasers all of the closing documents, including the conflict disclosure letter, the Transfer of Land, and the Statement of Adjustments. Each of those three documents disclosed SS as the vendor. The Member had no reason to conceal the identity of the vendor.

84. The Member prepared the Statement of Adjustments with a purchase price of $405,000 and a $40,000 credit. He testified that, at the time, he understood the proper way to depict the purchase price as being whatever the figure was in the Contract,

notwithstanding the credit. He noted that, in his experience, other real estate lawyers in Edmonton had described purchase prices and credits in the same way.

85. During the course of an investigation by the LSA into the Complaints, the Member informed the LSA that he had sent a copy of the Addendum to the lender prior to financing. He made that assertion without first reviewing his file. In the course of a follow up interview with an LSA investigator, the Member acknowledged that his assertion was in error. By then, he had checked his file and realized the error, and made full disclosure. It was not his intention to mislead the LSA. The LSA already had a copy of his file (which was delivered on December 19, 2007). Since a simple review of his file by the LSA would have demonstrated that the Addendum was never faxed to the lender, it would have been pointless to deliberately misrepresent that fact.

86. During cross-examination, the Member acknowledged that the effect of the renovation credit was to reduce the real consideration paid by the purchasers for the property to $500, so that the lender was essentially financing the entire purchase price. He did not think about that at the time, but now recognized his error in failing to draw that to the attention of the lender.

87. The Member also acknowledged that in late June 2007, he would have received a copy of the Certificate of Title, which stated that SS acquired the property approximately six months earlier for only $265,000. He recognized that perhaps he should have noted the sudden price inflation at the time, and discussed it with the purchasers. At the time, there was no express obligation to report prior title transfers and valuations to the title insurer.

88. During cross-examination, the Member was asked whether he had considered in June 2007 that the reason for two purchase documents – the Contract and the Addendum – was so that the mortgage could be obtained from the lender on the basis of the Contract alone, without disclosing the reduced price resulting from the credit. The Member stated that it did not occur to him at the time.

89. The Member also acknowledged that he should have recognized that the purchase price of $405,000 depicted in the Transfer of Land and the Affidavit of Transferee was no longer accurate, in light of the $40,000 credit. However, in June 2007, he mistakenly viewed the purchase price as the stated price, excluding credits.

90. The Member also freely acknowledged that he erred in representing to the title insurer that the insurable interest was $405,000, and now recognized that he should have made the insurer aware of a possible material change in the value of the property.

91. The Member did not inform the lender directly about the renovation credit, but did mention it to Ms. Sahgal, whom he understood to be the mortgage broker and representative for the lender. The subject of the credit simply arose during their discussion about the financing documents, and wasn't a concern to which he directly put his mind. She told him that everything was okay to proceed. At the time, her

comments satisfied him that the lender was aware of the credit, so he didn't consider the credit to be an issue. He freely acknowledged that he now recognized that to be an error, and that he should have reported directly to the lender.

92. Through the course of the cross-examination, the Member also acknowledged some minor errors or omissions in the documents prepared for the purchasers, including the Statement of Receipts and Disbursements.

93. During the Member's last meeting with the purchasers, CG asked him how they would get the keys for the house after the transaction closed. The Member recalled telling CG that the keys would be provided by the vendor, SS, who was mentioned by name. The Member recorded a reference to that exchange with CG in a letter to the LSA dated November 7, 2007 (Exhibit 8).

SUBMISSIONS OF THE LSA

94. On Citation 1, counsel for the LSA submitted that the improper purpose was assisting the vendor, the purchasers, or both, in deceiving RTC. The lender was exposed to an increased risk of default because the purchasers' equity in the property was substantially less than anticipated. While the purchasers have not defaulted on the mortgage to date, and the lender has suffered no loss, a risk remains. The cushion of safety for which the lender contracted is not present. The Member's misconduct involves either deliberate or reckless participation in the mortgage fraud.

95. On Citation 2, the LSA contended that the circumstantial evidence suggests that the Member recklessly, if not deliberately, failed to disclose the existence of the Addendum to the lender because he was a willing participant in the mortgage fraud. The LSA submitted that the purpose of the two purchase documents – the Contract and the Addendum -- was to deceive the lender about the true value of the property. The Member was either knowingly involved, possibly in the hope of getting more business from the Realtor in the future, or engaged in a reckless disregard for the true state of affairs, while perceiving some personal benefit that might be derived from his willful blindness. The Member's failure to contact the lender directly about the Addendum and the credit was therefore explained by his desire or willingness to see the deception through to fruition. The accumulation of mistakes in failing to report the true purchase price to the lender and the title insurer, and to prepare the closing documents properly, was similarly explained by that improper purpose.

96. On Citation 3, counsel for the LSA submitted that the Hearing Committee needed to make a finding of credibility about the competing stories between the purchasers and the Member.

97. On Citation 4, the LSA submitted that the Member failed to serve his clients conscientiously and diligently in several respects. First, the misstatement of the real purchase price, and the corresponding property value, potentially jeopardized the title

insurance. Second, the Member failed to draw to the attention of the purchasers that the property had been purchased for just $265,000 six months earlier. Third, the Member failed to advise the purchasers about the imprudence of completing the transaction with the purchase price incorrectly described. Fourth, he failed to advise CG about the risk of a perjury charge for swearing to an Affidavit of Transferee that inaccurately depicted the true consideration provided for and value of the property. Fifth, the Member failed to make disclosure to the lender about the true facts of the transaction, including the value of the property.

98. On Citation 5, the LSA's position was that the failure to disclose the Addendum and renovation credit to the lender was in breach of the written instructions received from the lender.

99. On Citation 6, the LSA's position was that the Member commissioned a false affidavit sworn by CG, knowing the contents to be false.

100. On Citation 7, the LSA submitted that the Member made bold assertions to the LSA investigator that were not supported in fact, and which could have been correctly ascertained through a "minimum of checking".

SUBMISSIONS ON BEHALF OF THE MEMBER

101. On Citation 1, counsel for the Member asserted that the citation failed to adequately describe the allegation against the Member and should be dismissed on that basis. Alternatively, the citation should be dismissed on the merits, as the evidence against the Member was contradictory, and not credible, and rebutted by the Member's testimony, which was credible.

102. On Citation 2, the Member failed to send the Addendum to the lender before the transaction closed. While that might have been negligent, it was a "far cry" from an act deserving of sanction. Ms. Sahgal acknowledged under cross-examination that she had a conversation with the Member about the renovation credit. The Member was entitled to believe that Ms. Sahgal represented the lender, and reasonably believed that the lender had been made aware of and had no issue with the credit. Further, the Member had no good reason to question the adequacy of the information with the lender or the lender's decision to finance the purchase.

103. On Citation 3, counsel for the Member asserted that his client had no reason to believe that the purchasers were unaware of the identity of the vendor. Indeed, the Member might have reasonably expected that SS had disclosed his identity as the vendor because section 18(3) of the *Real Estate Act* would have imposed that obligation on the Realtor. (Whether the Member had that understanding of the *Real Estate Act*, or was influenced in his thinking by it was not in evidence at the Hearing.) Further, the Member had no obligation to inform the purchasers about the identity of the vendor, unless asked, and the purchasers never asked.

104. On Citation 4, counsel for the Member conceded that his client might have been negligent, but that did not give rise to a breach of ethical duty. Simple mistakes can happen on files without engaging a breach of any ethical obligation. The Member was a relatively inexperienced lawyer confronted with an unusual situation at a time when the real estate market and the Member were both very busy. The Member fundamentally made one error, in not recognizing the effect of the renovation credit on the real purchase price, which then resulted in his alleged failure to conscientiously and diligently serve the purchasers and the lender.

105. On Citation 5, counsel for the Member noted that the lender's instructions were detailed and provided shortly before the closing date, at a time when the Member was very busy. The Member simply missed something in the instructions. He had assumed that the vendor and purchasers were being truthful with him, and therefore was not vigilant.

106. On Citation 6, counsel stated that the Member was operating on the understanding that the purchase price in the Contract dictated the purchase price for the closing documents, which in turn, directed the value of the consideration identified in the Affidavit of Transferee. As a consequence, the Member did not appreciate that the contents of the Affidavit might be viewed as false.

107. On Citation 7, the Member testified that he did not intend to deceive the LSA. Counsel asserted that the Member was credible. His inaccurate reporting to the LSA was consistent with the errors seen elsewhere on this file, and should be attributed to inexperience and inattention to detail, rather than any deliberate deception.

DECISION

108. The Law Society governs the profession in the public interest. To protect the public and the reputation of the profession generally, the Benchers and the LSA are vigilant about ensuring the integrity and competence of the LSA's members. Lawyers must be honest, as well as conscientious and diligent in the service of their clients' interests. A failure to maintain those standards reflects poorly on the entire profession, undermines public confidence, and puts the public at risk.

109. In assessing allegations of misconduct, the primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of the individual to practice law. A lawyer's intentions and the willfulness of conduct are relevant, but not always determinative. Ethical misconduct does not necessarily correspond to the legal rules governing negligence. An isolated incident or inadvertent error may constitute negligence and be legally actionable without amounting to incompetence or another form of ethical breach. Conversely, conduct that evidences gross neglect in a particular matter, or a pattern of neglect or mistakes in different maters, may be regarded as an ethical breach, even though it has not resulted in loss or damage to a client: *Code of*

Professional Conduct, Interpretation Section at paragraph 3, and Chapter 2 at paragraph G.2 of the Commentary.

110. The complaints against the Member involved, to some extent, competing versions of events, and challenges to the Member's honesty, which also necessitated an inquiry into the credibility of various witnesses, including the Member.

a) Citations 1 and 2

111. During closing arguments, the Member's counsel argued that the wording of Citation 1 is vague and that the citation should be dismissed on that basis. The Hearing Committee rejected that argument.

112. The proper approach, where citations are alleged to be vague, is to seek particulars. That approach is discussed in J.T. Casey, *The Regulation of Professions in Canada* (Toronto: Carswell, 2010), at page 8-16:

> "If a charge is defective in that it does not contain sufficient information to enable the member to properly prepare a defence, then the remedy is to ask for particulars. If particulars are refused or if the particulars supplied are defective or objectionable, then an order of prohibition may be granted preventing the charges from proceeding until the member obtains those particulars essential to a fair hearing.
>
> The charge must set out the offence in "relatively precise terms". As always, the overriding question is whether the combination of the formal charge and disclosure of particulars by the professional body provides sufficient notice to the professional of the case that he has to meet to ensure that there will be a fair hearing."

113. The Hearing Committee concluded that the citation was not vague. In addition to the plain wording of the citation, the Member had the benefit of disclosure. Further, the prehearing conference process afforded a mechanism by which the Member could have sought any necessary clarification. Accordingly, the application to dismiss Citation 1 on the basis of vagueness was dismissed.

114. As for the merits of Citations 1 and 2, the Hearing Committee concluded that the Member did not deliberately or recklessly assist the vendor, the purchasers, or either of them to engage in a mortgage fraud; similarly, the Member did not deliberately or recklessly fail to disclose the existence of the Addendum to the lender.

115. The LSA carried the burden of proof to establish, on the balance of probabilities, utilizing evidence that was sufficiently clear, convincing and cogent, that the Member engaged in the alleged misconduct: see *F.H. v. McDougall*, S.C.J. No. 54, 2008 SCC 53.

116. No direct evidence was placed before the Hearing Committee that the Member deliberately sought to assist in a mortgage fraud. He denied any such intention, and his own evidence demonstrated that he did not recognize the renovation credit, during the relevant time, as furthering such a purpose. No evidence was adduced from the Realtor, or the purchasers, to suggest that the Member was a willing participant in the scheme.

117. Counsel for the LSA seemed to suggest that the Member's denial of any deliberate involvement in the mortgage scheme might be challenged through circumstantial evidence of financial gain. Alternatively, that financial gain might suggest that the Member was recklessly disregarding the risk to his lender client in order to curry favour from the Realtor, in the hope of future work or other reward.

118. The difficulty with that argument, however, was that it stood only on speculation, unsupported by "clear, convincing and cogent" evidence. There was no evidence before the Hearing Committee demonstrating that the Member received, expected to receive, or even perceived that he might receive a personal benefit from the alleged mortgage fraud. The suggestion that the Member might receive additional referrals from the Realtor in the future, or acquire some other benefit, was mere supposition.

119. The LSA's counsel also suggested that the Member's intention or recklessness might be deduced from his failure to report the Addendum and the renovation credit to the lender. However, such an inference did not logically follow from the totality of the evidence. The Member offered a plausible explanation for not reporting the renovation credit to the lender. First, at the time, he did not view the credit as untoward, and did not appreciate how it might be detrimental to the lender. Second, even if he had turned his mind to that possibility, he would have thought that the lender knew about the credit based on his conversation with Ms. Sahgal.

120. The Member's explanation must be judged against his circumstances at the time. He was a relatively inexperienced real estate lawyer, engaged in a busy, sole practice. The vender was someone he knew, and by all appearances was a reputable and professional realtor. The renovation credit was atypical, but not entirely foreign to the Member. The real estate market was booming, and escalating property values were the norm. Home renovations were commonplace. Residential properties were perceived as good investments. In such a market, the focus of transactions was generally on closing deals quickly, rather than addressing future risks if the equity in the property was less than expected.

121. That is not to suggest that the pace of the real estate market and the burdens of the Member's practice excused him from fulfilling his professional obligations to his clients. They did not. However, in combination with his inexperience and knowledge of the Realtor, they assist in contextualizing how the Member failed to appreciate the concerns that should have arisen from the circumstances of the Addendum.

122. The Hearing Committee recognized that Ms. Sahgal's evidence was that she told the Member to check with the bank about the Addendum or credit. The Member denied

this, stating that he was led to believe through his conversation with Ms. Sahgal that the lender did not have a concern about the credit.

123. The Hearing Committee preferred the evidence of the Member to that of Ms. Sahgal. The Member did not overstate his recollection of the conversation, freely acknowledging the limits of his memory about specifics of the discussion. During the Hearing, his testimony was internally consistent, and he freely made concessions against his own interests about aspects of his professional conduct. Conversely, Ms. Sahgal gave inconsistent evidence about having a discussion with the Member about the Addendum and the credit. At first she testified that no such discussion occurred, and then she purported to remember the detailed aspects of the conversation more than three years later despite the absence of any notes, any file, and any reason to remember that part of the conversation. Her memory of asking the Member to check with the bank served her own interests, as the failure to do so would reflect poorly on her own professional conduct. Her assertion that she was directed to destroy customer files at the direction of her supervisor, except for this customer file, which could not then be located, seemed implausible. Accordingly, her evidence on this point was found to be less credible and reliable than that of the Member.

124. The Hearing Committee found that the Member held an honest belief that the lender was aware of the Addendum and the credit based on his conversation with Ms. Sahgal. Combined with his failure to appreciate the significance of the renovation credit at the time, the Hearing Committee was satisfied that Citations 1 and 2 were not proven, and those citations were dismissed.

b) Citation 3

125. The purchasers denied knowing the identity of the vendor until sometime after the transaction closed. Based on that premise, they contended that the Member had a duty to inform them of the vendor's identity. Both purchasers acknowledged that they never specifically asked the Member for the name of the vendor.

126. This allegation was essentially based on the evidence of CG. His wife, RG had little direct involvement in this transaction, and acknowledged that she paid little attention to the legal documents surrounding the transaction.

127. The Member testified that the name of the vendor appeared on the conflict disclosure letter, the Transfer of Land attached to the Affidavit of Transferee sworn by CG, and the Statement of Adjustments. All of those documents were presented to the purchasers on June 27, 2007 as part of the Member's standard practice in preparing closing documents and reviewing them with residential real estate clients. The Member's legal assistant acknowledged preparing the Transfer of Land, which would have contained the vendor's name. The Member recalled mentioning the vendor by name when CG asked him about obtaining the keys to the house. That part of their discussion was recorded in the Member's letter to the LSA dated November 29, 2007 (Exhibit 8).

128. The vendor's name also appeared on the revised version of the Contract, although that document was not specifically referenced during the June 27th meeting.

129. The Member stated that he had no reason to conceal the vendor's name.

130. CG denied that the closing documents mentioned SS or that the Member ever mentioned that SS was the vendor. The Hearing Committee did not find CG's evidence credible.

131. CG was a knowing participant in a mortgage fraud. He misrepresented his income to the lender, forged a letter from his employer, and misrepresented the source of his deposit on the belief that he was helping his father to evade tax. His evidence suffered from internal inconsistencies, as noted earlier at paragraphs 51, 56, 58, and 61. His assertion that he did not know the vendor's identity was contradicted by the testimony of Ms. Sahgal. While Ms. Sahgal's reliability was in question elsewhere, on this point she had a clear, detailed and plausible explanation of the communications with CG, and her personal interests were not served by stating that CG told her about SS being the vendor. Her evidence about CG faxing to her a copy of an amendment to the Contract bearing the name of SS was corroborated by Exhibit 16, TAB C, which was an Amendment to the Real Estate Purchase Contract bearing a fax header from CG's employer. The Hearing Committee therefore preferred the accuracy of her evidence in that regard.

132. Most fundamentally, CG's assertion suggests that the Member presented him with closing documents that did not reveal the vendor's name and that the Member later inserted the references to SS. No reason was offered by the LSA or CG for the Member to withhold the name of the vendor. The only possible explanation is that the Member was a party to a mortgage fraud with the vendor, and therefore did not want the purchasers to know that the vendor was SS. However, the Member himself revealed the identity of the vendor (on CG's story) when he mailed the final closing documents to the purchasers. That theory is therefore wholly implausible.

133. The Hearing Committee concluded that the vendor's identity was provided to the purchasers by the Member before the closing date, and that they knew or should have known that their realtor was the vendor. Citation 3 was therefore dismissed.

c) Citations 4 and 5

134. The Member was accused of not conscientiously and diligently serving his clients, and more specifically in relation to Citation 5, that he failed to follow the instructions of the lender. During the course of the Hearing and the final arguments, the particulars of this allegation crystallized into the following:

> a. The Member failed to advise his clients that the renovation credit effectively reduced the purchase price and was contrary to the mortgage approval;

b. The Member procured title insurance based on an inflated and artificial purchase price;

c. The Member failed to check with the lender directly to ensure that the lender knew it was advancing financing for almost all of the real purchase price;

d. The Member failed to warn CG that the contents of the Affidavit of Transferee incorrectly described the true consideration paid for and value of the property, and failed to advise CG about the consequences of swearing an inaccurate affidavit;

e. The Member incorrectly reported to the lender that the transaction was in accordance with the Contract;

f. The Member failed to look closely at the Certificate of Title and to consider whether it contained material information that should have been communicated to the purchasers and the lender;

g. The Member made errors or omitted relevant information from some of his closing documents, including the Statement of Receipts and Disbursements.

135. The Hearing Committee was cognizant of the Member's relative inexperience, and that he was engaged in a busy practice. However, the accumulation of errors was substantial and compromised the performance of his obligations in circumstances where the representation of multiple clients should have heightened his diligence. A busy practice explained some of the Member's errors and omissions, but did not excuse them.

136. While some of the Member's errors and omissions stemmed from his erroneous treatment of the purchase price, not all of the errors can be blamed on that mistake. Further, even the mistakes related to the purchase price were not the mere repetition of the same error. For example, the Member was asked by the lender to confirm that the sale was closing according to the terms in the Contract, which were then specifically described in the lender's letter. The Addendum was inherently a variation to the terms in the Contract, yet the Member provided confirmation of no change.

137. The Hearing Committee concluded that Citation 4 was established.

138. The merits of Citation 5 were also established. However, as the substance of Citation 5 was already subsumed within the scope of Citation 4, Citation 5 was dismissed for being redundant.

d) Citation 6

139. The Member was accused of knowingly commissioning a false affidavit. The Hearing Committee accepts that the Member did not perceive it to be false.

140. Due to his inexperience and haste, the Member was labouring under the misunderstanding that the purchase price in the Contract dictated the purchase price for the closing documents, which in turn, directed the value of the consideration identified in the Affidavit of Transferee. His analysis was deficient. However, he did not knowingly commission a false affidavit.

141. Citation 6 was therefore dismissed.

e) Citation 7

142. The allegation was that the Member sought to deceive the Law Society through bold assertions that were inaccurate, including the statement in his letter dated March 18, 2007 (should have been 2008) that he had provided a copy of the Addendum to the lender prior to the closing.

143. The Member testified that he was mistaken in reporting to the LSA that he faxed the Addendum to the lender before the closing. In fact, he had sent the Addendum to the lender in late 2007. His error was due to carelessness in not reviewing his file before responding, and relying on memory alone. That excuse is certainly consistent with the pattern of careless behaviour and shortcomings observed in the Member's practice during this time in his career. It is also more plausible than the alternative explanation, which is that the Member knowingly made a misrepresentation during the course of an LSA investigation, when the truth would have been readily apparent on a review of his file – a file that had been copied and sent to the LSA three months earlier.

144. While the Hearing Committee accepted the Member's explanation, it did not condone the lack of careful reporting to the LSA. A lawyer faced with an allegation of misconduct owes an obligation to the complainant, the LSA, the profession he represents, and the public at large to be careful and deliberate in his reporting. However, the citation before the Hearing Committee was that the Member sought to mislead, not that he was less diligent than he should have been.

145. Accordingly, Citation 7 was dismissed.

SANCTION AND COSTS

146. In determining an appropriate sanction, the Hearing Committee was 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.

147. In *McKee v. College of Psychologists (British Columbia*), [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

"In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practise his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practise, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

148. The Hearing Guide for the LSA, at paragraphs 60 and 61, articulates the relevant factors to be considered in determining the appropriate sanction:

"A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

(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 in further misconduct.
(c) Incapacitation of the member (through disbarment or suspension).
(d) General deterrence of other members.
(e) Denunciation of the conduct.
(f) Rehabilitation of the member.
(g) Avoiding undue disparity with the sanctions imposed in other cases.

In one-way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

More specific factors may include the following:

(a) The nature of the conduct:

i. Does the conduct raise concerns about the protection of the public?
ii. Does the conduct raise concerns about maintaining public confidence in the legal profession?
iii. Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties of the court, other lawyers or the Law Society)
iv. Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

(b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.
(c) Impact or injury caused by the conduct.
(d) Potential injury, being the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.
(e) The number of incidents involved.
(f) The length of time involved.
(g) Whether and to what extent there was a breach of trust.
(h) Any special circumstances (aggravating/mitigating) including the following:

- Prior discipline record
- Risk of recurrence
- Member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
- Restitution made, if any
- Length of time lawyer has been in practice
- General character
- Whether the conduct involved taking advantage of a vulnerable party.
- A dishonest or selfish motive
- Personal or emotional problems
- Full and free disclosure to those involved in the complaint and hearing process or cooperative attitude towards proceedings
- Physical or mental disability or impairment
- Delay in disciplinary proceedings
- Interim rehabilitation
- Remorse
- Remoteness of prior offences"

149. The Member did not engage in any deliberate or reckless misconduct, and was honest. His errors arose from inexperience, inattention, and haste.

150. While the lender has been subjected to increased risk, no loss has yet been suffered and the risk of loss diminishes with time as the purchasers accumulate equity in the property. The purchasers might have benefited from a careful solicitor, who might have advised them of the previous purchase price for the property and the risks associated with a purchase from their own realtor. However, no compelling evidence was before

the Hearing Committee to suggest that the purchasers would have conducted themselves differently at the time, even with the benefit of that counsel.

151. The Member has learned from this experience, and was contrite. During the Hearing, he did not shy away from his failings and recognized that he should have conducted himself differently.

152. The Member had no prior disciplinary record.

153. The Hearing Committee was satisfied that remediation and the risk of recurrence could be managed through the Practice Review process.

154. Having regard to the sanctioning principles outlined above, the Hearing Committee concluded that the public interest would be protected and confidence in the profession maintained through a reprimand and a referral to Practice Review.

155. A reprimand has serious consequences for a lawyer. It is a public expression of the profession's denunciation of the lawyer's conduct. For a professional person, whose day-to-day sense of accomplishment, self-worth and belonging is inextricably linked to the profession, and the ethical tenets of that profession, it serves as a lasting reminder of failure. Additionally, it remains a permanent admonition to avoid repetition of that failure. Deterrence, public confidence, and rehabilitation are therefore served.

156. The Hearing Committee made the following orders:

    a. An Order that the Member be reprimanded;

    b. An Order that the Member pay the Law Society one half of the actual costs of the Hearing;

    c. An Order that the costs be paid within 6 months of the date on which the Member is provided with notice of the actual costs of the Hearing;

    d. An Order pursuant to s. 72(2)(a) of the *Legal Profession Act* directing that the Member be referred to Practice Review and that he cooperate with the Practice Review Committee and satisfy any reasonable conditions imposed on him by that committee for a period of 12 months or such other period of time as directed by the Practice Review Committee.

157. Counsel for the LSA tendered an Estimated Statement of Costs, which showed the estimated hearing costs to be $9,029.20.

158. The Chair delivered a reprimand, which expressed denunciation for the conduct of a member of the Bar whose lack of diligence failed his client, the profession, and the public interest. A copy of the reprimand is appended to this Hearing Report.

CONCLUDING MATTERS

159. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of proceedings shall be redacted to protect privileged communications, the names of any of the Member's clients who were not witnesses at this Hearing, and confidential personal information, such as copies of driver's licenses, personal cheques, health cards, financial cards and certificates of birth. Without limiting the foregoing, the information to be redacted is generally described at pages 406 to 410 of the transcript of proceedings.

160. There was no referral to the Attorney General.

161. No Notice to the Profession was directed.

Dated this 25th day of February, 2011.

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KEVIN S. FETH, QC, Bencher, Chair

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JAMES T. EAMON, QC, Bencher

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SCOTT A. WATSON, QC, Bencher

REPRIMAND

Mr. Westra, the Law Society of Alberta governs the profession in the public interest. Self-regulation through an independent Law Society is a privilege which our profession enjoys.

That privilege is only preserved if lawyers firmly commit to and honour the ethical tenets of our profession. We are obligated to serve our clients diligently, conscientiously, and with a selfless regard for the client's interests.

Here, you failed in your ethical obligations. You failed to take the time to effectively and carefully review written instructions. You failed to reflect on whether the $40,000 credit was something that might have adversely affected the interests of one or more of your clients. You did not take the time to formulate and exercise your professional judgment in such a way that the consequences of characterizing the purchase price at an inflated figure were understood by you and your clients.

Due to those failings, you exposed your purchaser client to the risk of swearing an affidavit that might be viewed as false.

You exposed your lender client to the risk that it might not be fully repaid one day or that it loaned funds at a commercially undervalued rate.

You courted the risk that your purchaser clients did not receive all material information before closing the deal.

In these substantial respects, you failed your clients and your profession.

The public interest we serve demands more of you. Your standard of conduct fell short. As a consequence, you invited public derision of you and your profession. That loss of confidence is not easily regained.

Your professional colleagues, quite frankly, expected more of you.

Having said that, we are mindful that a residential real estate practice must be conducted efficiently and often on a short time line.

Economic realities sometimes pressure lawyers to cut corners or to be less vigilant. That is a pressure all lawyers must resist. Your professional obligations are paramount.

We are also mindful that in June 2007, you were still a relatively junior real estate lawyer and that you encountered an unusual situation during a busy time of the year.

But your inexperience should have heightened your vigilance. You could have contacted a more experienced real estate practitioner for advice. You could have contacted the Practice Advisor at the Law Society. You could have contacted a Law Society mentor or a member of the executive of the CBA Real Property Section. Resources were available to you.

Today you have the opportunity to move forward with your career. By agreeing to a referral to Practice Review, you have demonstrated the sound judgment of seeking formal guidance and pursuing the improvement of your legal skills.

You potentially have a long career ahead of you. You have this opportunity to proceed with greater care and to demonstrate that you can emulate the best traditions of our profession. We hope and expect, Mr. Westra, that this will be the last time you appear before the Benchers in this type of proceeding.