IN THE MATTER OF THE LEGAL PROFESSION ACT AND IN THE MATTER OF A HEARING INQUIRING INTO THE CONDUCT OF GRANT NICKLESS, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REASONS FOR DECISION - CITATION PHASE OF HEARING

1. A Hearing Committee was convened to inquire into certain conduct of Grant Nickless, a member of the Law Society of Alberta (the "Member") in Edmonton on July 6, 2010. The Hearing Committee consisted of Steve Raby, Q.C., Chair, Frederica Schutz, Q.C., and Dr. Larry Ohlhauser. Garner Groome appeared as counsel for the Law Society of Alberta (the "LSA"). Laura Stevens, Q.C., appeared as counsel for the Member and the Member was present throughout the hearing.

Jurisdictional Matters

2. It was brought to the attention of the Hearing Committee that Ms. Schutz's firm had previously represented the Member in a civil matter. Ms. Schutz indicated that she had no recollection of such a file being in her office and confirmed that she was not involved in the file. The Hearing Committee according concluded that they did not believe that there was a reasonable apprehension of bias. Counsel also indicated that they had no objection to the composition of the Hearing Committee notwithstanding the foregoing. The appointment of the Hearing Committee, Notice to Solicitor, Notice to Attend and Certification of the Members status were entered as Exhibits 1 through 4, respectively. The Member's current status is that he is on a suspended list of the LSA. He was suspended on an interim basis under section 63 of the *Legal Profession Act* (the "Act") on January 24, 2006.

3. The Hearing Committee was advised that there was no application to have any portion of the hearing held in private but Mr. Groome did indicate that the LSA's only witness at the hearing would be asked if he had any objection to the matter being on the public record. Subject to potentially revising its position on hearing such witness's position, the Committee directed that the matter be held in public. With the consent of counsel, Exhibits 6 through 19 were entered as exhibits and the original of Exhibit 6, namely an Agreed Statement of Facts executed by the Member, was tendered.

The Citations

4. The Notice to Solicitor referenced 14 Citations as follows:

   (1) IT IS ALLEGED that you are or were addicted to drugs and that you subsequently engaged in criminal conduct and your addiction otherwise impaired your capacity or motivation to provide competent services, and that such conduct is conduct deserving of sanction.

   (2) IT IS ALLEGED that you are or were addicted to drugs and that you engaged in bizarre public behaviour at the Fort McMurray courthouse and your addiction

otherwise impaired your capacity or motivation to provide competent services, and that such conduct is conduct deserving sanction.

(3) IT IS ALLEGED that you were less than candid in your initial response to the Law Society in the matter of a complaint by Crown Counsel Anders Quist, and that such conduct is conduct deserving of sanction.

(4) IT IS ALLEGED that you are or were addicted to drugs and that as a result you engaged in inappropriate courtroom behaviour before the Provincial Court of Alberta, and your addiction otherwise impaired your capacity or motivation to provide competent services, and that such conduct is conduct deserving of sanction.

(5) IT IS ALLEGED that you were less than candid in your initial response to the Law Society in the matter of a complaint made by Crown Counsel Bart Rosborough, Q.C., and that such conduct is conduct deserving of sanction.

(6) IT IS ALLEGED that you are or were addicted to drugs and that as a result you engaged in inappropriate courtroom behaviour before the Court of Queen's Bench of Alberta and elsewhere in the Calgary courthouse, and your addiction otherwise impaired your capacity or motivation to provide competent services, and that such conduct is conduct deserving of sanction.

(7) IT IS ALLEGED that you were less than candid in your initial response to the Law Society in the matter of a complaint by Crown Counsel Sylvia Kasper, Q.C. and Patricia Yelle, Q.C., and that such conduct is conduct deserving of sanction.

(8) IT IS ALLEGED that you failed to properly handle the trust funds of your client R.W., thereby breaching Rule 123 of the Rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.

(9) IT IS ALLEGED that you failed to provide to your client R.W. appropriate information concerning your fees and disbursements, and that such conduct is conduct deserving of sanction.

(10) IT IS ALLEGED that you overcharged your client R.W. for disbursements, and that such conduct is conduct deserving of sanction.

(11) IT IS ALLEGED that you misappropriated, or in the alternative, wrongfully converted a portion of the trust funds of your client R. W., and that such conduct is conduct deserving of sanction.

(12) IT IS ALLEGED that you are or were addicted to drugs and that as a result you inappropriately handled the funds of your client R.W., and your addiction otherwise impaired your capacity or motivation to provide competent services, and that such conduct is conduct deserving of sanction.

(13) IT IS ALLEGED that you were less than candid in your initial response to the Law Society in the matter of a complaint by R.W., and that such conduct is conduct deserving of sanction.

(14) IT IS ALLEGED that you failed to properly serve your client K.J., and that such conduct is conduct deserving of sanction.

Overview of Citations and Result of Hearing

5. This is a tragic case of a member who was generally well respected and had positions of authority within Alberta Justice over a portion of his years of practice, but whose ability to practice and indeed his life in general spiralled downward as a result of a health issue, namely a serious addiction to both prescription drugs and illegal narcotics.

6. The Citations alleged four (4) separate incidences of very serious misconduct whereby the Member was incapable of properly representing his clients in court as a result of his drug use. The Citations also alleged that until his interim suspension, the Member deceived, lied and misled the LSA as to his abuse of narcotics in the course of the LSA's investigation of the Member's conduct.

7. A majority of the time in the hearing was spent with respect to Citation number 11 which alleged that the Member misappropriated, or alternatively, wrongfully converted, a portion of the trust funds of his client, R.W. In the executed Agreed Statement of Facts, the Member admitted all of the citations he faced with the exception of Citation 11. He and his counsel maintained the position that despite the Member's downward spiral hitting rock bottom at the time of the Member's dealings with R.W., the Member was not capable of crossing the line from incompetence and attempting to practice Law while incapable of doing so as a result of his incapacity, to misappropriating or wrongfully converting funds.

8. The Hearing Committee ultimately accepted the Agreed Statement of Facts which results in a finding of guilt with respect to Citations 1 through 10 inclusive and 12 through 14 inclusive. They also ultimately determined that Citation number 11 was in fact made out, but only on a partial basis and in circumstances which are somewhat different than an overt act of theft or misappropriation of trust funds.

Joint Application to Merge Citations

9. Mr. Groome on behalf of the LSA made a preliminary application to merge all of the citations other than Citation number 11 into two citations. The proposed citation amendments were entered as Exhibit 20 and would have read as follows:

(1) Combining the particulars of Citations 1, 2, 4, 6, 12 and 14 into one citation of: IT IS ALLEGED THAT you engaged in inappropriate public behaviour and failed to provide competent legal services on account of an addiction to drugs, and that such conduct is conduct deserving of sanction.

(2) Combining the particulars of Citations 3, 5, 7 and 13 into one citation of: IT IS ALLEGED THAT you failed to be candid with the Law Society in your initial responses to complaints to the Law Society, and that such conduct is conduct deserving of sanction.

10. Mr. Groome indicated that the purpose of the amended citations was to streamline the hearing on the basis that Citations 1, 2, 4, 6, 12 and 14 all related to public incidences where the ability of the Member to properly carry on his practice was seriously impaired on account of his addiction to drugs, and that Citations 3, 5, 7 and 13 all related to lying to, deceit of, or misrepresenting matters to, the LSA in the course of the LSA's investigation of the Member's conduct.

11. Ms. Stevens indicated that the Committee could treat Mr. Groome's application as a joint submission.

12. After recusing itself to make a decision regarding the joint submission, the Hearing Committee indicated that while it was unusual for a hearing committee to second guess the position of the LSA counsel as to the strategic manner in which LSA counsel wish to present their case with respect to guilt on the citations before a hearing committee, and notwithstanding that this was a joint submission of both counsel, the Hearing Committee in this case determined that it could not accept the joint submission for the following reasons:

    (a) combining 13 Citations into two (2) Citations had the potential effect of lessening the severity and gravity of the Citations. While it is accepted by the Hearing Committee that the cause of all of the Citations essentially is based upon the Member's addiction, the reality is that the four courthouse incidences were in fact separate and serious incidences of improper conduct;

    (b) the revised Citation 1, while it referenced the fact that the Member's misconduct occurred in public, did not specifically indicate that the incidences all took place in either a court room or a courthouse;

    (c) the combined Citation 1 does not reflect the concept of engaging in criminal conduct as is set forth in the original Citation 1; and

    (d) neither of the proposed amalgamated citations makes it clear that the misconduct was repetitive. If the joint submission were to be accepted, someone reading the Citations might assume that there was only one incident giving rise to each of the two (2) Citations.

13. The Committee indicated that notwithstanding that it had refused to accept the joint submission as to amalgamated citations, it was keenly aware that the separate incidences of misconduct as set forth in the original Citations were, in certain circumstances, very similar incidences resulting from the same cause.

14. In light of that decision, counsel ultimately jointly submitted that the Agreed Statement of Facts should be accepted by the Committee and that the Committee should conclude that Citations 1 through 10 inclusive and 12 through 14 inclusive were therefore made out.

Citation Number 11

15. Citations 8 through 13 inclusive all relate to conduct of the Member in dealing with his client, R.W. Citation 8 relates to improperly handling trust funds. Citation 9 relates to a failure to provide appropriate information regarding fees and disbursements. Citation 10 relates to overcharging for disbursements. Citation 12 relates to inappropriately handling the funds of R.W. and impairment of ability to provide competent services to R.W. Citation 13 relates to being less than candid in the Member's original response to the LSA with respect to R.W.'s complaint. Citation 11 however, which is not admitted by the Member, is an allegation of misappropriation, or in the alternative, wrongful conversion of a portion of the trust funds of R.W.

16. In the course of dealing with Citation 11, LSA called one witness, namely R.W., and the Member took the stand in response.

17. As a preliminary matter, R.W. was asked whether he had any position as to whether the hearing, including his testimony, would become a matter of public record or whether it should remain in private. R.W. indicated that he had no objection to the entirety of the hearing being in public, inclusive of his testimony, and accordingly, the Committee confirmed that the Hearing would fully remain in public (subject to redaction of client names).

18. Based upon R.W.'s testimony and Exhibit 18, it would appear that the Member's relationship with R.W. commenced in late September of 2005. At the time, the Member was working on some basis with another member of the LSA, Angus Boyd, who was carrying on a practice under the name "Boyd and Associates". R.W. apparently initially contacted Mr. Boyd to assist R.W. in the return of some cash that was seized by the Edmonton Police Service ("EPS") at a time when such cash was in R.W.'s jacket in his friend's car.

19. The Member indicated that Mr. Boyd had spoken to him about taking the matter on while they were both at the Court House and suggested that Exhibit 18 was a written memorandum of that discussion that Mr. Boyd put on the file when he got back to his office.

20. There were numerous discrepancies with respect to the version of events as presented by R.W. in his testimony and as presented by the Member in his response. The first minor inconsistency is the nature of the retainer. R.W. indicates that his understanding was that the matter would be handled on a contingency basis whereby the Member and Mr. Boyd would be entitled to 20 to 25% of the funds returned to him from the EPS. Mr. Boyd's memo and the Member's understanding was that the percentage was between 25 and 30%. Exhibit 17 is handwritten notes of the Member on the jacket of Mr. Boyd's file which states "NB: Our fee is 30% of $7900. Our fee $2370."

21. The next area of discrepancy of testimony surrounds the initial meeting between the Member and R.W. R.W. indicates that they met at a PetroCanada station and that R.W. drove he and the Member back to his apartment. The Member's testimony is that he went directly to R.W.'s apartment and that he spent an hour to an hour and a half getting R.W.'s version of the events involving the seizure of funds by the EPS. The culmination of that meeting was the preparation by the Member of an affidavit of R.W. and an affidavit of R.W.'s girlfriend at the time, C.E., both of which were to be used in support of an application for a Court Order for the return of the funds. Those two Affidavits are Exhibits 8 and 9, respectively.

22. The Member explained that the Affidavits were necessary because he had, by this time, already concluded that the matter was not as simple as he had originally anticipated. The Member had originally anticipated that he could make a written application under section 490 of the Criminal Code to have the seized item returned to its lawful owner which he anticipated would be relatively straight forward. The Member described a 30% contingency fee for this procedure to be "good money". However, the Member indicated that for a section 490 written application to be made, the EPS would have first had to file a report as to what it had seized. When the Member attempted to locate such report, he concluded that the EPS had not filed a report of the incident at all and therefore there was no record that these funds had been seized. Accordingly, the Member needed to consider under what authority he could attempt to obtain the return of funds. He concluded that he would need a Court Order to do so and then he had to determine whether the Provincial Court of Alberta had jurisdiction to grant such an order or whether he needed to do that in Queen's Bench. The Member testified that if he needed to proceed in Queen's Bench, the cost of proceedings would likely have been prohibitive given the amount of money involved.

23. The Member also testified that it was problematic that R.W. didn't know exactly how much money was in his jacket and which had been seized by the EPS. R.W. confirmed, in his testimony, that he had started out with $8200, but had spent some and he accordingly was not sure exactly how much money was in his jacket at the time of the seizure.

24. The Member ultimately concluded that he could make the application to the Provincial Court of Alberta and the two affidavits referenced above were to be used in support. Key elements of the Affidavit that were the subject of examination and cross-examination at the Hearing included the following:

    (a) that the amount of funds in the jacket was approximately $7,900;

    (b) who owned the vehicle in which the funds were seized from;

    (c) whether the EPS seized the jacket as well as the funds, or the funds only; and

    (d) whether or not R.W. was detained by the EPS while he was in the apartment of his friend's girlfriend at the time the seizure took place.

25. The Member testified that based on advice provided to him by R.W., he drafted the Affidavit on the basis that there was $7,900 in the jacket, that the jacket was not seized by the EPS and was left in the vehicle, that the vehicle, while driven by a J.L., was actually owned by a K.H., and that R.W. was, in the opinion of the Member, in fact detained by the EPS while in an apartment leased by the girlfriend of J.L.

26. On examination and cross-examination of each of R.W. and the Member, much was made of the fact that it ultimately appeared that there were erroneous statements in the Affidavit of R.W., based either on uncontroverted evidence or subsequent admissions by R.W. that such statements were not in fact correct. Specifically, it appeared that there was $7,300 in the jacket rather than $7,900. R.W. took the position that the vehicle from which the funds were seized was in fact owned by J.L., but "insured by K.H.". R.W. admitted that he knew at the time of the seizure that his jacket had been seized as well, that he saw the EPS physically remove the jacket from the vehicle and the Affidavit was in error in this respect. R.W. testified that in his view, he had not been detained by the EPS as he simply sat in the living room of the apartment of his friend's girlfriend and was not spoken to at all by members of the EPS.

27. The next discrepancy in testimony surrounds the execution of the Affidavit by R.W. R.W. indicated he couldn't recall where he signed the Affidavit nor the circumstances surrounding his review of the Affidavit before signing. He seemed to think that he had briefly reviewed same, determined that the contents were generally accurate and that he likely did sign it in the presence of the Member. The Member on the other hand indicates that in fact he again attended at R.W.'s apartment, walked him through the contents of the Affidavit and had it properly sworn.

28. Based on the Notice of Motion which is in Exhibit 7, it appears that the Member filed a Notice of Motion on October 4, 2005 (the same day as the Affidavits were sworn), returnable on October 7, 2005.

29. Exhibit 23 was tendered in evidence. It purports to be a letter from the Member to the solicitor for the EPS dated October 4, 2005 with written submissions of the Applicant to support the October 7, 2005 application. The Member indicates that the date of the letter must be in error as the submissions would not have been served on the EPS until after the October 7, 2005 Application. The courthouse records of the proceedings (Exhibit 12) indicate that the Hearing commenced in front of Judge LeReverend on October 7, 2005 and the Hearing was adjourned pending written argument. On October 19, 2005, the Court Records indicate that the Hearing continued with written judgment provided to all parties by the Court, but notwithstanding such judgment, the Court granted a further adjournment for the defence to raise a new submission. The judgment of Judge LeReverend is at Exhibit 13 and it indicates that the matter was heard on October 7, 2005 and was signed on October 19, 2005. The original Application was granted pursuant to these reasons for decision.

30. The Member testified that the reason for the adjournment on October 19, 2005 was that the EPS, realizing that they had lost the original application, wanted to involve the Federal Justice Department to make an application for a determination that the seized

funds were proceeds of crime and therefore not returnable to R.W. This explanation appears to be consistent with the fact that the Member provided further written submissions to the Department of Justice Canada on October 17, 2005 (Exhibit 11) and the Court Record indicates that the matter was determined on November 4, 2005 by an Order of Judge LeReverend requiring the return of $7,900 from the EPS to R.W. It disclosed that the Applicant was to draft an order. Exhibit 14 is an order. The Member testified that he in fact typed the Order on his laptop at the Courthouse. Notwithstanding that it appears clear from Exhibit 12 that the Order was actually issued by Judge LeReverend on November 4, 2005, the date of the Order itself shows as December 4, 2005 and in any event, it was actually signed by Judge LeReverend on December 19, 2005, filed with the Clerk of the Court on December 21, 2005 and served on each of the EPS and the Federal Department of Justice with acknowledgments of service from each of those parties on December 21, 2005. Prior to obtaining Judge LeReverend's signature on the Order, it was approved as to form and content by the Member as counsel for the Applicant and by counsel for the Attorney General of Canada. Despite questioning, the Member was not fully able to articulate why the approval as to form and content had not been obtained from the solicitor for the EPS.

31. In any event, it appears clear that Order was signed on December 19, 2005, filed on the 21st of December, 2005 and that, despite the time of year, somehow the Member got the Admission of the Service of the Order by both the Solicitor for the Federal Department of Justice and the Solicitor for the EPS on the same day that it was filed.

32. From the time of signing the Affidavits until December 21, 2005, the Member's testimony and R.W.'s testimony as to their communication is relatively consistent, namely that they had telephone discussions as to what was happening.

33. However, the next major discrepancy is as to when the Member disclosed to R.W. that the Order had been obtained. R.W.'s testimony in this regard was essentially that he couldn't remember how he discovered that the Order had been obtained but that he didn't think it was as a result of a communication from the Member. He essentially indicated that by January of 2006, he had somehow found out that the Order had been granted and that he had started calling the Member to try and get his money back and ultimately when that wasn't happening, he made a complaint to the LSA in January of 2006.

34. In cross-examination, Exhibit 22 was tendered which is a fax which R.W. admitted that he had sent to Mr. Hilborn at the LSA on January 11, 2006. After referring to signing the Affidavit, that fax essentially indicates that after another month, the Member advised R.W. that the Judge ordered the return of the funds and that the EPS had 30 days to appeal it. On the other hand, the Member suggests that there was no such appeal period, but this does not explain the delay between November 4, 2005 when the Order was entered and December 19, 2005 when it was finally signed by Judge LeReverend.

35. The other significant feature of the fax at Exhibit 22 from R.W. to Mr. Hilborn is that there is an addendum that indicated that after R.W. was made aware that the Order was granted,: "then he told me that there was only $7,300.00 cash and they destroyed my

jacket". Accordingly, there is evidence that R.W. heard from the Member that there was $7,300.00 and not $7,900.00 that was seized, and that his jacket was destroyed.

36. The Member's testimony is that R.W. phoned the Member on December 21, 2005 to indicate that he was desperately looking for some if not all of the funds in time for Christmas. The Member testified that he initially told R.W. that notwithstanding that he had the Order, it was not going to be possible to obtain the actual funds until after Christmas and that he assumed that he would have to go through normal channels which would likely have resulted in the cheque being sent to Mr. Boyd's office. However, because of the persistence of R.W., the Member testified that he agreed with R.W. that he would go to the EPS seizure office and see what he could do. The Member testified that just before the EPS seizure office closed for Christmas on December 21, 2005, he was ultimately successful in obtaining the $7,300.00 in cash and that he signed for same as counsel for R.W. The Member must have done some other scrambling on December 21, 2005 as that was the day that the Order was filed and service of a copy admitted by the solicitors for Justice Canada and the EPS, but the Member did not testify as to any of this.

37. The Member candidly testified that starting on December 20, 2005, his drug use was increasing and that he was using constantly throughout this period of time until after Christmas.

38. There is then a gap of two days where the Member indicated that he had simply put the money in what he considered to be a safe place in a friend's apartment where he was staying, notwithstanding that the apartment was apparently constantly inhabited by drug users. The Member's testimony is that on December 23, 2005, R.W. called again looking for money before Christmas. The Member testified that he initially told R.W. that he couldn't do anything until after Christmas when he could put the money in Mr. Boyd's trust account, render his account and provide the balance of funds to R.W. The Member again testified that R.W. was persistent in demanding release of his funds and as a result, the Member agreed to meet R.W. at a Second Cup location on Jasper Avenue to release to him a portion of the $7,300.00.

39. R.W.'s testimony is that apart from his calls to the Member to find out what the status of the Order was and where his money was, all of the Member's testimony in this regard is a complete fabrication.

40. The Member then testified that, in the apartment of his friend, he hastily wrote out two original copies of what was tendered as Exhibit 15. That is a handwritten scrawled note on one sheet of paper with the name R.W. at the top. It purports to show a receipt of $7,300.00, disbursements of $1,000.00, fees of $4,500.00 (crossed out from $4,800.00), GST of $315.00 for a subtotal of $5,815.00 and the sum of $1,485.00 "paid to you". There is then a line and then a notation "due and owing - nil". There are then some calculations at the bottom of the page. It should be noted that no matter how the calculations were done, the GST is not correct. The Member testified that one of the originals was kept and ultimately must have found its way onto Mr. Boyd's file and the other he placed in an envelope with $1,485.00 cash. The Member testified that at approximately 10:00 p.m. on December 21, 2005, he then went to the Second Cup

location on Jasper Avenue. When he arrived, he noticed that R.W. was in the parking lot at the location in a black Toyota Supra, and that there were two other individuals in the vehicle. The Member testified that at this point, he became afraid that there may be a confrontation and that he was well aware that R.W. was expecting the return of just under $6,000.00 as opposed to $1,485.00 (based on the original contingency arrangement). The Member testified that in previous conversations with R.W., he had advised him that the matter had become much more complicated than originally anticipated and that accordingly, his fees would have to be increased. The Member did not indicate that there was any agreement by R.W. to his proposal.

41. The Member testified that he had a conversation with R.W. either through the window of the vehicle or just outside the vehicle which lasted less than three minutes, whereby the Member indicated that he was giving R.W. what he could after his fees, which were higher than the original contingency arrangement, and that he had simply estimated the disbursements because he didn't have access to Mr. Boyd's file and that they could "sort things out" after Christmas. The Member then indicated that he immediately left R.W. as he was afraid of what effect his comments and the fact of only giving him $1,485.00 might have had on R.W., and that he feared for his personal safety.

42. Under cross-examination, the Member candidly confirmed that he spent the balance of the $7,300.00 on Christmas presents (which he never gave to anyone and which were ultimately pawned) and repaid some personal debts.

43. The Member indicates that very shortly after Christmas 2005, Mr. Boyd terminated his arrangement with the Member and retrieved all of the paperwork that the Member had with respect to the matters that the Member was working on for Mr. Boyd. The Member further testified that he did not think there was going to be any issue with respect to providing a proper accounting to R.W. as Mr. Boyd owed the Member in excess of $12,000.00 for matters which the Member had already concluded or which was work in progress, and that they could simply set off anything that the Member owed to Mr. Boyd on the R.W. file from this $12,000.00.

44. The Member testified that there was never a reconciliation done on the R.W. file to his knowledge, nor did Mr. Boyd pay the Member or account to the Member for the aforesaid $12,000.

45. Although Mr. Boyd did not testify, it was common ground between LSA Counsel and Ms. Stevens that Mr. Boyd was not claiming any funds from the Member.

46. On the other hand, R.W. testified that there was no such meeting on December 23, 2005 with the Member and that the only occasion where R.W. met with the Member was on one or two instances when his original statement was taken and when he signed the Affidavit.

47. R.W. testified that he never received any portion of his $7,300.00 from the Member and regardless of his lack of memory of many of the events surrounding this matter, he was adamant that he did not receive any monies from the Member.

Credibility

48. Both Mr. Groome and Ms. Stevens acknowledged that this was a very unusual matter where the credibility of both of the witnesses was seriously at issue. In fact, prior to calling R.W. as a witness for the LSA, Mr. Groome advised the Committee that he had some serious reservations about the credibility of R.W. and that his examination in chief would be structured accordingly.

49. With respect to R.W., he is now 27 years of age which would have made him 22 at the time of the events in question. He admitted that prior to the EPS seizure, he and J.L. had been smoking marijuana and that he was concerned that his jacket and his money would be seized because he was worried that the EPS would find illegal drugs in the vehicle.

50. His recollection of many of the events was hazy, although he refreshingly indicated that the incident took place five years previously, that he shouldn't be expected to remember specific details of something that happened that long ago and that whenever he indicated that probably something happened, this seemed to get him into trouble and it was better to simply indicate that he couldn't recall the specifics of the incident.

51. Some of the testimony that R.W. did provide was contradicted by his handwritten fax to Mr. Hilborn of the LSA (Exhibit 22).

52. Much was made by Ms. Stevens as to the discrepancies in the Affidavit of R.W. (Exhibit 8). She took the position that because the Affidavit was sworn testimony, R.W. lied in the Affidavit as to certain facts. Of the four significant discrepancies in the Affidavit that were raised in evidence, the Hearing Committee notes that really only one of the four is clear cut. It is clear that the Affidavit indicated that the EPS did not seize R.W.'s jacket, but it is also clear from the testimony of R.W. at the Hearing that in fact the jacket was seized. R.W. candidly admitted that the Affidavit was simply incorrect in this regard. "Ownership" of the vehicle from which the jacket and funds were seized is unclear. We don't really know in whose name it was registered or who insured it, and all the Member did in his testimony was simply indicate that as far as he was concerned, it was J.L.'s vehicle, but he continued to take the position that it could well have been registered in the name of K.H. and insured by K.H.

53. With respect to the amount of funds seized, R.W.'s testimony was that he thought it was $7,900 based on the fact that he started with $8,200 and had spent some money. Because the EPS did not report the seizure, neither R.W. nor the Member had any ability to determine how much in fact was seized at the time the Affidavit was taken.

54. With respect to the issue of whether R.W. was detained by the EPS, the Member testified that what R.W. told him of the incident in the apartment led him to believe that R.W. was legally detained. R.W. was adamant that he had not been detained which might well be a layman's impression given that he had not been questioned by the EPS.

55. In the result, the Hearing Committee did not place too much on the discrepancies in the Affidavit. It also is quite likely that no matter how the Member presented the Affidavit to

R.W., R.W. was likely to have signed whatever was placed before him that generally was a recounting of the facts as presented by R.W. to the Member in their initial interview.

56. Counsel also made much of Exhibit 19 which is a record of the cell phone use of a cell phone that the Member was using during the applicable period and which had been apparently given to him by Mr. Boyd as part of their arrangement. There was an attempt by both counsel to make the point that calls between this cell phone and what was alleged to be R.W.'s cell phone or the lack of such phone calls substantiated the evidence of the Member or R.W. in different circumstances. However, it was acknowledged that R.W. often used cell phones of his girlfriend or his other friends. The Member also testified that he rarely answered his cell phone and would often let the caller leave a message and the Member would then return the call if he felt inclined to do so.

57. In the most significant period between December 21 and December 31, 2005, the cell phone record suggests that there was one call from the Member to R.W. on December 21, no calls on December 23 and a number of very short calls after Christmas. This, according to Mr. Groome, is consistent with R.W.'s position that he was not made aware that the funds were in possession of the Member and that he was simply leaving messages with the Member to try to determine where his funds were. On the other hand, the fact that there was a call from the Member to R.W. on December 21, 2005 is consistent with the Member having a discussion with him on the 21st about trying to recover the funds from the EPS seizure office. The lack of phone calls on December 23rd is not consistent with setting up a meeting to deliver the funds, but again, this could have occurred on a phone other than the normal cell phone of R.W. In the result, the Hearing Committee does not place a good deal of emphasis on the cell phone records.

58. Ms. Stevens painted R.W. as an individual who had a very selective memory and who had one goal in mind, namely recovering as much money as he possibly could of the $7,300. She painted R.W. as having no interest in the truth, that the entirety of the evidence was such that he would say whatever it took to further his position, that he didn't care that this issue was of great significance between the Member and the LSA and that R.W. knew that the Member was a drug user and was taking advantage of his vulnerable position.

59. On the other hand, the Member appeared to have a relatively strong recollection of the events in question. The Member indicated that this was the case, notwithstanding that he was using drugs throughout the chronology of events and specifically that he was using significantly and consistently during the period between December 21, 2005 and December 31, 2005.

60. The Member also candidly admitted that in order to carry on his practice and in order to carry on some semblance of a normal life prior to his separation from his wife and family, he had spent much of his life deceiving his family, his co-workers and his superiors and that he got very good at lying to cover up his drug use. There is no question, based on the Agreed Statement of Facts, that the Member lied, misled and deceived the Law Society.

61. Despite that background, the Member would have us believe that the investigation interview of February 19, 2008 (Exhibit 24) and his testimony at the Hearing was completely truthful. There is, of course, always the danger that, for whatever reason, the lies and deception have reoccurred.

62. Notwithstanding the Member's testimony, there are some discrepancies. It is not clear what happened between November 4, 2005 when the Court Records indicate that the Decision was made and December 19, 2005 when the Judgment was actually signed. And it is not clear what happened between December 21, 2005 and December 23, 2005. Having acceeded to R.W.'s request to try and get the money out of the seizure office of the EPS and having succeeded in doing so late in the afternoon on December 21, 2005, it is unclear as to why the next communication from the Member to R.W. appeared to be some time late in the day of December 23, 2005 to the extent that the "meet" was ultimately set up for 10:00 p.m. on December 23, 2005.

63. On the other hand, the Member was very candid with respect to his drug use, the effects it had on him and of some of the actions that he took as a result thereof. The Member's testimony as to how he handled R.W.'s case was clear and cogent and, apart from what happened between November 4, 2005 and December 21, 2005, the documentation appears to be consistent with the Member's testimony.

64. Mr. Groome attempted to paint the picture that the Member was virtually completely out of control due to his drug abuse during the salient time period, that he recognized that R.W. was in a vulnerable position as a result of the fact that the seizure occurred from a vehicle which had some connection with drug use if not drug trafficking and that shortly before Christmas of 2005, the Member was at rock bottom with respect to his drug use and was capable of doing anything in order to keep feeding that use.

65. There is no doubt that the credibility of both the Member and R.W. is highly questionable. It is clear however that at some point in time, the Member advised R.W. that he had succeeded in obtaining the Court Order, that somehow the Member knew that the jacket only contained $7,300 and that the jacket had been destroyed (Exhibit 22). If in fact the Member was attempting to take advantage of R.W. and steal the $7,300 from him, there would have been no purpose in the Member having advised R.W. of these facts. This analysis, of course, assumes that the Member was in a frame of mind where he was capable of making logical and rational decisions and of course it is entirely possible that in his cocaine fuelled state, he didn't fully think through all of his actions and simply concocted his version of events.

66. The Committee concludes that it does not have to make a clear decision as to which version of events they would prefer to rely upon, but simply needs to analyze the credibility of the two witnesses in conjunction with the determination of the burden of proof in this matter.

Who Has the Burden of Proof?

67. In his opening statement, Mr. Groome advised that the LSA was waiving its rights under Section 67 of the Act and indicated that the burden of proof was on the LSA to make out Citation 11.

68. Section 67 of the Act reads as follows:

> "67. When it is established or admitted in any proceedings under this division that a member has received any money or other property in trust, the burden of proof that the money or other money has been properly dealt with lies on the member."

69. In this case, the Member freely admitted that he attended at the EPS Seizure Office and received the $7,300 that had been ordered by Judge LeReverend to be returned to R.W. As such, the Member has received money in trust and on the plain reading of this section, the burden of proof that the Member properly dealt with such money lies on the Member.

70. On questioning, Mr. Groome indicated that it was the position of the Counsel Department of the LSA that due to Charter of Rights implications, the proper reading of Section 67 is that the LSA has the right, in the course of investigation, to require the Member to adduce evidence as to properly dealing with trust property, but that in an actual hearing, the plain reading of Section 67 would contravene the Charter of Rights.

71. Ms. Stevens agreed with the conclusion that at this Hearing, the burden of proof with respect to Citation 11 resides with the LSA and she indicated that in her view, this was not a waiver at all by LSA counsel, but a recognition of the application of the Charter of Rights to this Hearing Committee. She indicated that if the Hearing Committee was of the view that the burden of proof lay with the Member, she would be looking for an adjournment of the Hearing to make a Charter of Rights application.

72. At the Hearing itself, the Hearing Committee determined that it was prepared to accept what essentially was the joint submission of both Mr. Groome and Ms. Stevens, namely that with respect to Citation 11, the burden of proof as to the Member's guilt lies with the LSA by reason of the application of the Charter of Rights.

The Standard of Proof

73. Mr. Groome took the position that despite the fact that Citation 11 contained concepts of misappropriation and wrongful conversion of funds, it was now clearly established law that the burden of proof in a matter before an administrative tribunal such as this Hearing Committee is on a balance of probabilities and the standard is neither beyond a reasonable doubt nor somewhere between a balance of probabilities and beyond a reasonable doubt.

74. Mr. Groome acknowledged that there were indications in previous judicial pronouncements that perhaps the standard of proof was somewhat higher than a balance of probabilities in circumstances involving allegations of misappropriation and wrongful

conversion of funds (for example, in *Law Society of Alberta v.Estrin* (1992), 4 Alta. L.R. (3rd) 373 (C.A.)) but that this case and others expressing similar sentiments were clearly overruled by the most recent pronouncement of the Supreme Court of Canada on the issue in *F.H. v. MacDougall,* 2008 SCC 53 [2008] S.C.J. No. 54.

75. Ms. Stevens took the position that there was a higher standard of proof in circumstances where the citations involved an allegation of misappropriation or wrongful conversion of trust property, but did not pursue this position with much vigour.

76. The Hearing Committee concluded that the Law Society had the burden of proving Citation 11 on the balance of probabilities based on clear and cogent evidence in that regard.

Analysis of Misappropriation or Wrongful Conversion

77. The Member admits to having received the $7,300.00 from the EPS seizure office and that these funds were ordered to be returned to R.W. by the Order of Judge LeReverend (Exhibit 14). The onus is on the Law Society to prove on the balance of probabilities that these funds were improperly dealt with by the Member.

78. Portions of the $7,300.00 need to be dealt with separately. The first portion is the sum of $1,485.00 that the Member alleges was returned to R.W. and which R.W. denies having received. The question for determination by this Committee is whether or not there is clear and cogent evidence on the balance of probabilities that in fact the $1,485.00 was not properly delivered by the Member to R.W.

79. There is also the issue of whether or not the remaining $5,815.00 was properly dealt with by the Member.

80. As indicated above, the Member candidly admitted that the $5,815.00 was retained by the Member and used by him to buy Christmas presents which were ultimately not delivered and were pawned for cash and to repay some personal debts of the Member.

81. Ms. Stevens takes the position that despite this admission, the Member did not misappropriate or wrongfully convert these funds, but rather the funds were retained by the Member on the basis of some sort of colour of right, namely that the $5,815.00 constituted the Member's fees in respect of the matter. Ms. Stevens indicates that the Member clearly has admitted guilt with respect to the manner of handling of these funds, and in particular, that he failed to properly handle these trust funds (Citation 8), that he did not provide appropriate information concerning the ultimate fees and disbursements that were being charged, presumably in the face of the original contingency fee arrangement (Citation 9) and by overcharging R.W. for disbursements (Citation 10). In a nutshell, Ms. Stevens' position is that the Member's handling of the $5,815.00 breached a number of the accounting and retainer requirements of the LSA, but was not tantamount to misappropriation or wrongful conversion.

82. As was indicated above, much was made of the fact that Mr. Boyd was not pursuing the Member for the return of any portion of the $5,815.00.

83. The question for this Committee is that given this evidence, has the LSA proven that the Member misappropriated or wrongfully converted trust monies in the sum of $5,815.00?

Decision as to Guilt

84. The Hearing Committee reviewed the Statement of Facts and the submissions of counsel relating to Citations 1 through 10 inclusive, and 12 through 14 inclusive, and concluded that the Citations were made out.

85. With respect to Citation 11, the Hearing Committee concludes that the LSA has not met the burden of proof to make out a Citation of misappropriation or wrongful conversion of the sum of $1,485.00. Simply put, there is not clear and cogent evidence to convince the Hearing Committee that the $1,485.00 was not returned to R.W. as alleged by the Member.

86. However, with respect to the sum of $5,815.00, the Hearing Committee concludes that the Member in fact wrongfully converted all or a portion of those funds. The Committee concludes that this is simply not an issue of failing to comply with the requirements of handling of trust property, failing to properly provide an account for those funds, overcharging for disbursements and the like. The reality is that the sum of $5,815.00 was the property of R.W. and the only reason that the Member would be entitled to take those funds and use them to buy Christmas presents and pay off personal debts was if the Member had run the funds through a trust account and had properly rendered an account for the entirely of those funds. In this case, the Member frankly admitted that he knew that he should not have accounted for the funds as he did pursuant to Exhibit 15, and that he knew that what he should have done was take the entirely of the $7,300.00, put it into Mr. Boyd's trust account, render an account from Boyd and Associates for legal fees and disbursements and provide the balance of funds, if any, to R.W. The Member frankly admits that he did not do that. Even if it was proper to have delivered $1,485.00 in cash to R.W. at 10:00 p.m. in a Second Cup parking lot, the Member knew that the remaining $5,815.00 should have been dealt with as set forth above, namely to have it run through the trust account of Mr. Boyd. The Committee concludes that by failing to do so, the Member wrongfully converted the funds.

87. Ms. Stevens, and indeed Mr. Groome, seemed to think that, because there was no allegation by Mr. Boyd that the Member owed him any money, somehow this made things right. The reality is that if the funds had been properly deposited in Mr. Boyd's account, the $5,815.00 would have been in a lawyer's trust account and it would have been up to Mr. Boyd (or perhaps the Member) to render an account. If in fact that account was for $5,815.00, then R.W. would have at least had an account which he could have dealt with either by negotiation with Mr. Boyd, by complaint to the Law Society, or by taxation. As a result of the acts of the Member, however, that did not occur. There is no evidence before the Committee that any account was provided to R.W. other than perhaps the scrawled note in Exhibit 15. By taking the $5,815.00 cash for his personal use, the Member precluded R.W. from taking any of these courses of action, and as a result, the Committee concludes that the Member wrongfully converted those funds.

88. The Hearing Committee acknowledges that while they have concluded that Citation 11 is made out with respect to the sum of $5,815.00, the Committee does recognize that this is not a typical circumstance of misappropriation or wrongful conversion where the Member simply overtly steals the client's funds. Ms. Stevens submitted that some element of *mens rea* was required in order to make out Citation 11. The Hearing Committee is satisfied that the element of *mens rea* existed in this case. The Member admitted he knew that the funds needed to go through Mr. Boyd's trust account and he knew that there was a high degree of likelihood that his estimate of the disbursements in Exhibit 15 was incorrect and that there was a reasonable probability that funds would need to be returned to R.W. if the $1,000.00 estimate in fact exceeded the actual disbursements. The Member's evidence is that this would have been something that could have been sorted out after Christmas. The Hearing Committee fails to see the difference between the situation where a Member wrongfully takes client funds on the theory that the Member can replace them very quickly and this circumstance where the Member knew that there could very well be monies that would be owing to R.W. but rather than ensure that those funds were properly dealt with, he converted them for his own use on the basis that it would all be sorted out later. And, of course, it did not all get sorted out later.

Conclusion as to Guilt

89. Accordingly, the Hearing Committee concludes that all 14 Citations are properly made out.

90. As a result of the length of the Hearing, the Hearing Committee was unable to deal with the sanctioning phase of the Hearing, and accordingly it was adjourned to a date to be agreed upon between the Hearing Committee Members, counsel for the LSA and counsel for the Member.

DATED this 26th day of July, 2010.

_____

Steve Raby, Q.C. - Chair

_____

Frederica Schutz, Q.C.

_____

Dr. Larry Ohlhauser

DECISION AND SANCTION

On September 1, 2010 the Hearing Committee reconvened and issued a verbal decision which accepted the Member's admissions of guilt on Citations 1 – 10 and 12 – 14, and found the Member guilty of only the wrongful conversion particular of Citation 11. The Hearing Committee made a specific declaration that the misconduct arose from incompetence on account of a drug addiction.

On December 2, 2010, the Hearing Committee reconvened to decide the appropriate sanction. It heard further evidence relative to sanction and suspended the Member for 18 months. Prior to reinstatement the Member will be referred to the Practice Review Committee. The Member was ordered to pay the actual costs set at $8,500.00 prior to reinstatement, estimated at the time to be in excess of $11,610. In so doing the Hearing Committee expressly granted a reduction of costs for compassionate reasons. A Notice to the Profession is to be issued.

The reasons will be published when released.