

**IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING INQUIRING
INTO THE CONDUCT OF MADELINE J. WOOD.
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

REASONS FOR DECISION

1. On October 28, 2008, a hearing committee panel (the "Panel") comprised of Stephen Raby, Q.C. (Chair), Rod Jerke, Q.C. and Yvonne Stanford convened at the Law Society offices in Calgary, Alberta to enquire into the conduct of Madeline J. Wood (the "Member"). The Member was represented by Fred Fenwick, Q.C. and was present for the duration of the Hearing. The Law Society of Alberta ("LSA") was represented by Michael Penny.

Jurisdiction and Preliminary Matters

2. Jurisdiction was established by **Exhibits 1 through 4** inclusive. There was no objection to the composition of the Panel, notwithstanding that it was disclosed that Ms. Stanford had been a member of certain of the assurance fund panels as referenced in **Exhibit 15**, and notwithstanding that Ms. Stanford and Mr. Raby had been on one or more of the committees of Benchers who heard the interim suspension applications in respect of the Member. Mr. Penny advised that a Private Hearing Application Notice had been served on a member, Thomas Viccars, but that Mr. Viccars had not responded to the notice. He therefore submitted that the matter should be heard in public, but that the names of Member's clients should be redacted wherever they appear on the record. The Panel concurred with Mr. Penny's submissions.

Citations

3. The Member faced six citations as follows:

- (1) IT IS ALLEGED that you failed to maintain your books and records as required by the *Rules of the Law Society of Alberta*, and that such conduct is conduct deserving of sanction.
- (2) IT IS ALLEGED that you failed to reconcile your trust bank account statements as required by the *Rules of the Law Society of Alberta*, and that such conduct is conduct deserving of sanction.
- (3) IT IS ALLEGED that you failed to file your forms S for the years 2003 and 2004 and your Forms T for the years 2002, 2003 and 2004 as required by the *Rules of the Law Society of Alberta*, and that such conduct is conduct deserving of sanction.
- (4) IT IS ALLEGED that you performed legal services during the time you had been suspended and thereby breached Part 6, Section 106 of the *Legal Profession Act*, and that such conduct is conduct deserving of sanction.

- (5) IT IS ALLEGED that you accepted employment with another lawyer when you were suspended, contrary to Part 6, Section 108 of the *Legal Profession Act*, and that such conduct is conduct deserving of sanction.
- (6) IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to the Law Society of Alberta and thereby breached Chapter 3, Rule 3 of the *Code of Professional Conduct*, and that such conduct is deserving of sanction.

Evidence

4. The Panel also had the benefit of reviewing **Exhibits 6 through 16** in the proceedings, which Mr. Fenwick kindly allowed the Panel to review in advance of the hearing. Those Exhibits were formally tendered by Mr. Penny, with a fully executed copy of **Exhibit 6** replacing the unsigned version previously provided to the Panel.

5. Mr. Penny tendered into evidence a Statement of Facts and Admission of Guilt of the Member with respect to Citations 1, 2, 3 and 6 [**Exhibit 6**].

6. Excerpts from the Statement of Facts and Admission of Guilt of the Member with respect to Citations 1, 2 and 3 are reproduced herein as follows:

- (a) On October 13, 2005, Francine Leroux, an auditor contracted by the Law Society of Alberta, commenced an audit pursuant to Rule 130 of the *Rules of the Law Society of Alberta*, of the financial records of Ms. Wood's legal practice.

[**Exhibit 7**, Tab 3]

- (b) Ms. Leroux was unable to proceed with this audit because of a number of problems with Ms. Wood's trust records, the most serious of which was her failure to complete reconciliations of her trust account since October, 2002.

[**Exhibit 7**, Tab 3]

- (c) Ms. Wood had also failed to file Form T's, with the last one being filed for the year ended December 31, 2001.

[**Exhibit 7**, Tabs 1 and 2]

- (d) As a result of the breaches of the trust accounting rules, the Law Society sought an undertaking from Ms. Wood to freeze her trust account, but Ms. Wood initially resisted, saying that she had real estate transactions to complete. She did, however, sign and deliver the undertaking to freeze her trust account at the National Bank, on October 17, 2005. She did not disclose on her undertaking an additional trust account she maintained at Alberta Treasury Branches.

[**Exhibit 7**, Tab 7]

- (e) On October 17, 2005, Ms. Leroux attempted to reconcile Ms. Wood's trust account for the month of September, 2005, but was unable to do so. In fact, Ms. Wood's trust account was in surplus by \$26,581.14. There was a further amount of \$10,000 which Ms. Wood said was a "trust float" being fees to which she was entitled, but which she had not transferred to her general account. The \$26,581.14 surplus, however, meant that there was unallocated money in Ms. Wood's trust accounts, and also meant that there were serious deficiencies in Ms. Wood's trust account record-keeping.

[Exhibit 8]

- (f) The Law Society's audit department then gave Ms. Wood until October 31, 2005 to prepare trust reconciliations for the months from November, 2002 to September, 2005, as these earlier trust reconciliations were required before the current discrepancies could be resolved. Ms. Wood did not meet this deadline.

[Exhibit 7, Tab 6]

- (g) On October 20, 2005, at a Special Meeting of the Benchers, the Benchers resolved that "by the close of business on November 23, 2005, [Ms. Wood] shall provide to the Law Society up to date client trust ledger cards, trust reconciliations and bank statements in form acceptable to the Audit department of the Law Society of Alberta."

[Exhibit 8, Page 4]

- (h) On November 23, 2005, Ms. Wood provided some of the documents listed in the resolution, and on November 25, 2005, R. Gregory Busch, the Law Society's Director of Lawyer Conduct, sent Ms. Wood a letter listing the numerous deficiencies in the materials she provided, and requiring her to rectify certain of those deficiencies by November 29, 2005, and others by December 1, 2005.

[Exhibit 8, Pages 4 and 5]

- (i) Ms. Wood provided some, but not all of the material required by Mr. Busch. She did not give an explanation as to why not all material was provided.

[Exhibit 8, Page 5]

- (j) On December 1, 2005, the Law Society's contract auditor, Sara Jimenez, completed a Preliminary Investigation Report. She concluded that Ms. Wood:

- (i) did not keep a client trust receipts and disbursements journal;
- (ii) did not keep a trust transfer journal;
- (iii) did not keep proper client trust ledger cards;

- (iv) had five overdrafts on her trust bank account from May 14, 2004 to September 12, 2005 (which were corrected quickly, usually on the next business day);
- (v) had not prepared a trust bank reconciliation since October, 2002, but when she did, after October 17, 2005, none of the reconciliations did in fact reconcile;
- (vi) had discrepancies in her reconciliations which ranged from a surplus of \$12,627.91 to a deficiency of \$86,827.33;
- (vii) had not filed for Form S (Annual Law Firm Report) for 2003 and 2004; and
- (viii) had not filed her Form T (Annual Accountant's Report) for 2002, 2003, and 2004.

[Exhibit 8]

- (k) Ms. Wood maintained trust bank accounts, one each with the National Bank and with Alberta Treasury Branches. Ms. Wood continued to use her ATB trust account after October 17, 2005. Although no funds went from trust to her, her use of this account did result in an overall shortfall in this trust account, as Ms. Wood used funds from this account to pay a client obligation properly payable from her frozen National Bank account.

[Exhibit 8, Page 14]

- (l) In 2006, Law Society staff reconstructed Ms. Wood's trust records back to 2002. They found:
 - (i) Miscalculations which resulted in overpayment to a client or Ms. Wood;
 - (ii) Transposition of figures resulting in recording the wrong balance;
 - (iii) Failures to post deposits or cheques; and
 - (iv) Postings of cheques into a statement of receipts and disbursements, when there was no record of a cheque being written.

[Exhibit 9, Page 5]

- (m) On January 10, 2007, the results of this reconstruction of her trust account were delivered to Ms. Wood. In particular, Ms. Wood was provided with a spreadsheet setting out "Client Trust Listing - with Shortages."

[Exhibit 9, Tab 1]

- (n) On January 17 and January 24, 2007, Ms. Wood was interviewed by Dan Dorsey, a Law Society Investigator. In particular, Ms. Wood was asked about a schedule prepared by Law Society staff, of "Client Trust Listing - With Shortages." In the schedule, thirty-two shortages totalling \$23,064.12 were identified, with the reasons for the shortage.

[Exhibit 9, Page 9]

- (o) On those thirty-two shortages, one was the responsibility of another lawyer (\$5419.01) who has since replaced the funds through Ms. Wood's custodian.

[Exhibit 9, Page 9]

- (p) The remaining thirty-one client shortages fall into these categories:

- (i) Ms. Wood took too much in fees (A., B., B.);
- (ii) Ms., Wood erroneously forwarded too much to the client at the conclusion of the transaction (B., C., G., H., L., L., M., P., R., R., S., S., S., V.);
- (iii) Ms. Wood made a calculation error (B., C., G., G., M., R., W.);
- (iv) Ms. Wood made an error transferring funds from one trust account to the other (B., C.); and
- (v) Ms. Wood made a posting error (G., H., Z.).

[Exhibit 9, Tab 1]

- (q) The "Client Trust Listing - With Shortages" also identifies fifteen files where there was no statement of account to justify the payment to Ms. Wood of her fees. Ms. Wood has subsequently provided such statements of account to justify the transfer of her fees. On many occasions the statements were prepared contemporaneously with the transfer, but were not forwarded to the client.

[Exhibit 9, Tab 2]

- (r) There were also occasions where Ms. Wood says she had work-in-progress that has not been billed, or has been billed, but she had not transferred the funds from trust to pay her account. Ms. Wood, during the course of her interview with Mr. Dorsey, provided a list of clients from whom she says she was entitled to payment of fees from trust, but had not completed the transfer. If Ms. Wood is correct in her list of such clients and her entitlement to fees, then despite the shortages on individual client ledgers, because of her not having completed these transfers of fees, the balance on her trust bank accounts cover her overall trust obligations to her clients.

7. Circumstances giving rise to Citation 6 are reproduced from the Statement of Facts and Admission of Guilt of the Member as follows:

- (a) On April 12, 2007, the Final Investigation Report was issued by Dan Dorsey, the Law Society's investigator. On May 8, 2007, Katherine Whitburn, Manager, Complaints for the Law Society, sent that report, including its attachments, to Ms. Wood for her written response pursuant to Section 53 of the *Legal Profession Act*.

[Exhibit 10]

- (b) Ms. Wood initially responded on May 23, 2007 with a request for further time in which to respond.

[Exhibit 11]

- (c) Ms. Whitburn extended the deadline for response to June , 2007, and Ms. Wood responded on June 4, 2007 with a letter saying that she had "prepared a document" but needed further information before she could forward it. Ms. Wood then asked four specific questions, which Ms. Whitburn answered in her June 6, 2007 letter. Ms. Whitburn also granted a further extension to June 15, 2007.

[Exhibits 12, 13 and 14]

- (d) Ms. Wood did not provide a written response as required by Section 53, so Ms. Whitburn prepared her report to the Conduct Committee Panel, without the benefit of such response.

8. The Member expressly did not admit guilt with respect to Citations 4 and 5, but signed the Statement of Facts confirming the circumstances giving rise to those Citations. Those circumstances are as follows:

- (a) Approximately three months after her suspension, Ms. Wood accepted employment with Mr. Thomas Viccars, a member of the Law Society;
- (b) Ms. Wood worked for Mr. Viccars primarily as a receptionist, but did complete other tasks for which Mr. Viccars billed his clients;
- (i) Ms. Wood assisted in real estate transactions, but completing template forms with regard to such transactions; and
- (ii) on one occasion, Ms. Wood completed legal research on an estate matter;
- (c) The work that Ms. Wood completed on the real estate transaction was work that Mr. Viccars had previously assigned to his receptionists, and the documents so prepared were not used until checked by another staff member who acted as his book-keeper and real estate paralegal; and

- (d) Ms. Wood told Mr. Viccars that she was suspended and not entitled to practice law, and she believes that she and Mr. Viccars honoured that restriction. Mr. Viccars was unaware of the provisions of Section 108 of the *Legal Profession Act*. When the Law Society informed Ms. Wood and Mr. Viccars that Section 108 applied, Ms. Wood's employment terminated.

9. Mr. Penny urged the Panel to confirm the admission of guilt of the Member with respect to Citations 1, 2, 3 and 6. With respect to Citations 4 and 5, he suggested that it would be expedient for the Member to provide direct evidence with respect to the circumstances surrounding Citations 4 and 5 and that his evidence would be limited to the cross-examination of the Member.

10. Accordingly, the Member was put under oath and testified as follows with respect to the circumstances of her employment with Mr. Viccars:

- (a) after her interim suspension, the Member determined that Mr. Viccars was looking for a receptionist and the Member offered her services in this capacity and worked at Mr. Viccars' office from March, 2006 to February, 2007;
- (b) the tasks that she performed in her capacity as a receptionist included the following:
 - (i) answering the phone;
 - (ii) photocopying;
 - (iii) land title searches;
 - (iv) on two occasions, she performed some legal research on behalf of Mr. Viccars on estate matters; and
 - (v) services relating to a software business that Mr. Viccars also ran from his office.
- (c) the Member indicated that she specifically did not do any of the following:
 - (i) meet with clients other than greeting them at the receptionist's desk;
 - (ii) prepare or sign letters;
 - (iii) provide legal advice to Mr. Viccars' clients; or
 - (iv) provide a legal analysis of any of the title searches she conducted (a number of which were British Columbia searches as a result of the fact that Mr. Viccars is also called in the Province of British Columbia);

- (d) that the Member was not aware, until January of 2007 that there was potential issue of her employment in this capacity with Mr. Viccars as being a breach of Section 108 of the *Legal Profession Act* ("Section 108");
 - (e) that in January of 2007, she was interviewed by Dan Dorsey, an investigator with the LSA who was investigating the trust account issues raised in Citations 1, 2 and 3, and in the course of that interview, Mr. Dorsey raised the issue of whether or not the Member's employment with Mr. Viccars contravened Section 108. A portion of the transcript of that interview was entered as **Exhibit 17**. From that transcript, it is clear that Mr. Dorsey raised the issue of whether or not the Member's employment with Mr. Viccars was a breach of Section 108, but that Mr. Dorsey concluded that Section 108 was confusing and suggested that the Member should read Section 108 and draw her own conclusions. It is also clear from the transcript that Mr. Dorsey asked someone for clarification, but that the person he asked also determined that the Section was "a bit confusing". It is unclear as to who Mr. Dorsey asked for clarification, but the implication clearly was that it was someone within the LSA;
 - (f) the Member testified that she did review Section 108 after the interview with Mr. Dorsey, but concluded that it simply prohibited her from doing any legal work while she was in the employ of Mr. Viccars;
 - (g) some time subsequently, likely in late February or early March, 2007, someone from the LSA contacted Mr. Viccars directly and advised him that he was in breach of Section 108 by employing the Member, even in a non-legal capacity, and further suggested to Mr. Viccars that it was not a good idea if the Member was employed by him even only in relation to his software company if she in fact was physically located in the office where Mr. Viccars also conducted his law practice. As a result of this conversation, her employment with Mr. Viccars terminated forthwith; and
 - (h) the Member confirmed that there was never any definitive communication from the LSA to her advising her that her employment with Mr. Viccars was in breach of Section 108.
11. On cross-examination by Mr. Penny, the Member confirmed the following:
- (a) from 2001 until the date of her interim suspension, she shared office space with Mr. Viccars, although they ran completely separate law practices and did not share a trust account;
 - (b) Mr. Viccars was aware that the Member had been interim suspended for trust account irregularities;
 - (c) the research that she conducted was academic research and she did not provide any legal conclusions arising from her research; and

- (d) when she did land title searches, she simply provided the searches to Mr. Viccars and did not comment on their contents.

Submissions as to Guilt re. Citations 4 and 5

12. Mr. Penny advised the Panel that based on the evidence, he was not making a submission that the Member in fact was guilty of Citation 4 as he concluded that the evidence before the Panel fell short of evidence that she in fact performed legal services for Mr. Viccars during the period from March 2006 to the end of February, 2007 when she was a suspended member.

13. Mr. Penny, however, did urge the Panel to conclude that the Member was guilty of Citation 5. Mr. Penny urged the Panel to conclude that Section 108 was not ambiguous and that in fact it was very clear that no active member or professional corporation could employ a suspended member, and that there was no specific wording in this Section, nor was it implied that such prohibited employment had to be in the capacity as a barrister and solicitor.

14. On answering questions from the Panel, Mr. Penny conceded that even assuming that his argument was valid and that Section 108 was non-ambiguous, the acceptance by the Member of the employment offer of Mr. Viccars was not a breach of Section 108 as that Section prohibited an active member or professional corporation from employing a suspended member, and not the reverse. Accordingly, the sanctionable conduct of the Member in accepting employment would only be as a result of a breach of Section 49 of the *Legal Profession Act* which indicates that any conduct of a member which is incompatible with the best interests of the public or the members of the Society or tends to harm the standing of the legal profession generally is conduct deserving of sanction. Mr. Penny urged the Panel to conclude that if there was a prohibition against employing a suspended member, then Section 49 was breached by the suspended member in accepting that employment.

15. Mr. Fenwick, on the other hand, strongly urged the Panel to conclude that in fact, Section 108 is ambiguous. He suggested that the Section should essentially be read that no active member can employ, as a barrister and solicitor, a suspended member.

16. Section 108(1) reads as follows:

"108(1)No active member or a professional corporation shall, except under the authority of a resolution of the Benchers, employ in connection with the member's or corporation's practice as a barrister and solicitor:

- (a) a former member,
- (b) a member whose membership is under suspension,
- (c) a student at law whose registration is under suspension, or
- (d) a person who is entitled to practice as a member of the legal profession in a jurisdiction outside Alberta

but whose right to do so has ceased or is under suspension."

17. Mr. Fenwick urged the Panel to conclude that the phrase "... as a barrister and solicitor" in line four, must qualify the list of potential persons in subsections (a) through (d), rather than qualifying the nature of the practice of an active member or professional corporation. He suggested that there was no need to qualify the nature of such practice and accordingly the phrase "... as a barrister and solicitor" must qualify the list of potential person in Subsections (a) through (d). On questioning from the Panel, Mr. Fenwick conceded that it was possible that the phrase "as a barrister and solicitor" could in fact qualify the member's or corporation's practice as it was possible that a member could have a practice other than as a barrister and solicitor (for example if they were also a chartered accountant or a licensed realtor, etc.) and that it would only be crystal clear if the phrase "as a barrister and solicitor" was inserted immediately after the word "employ". However, Mr. Fenwick urged the Panel to conclude that there was enough of an ambiguity in Section 108 that the Member should not be convicted of this Citation. In fact, Mr. Fenwick indicated that he felt that the ambiguity could likely only be resolved by a legislative amendment.

Decision as to Guilt

18. The Panel concurred with the submissions of Mr. Penny that the admission of guilt of the Member in respect of Citations 1, 2, 3 and 6 should be accepted and accordingly, those Citations are made out.

19. The Panel also concurred with the submissions of Mr. Penny that there was insufficient evidence that the Member, in fact, was practising as a barrister and solicitor while suspended, and accordingly, the Panel concluded that Citation 4 was not made out.

20. With respect to Citation 5, the Panel concluded that Citation 5 had not been made out. The Panel concluded as follows:

- (a) there was indeed, some ambiguity with respect to Section 108 in that it was certainly possible to read the Section as suggested by Mr. Fenwick. While that may not be the better view of the interpretation of the Section, the interpretation of the wording was not free from doubt, and indeed, one Panel member concluded that the better view of the interpretation of the Section was in accordance with Mr. Fenwick's interpretation;
- (b) the Citation as drafted referenced a breach of Section 108. Making a finding of conduct deserving of sanction under Section 49 could only be accomplished by taking a circuitous route through complicity in a breach of Section 108 when the specific conduct was not prohibited under Section 106, a path the Panel was not prepared to follow;
- (c) the Panel put a good deal of weight on the discussion that the Member had with Mr. Dorsey. The Panel in no way wished to criticize Mr. Dorsey's handling of the matter. As a non-lawyer, his indication to the Member that she was potentially in breach of Section 108 and that she should carefully analyze whether that in fact

was the case, was a proper method of dealing with the issue and had the matter been left at that, the Panel would have had no sympathy for the Member if she was in fact in breach of Section 108. However, Mr. Dorsey clearly indicated that he had spoken to someone else and the implication has to be that it was somebody at the LSA, and he advised the Member that this individual also concluded that Section 108 was unclear. When the LSA did advise Mr. Viccars that in its view, he was in breach of Section 108, then the employment arrangement immediately terminated. On the basis of all of the foregoing, the Panel concluded that Citation 5 was not made out.

Evidence re Sanctions

21. Mr. Penny again suggested that it would be expedient if the Member provided evidence regarding sanction, and that his submissions would be based upon his cross-examination of the Member.

22. Accordingly, the Member, under oath, testified as follows with respect to sanctioning issues:

- (a) the Member articulated with Jack Moore of the firm of Moore Martin, and was admitted in 1985. Within six months of her admission, she became a sole practitioner and has been a sole practitioner ever since;
- (b) while she has carried on a fairly general practice, a good portion of her practice has always been residential real estate conveyancing and between 2003 and her interim suspension in 2005, she was doing a significant number of residential real estate transactions per month as a result of the state of the Calgary economy;
- (c) she completed all of her legal work on her own as she did not have a paralegal, assistant or book-keeper. She retained the services of an accountant to complete her Form T's;
- (d) she has been running her practice from an accounting perspective in exactly the same fashion from 1986 through 2005;
- (e) she was audited by the LSA in the late 1980's or early 1990's and other than some suggestions on how to improve her book-keeping, the LSA did not negatively comment on her accounting procedures, even though those procedures were apparently in contravention of the LSA Rules, even as they existed back in the late 1980's;
- (f) she had always filed her Form S's and Form T's on time, and she rarely had difficulty in balancing her trust account. The trigger for her spiral into non-compliance was misplacing a bank deposit book in 2002, and being unable to reconcile her accounts at that time;

- (g) she is married and has two teenage daughters. From 1996 through 2005, her husband essentially was not working and she was the sole breadwinner for the family;
- (h) after the trust accounting became out of control, she felt constantly fatigued, could not sleep properly, was constantly anxious, was melancholy, would become tearful frequently and gained a significant amount of weight;
- (i) she has been in arrears of her income tax obligations since 1998 and is still working through those issues;
- (j) finally, in 2008, she visited her family doctor, Dr. Bruce Wheeler, and advised him of the entirety of her symptoms. Dr. Wheeler then conducted a series of tests, resulting in a diagnosis of a major depressive disorder in accordance with the DSM-IV classification. The Member is now being treated with medication for depression and medication for a thyroid problem. Dr. Wheeler's report is found at **Exhibit 16** and it concludes that her medication is not yet fully balanced;
- (k) the Member advised that she was feeling much better since being put on medication, and as a result had enrolled at the University of Calgary in a PhD program in history and was taking a full course load in the 2008 fall semester. She is also a teaching assistant to second year students, and had recently marked one hundred and ten mid-term papers over one weekend. The Member indicated that her course load for the PhD program would continue through the spring semester and likely into the summer of 2009 and thereafter, in order to obtain her PhD, her studies would become self-directed;
- (l) the Member indicated that her long-term goal was to return to the practice of law, although she felt that she had done enough real estate to last a lifetime; and
- (m) the Member testified that based on the latest reconciliation of her trust account, the shortfall to her clients was approximately \$17,000.00 and that she honestly believes that she has unpaid fees of approximately \$29,000.00. In answer to her counsel's question, she further confirmed that to the extent she was unable to recover all or a sufficient portion of her fees, she would personally reimburse any of her clients so that the \$17,000.00 shortfall would be covered. The Member testified that this was always her position in respect of her trust account irregularities, and that her objection to the payouts ordered by the Assurance Fund Panels was on the basis that there were in fact sufficient funds in her trust account to make payment of all of these obligations. With specific reference to certain trust account discrepancies on a file-by-file basis, she confirmed that in certain cases, she had simply neglected to apply funds remaining in trust to her accounts, and in other cases where there was a shortfall disclosed, the shortfalls resulted from the fact that she had overpaid her client and then attempted to take her fees out when there was no funds remaining. Other discrepancies arose from simple clerical errors, such as transposition of numbers and miscalculations.

23. On cross-examination by Mr. Penny, the Member confirmed the following:
- (a) although she knew that she was in trouble with respect to her account reconciliations when she lost her deposit book in 2002, she was simply immobilized in seeking help;
 - (b) between 2002 and 2005, approximately 90% of her practice was residential real estate;
 - (c) her accounting records were all done on a completely manual basis, and she did not even use a one-write system as a check and balance. Her only accounting function was to create a statement of receipt and disbursement of funds at the start of each file and to complete it as she went along;
 - (d) she may not have made it clear during the course of the investigation and the Assurance Fund Panels that she was prepared to forego her fees in order to make her clients whole, or to replenish her trust account from her own resources in the event that there was still a shortfall after she was able to collect all her fees; and
 - (e) she had wanted to put into evidence at the Assurance Fund Panel hearings the reconciliations of a number of her trust accounts as per the spreadsheet which the LSA prepared and to which she added details of unpaid invoices and which was tendered as **Exhibit 19**, in order to show to the Assurance Fund Panels that there really were no monies missing from her trust account, but that she was advised by someone from the LSA that she was unable to tender this evidence. Her evidence remained consistent even when Mr. Penny advised her that he found it very difficult to believe that she could have received such advice from the LSA.

Submissions re Sanction

24. Mr. Penny urged the Panel to conclude that a suspension was necessary in the public interest for the following reasons:
- (a) the public was placed at risk as a result of the Member's total abdication of her accounting responsibilities for over a three-year period, which forced clients to wait for payment of funds and to have to go through the assurance fund process, all notwithstanding that the Member did not deliberately misappropriate funds for her own benefit or deliberately act such that her clients were forced to become involved in the assurance fund process;
 - (b) the Member had been given a number of opportunities in order to rectify the problem and if she had owned up to the problem early, the problems would have been solved relatively easily;
 - (c) the cost to the Law Society to investigate this matter and to recreate the Member's trust accounts was significant; and

- (d) notwithstanding that she participated in the LSA processes on certain occasions, on other occasions, she did not respond to LSA correspondence.

25. Mr. Penny did indicate that there were mitigating factors that might reduce the period of suspension. He confirmed that once the matter reached his desk, the Member was cooperative, admitted guilt on four of the Citations, assisted in getting an Exhibit Book that was workable (notwithstanding the myriad of accounting records) and that there was medical evidence of an illness or mental disability. Mr. Penny urged the Panel to conclude what sort of suspension they would have likely determined absent the medical issues, and to reduce the period of suspension on the basis that the medical condition should be considered as a mitigating factor, all as contemplated by the Hearing Guide.

26. In the result, Mr. Penny suggested that there should be a suspension in the order of six months, the Member should pay the actual costs of the hearing and, as authorized by Rule 99, the Member should pay for the audit costs of a contract auditor, Ms. Ellergodt, in the sum of \$6,427.08, which invoice was tendered as **Exhibit 24**. Mr. Penny further indicated that any issue as to whether the Member was now capable of conducting a proper practice in compliance with the LSA accounting rules, should be something for a reinstatement panel and not something that this Panel should take conduct of (which would be the result if no suspension was ordered).

27. Mr. Fenwick urged the Panel to consider the overall impact of what had happened to the Member, and the fact that she has been suspended on an interim basis for close to three years, and that in the result, no further sanctions should be imposed on the Member. Specifically, Mr. Fenwick relied on the following:

- (a) that the Member's lack of compliance with the LSA accounting rules should have been evident to the LSA when they did their initial audit in the late 1980's or early 1990's and that the Member cannot be faulted for failure to alter her procedures;
- (b) the Member's failure to respond to certain LSA correspondence was not a significant breach of the rules. While the Member has admitted guilt in this regard, Mr. Fenwick urged the Panel to note that the Member had fully engaged in a number of the LSA processes (and most importantly had spent three days with the auditor attempting to reconcile her accounts) and that where she did not respond, it was generally because she had no information that would have provided a meaningful response;
- (c) this is not a case where the Member has been dishonest, but one where there has simply been a miscommunication between the Member and the Law Society and that the Member has always taken the position that she would make her clients whole, if indeed there are trust account shortages. In this regard, Mr. Fenwick suggested that the Member has been somewhat prejudiced by the Assurance Fund Panel decisions which are a *de facto* taxation of her fees;
- (d) Mr. Fenwick argued that the Member was not overcharging her clients as is often the case in circumstances where there are trust account irregularities; and

- (e) Mr. Fenwick's most strenuous argument was that the Member's breach of the rules of the LSA arose from a mental disability and not from a character flaw. The Member's inability to deal with her trust accounts in an appropriate fashion was not a gradual slip into non-compliance, but was a sudden event after sixteen years of providing adequate reporting to the Law Society, resulting from a mental illness. Mr. Fenwick indicated that the Member should not be sanctioned because of her illness and specifically should not be sanctioned for not recognizing that she was ill, such that she did not get sufficient help. Mr. Fenwick argued that a suspension was in fact a breach of the *Human Rights, Citizenship and Multiculturalism Act*, and in particular, Section 9 thereof which reads as follows:

- "9 No trade union, employer's organization or occupational association shall:
- (a) exclude any person from membership in it,
 - (b) expel or suspend any member of it, or
 - (c) discriminate against any person or a member, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or member."

Mr. Fenwick argued that if the Panel suspended the Member, it would be suspending her because of a mental disability and that this would be a breach of Section 9. Notwithstanding his forceful argument, Mr. Fenwick made no strong objection to a short suspension, recognizing that the only way that the Member would not be required to apply for reinstatement is if the Citations were dismissed or if the Panel unconditionally terminated the interim suspension and did not order a fixed-term suspension.

28. In response to Mr. Fenwick's argument, Mr. Penny took the position that there was no breach of Section 9 of the *Human Rights, Citizenship and Multiculturalism Act*. He urged the Panel to conclude that by ordering a suspension, the Panel was not suspending the Member by reason of her mental disability, but by reason of her misconduct (even though that misconduct may have partially resulted from a mental disability). He further concurred with comments from the Panel that the sanctioning process of the LSA as articulated in the Hearing Guide, was not a process designed to punish the Member, which, in and of itself, might give rise to an application of Section 9.

Decision as to Sanction

29. The Panel noted that Citations 1, 2 and 3 were very serious matters and go to the heart of the LSA's mandate in protecting the public interest. In this case, by the time the LSA was involved in the Member's practice, it would be charitable to describe those financial records as a mess. While the Panel concurred with the submission of Mr. Fenwick which was essentially accepted by Mr. Penny that there was no *mens rea* on the part of the Member to misappropriate a

client's funds, the state of her financial records resulted in a number of significant adverse consequences to both the Member and her clients, namely her interim suspension, the custodianship of her practice, assurance fund claims and clients essentially wondering about the security of their funds.

30. The Panel made note that well before 2003, which appeared to be the onset of the Member's mental disability, the Member either knew or ought to have known that she was putting the public at risk as a result of the manner in which she was keeping her trust accounts since she was essentially one problem away from a significant accounting disaster. The Panel also noted that while Mr. Fenwick urged them to find that the failure to respond to the LSA was not a significant failure in the current circumstances, the Member in fact was previously found guilty on a Citation which involved a failure to respond to the LSA and this goes to an issue of governance (the Member's record was tendered as **Exhibit 20**). That previous Citation was well before 2003 and the onset of the Member's mental disability.

31. With respect to Mr. Fenwick's argument that a suspension would be a contravention of Section 9 of the *Human Rights, Citizenship and Multiculturalism Act*, the Panel concurred with Mr. Penny's submission that the Member was not being sanctioned as a result of her mental disability but as a result of her misconduct. The Panel confirmed that the sanctioning of a member for breach of the rules of the LSA was, in accordance with the purposeful approach to sanctioning as confirmed by the LSA Hearing Guide, not primarily for the purpose of punishment of the Member, but rather to protect the public, maintain high professional standards, and preserve public confidence in the Legal Profession. The Hearing Guide further goes on to confirm that the existence of a physical or mental disability by a Member at the time of commission of the acts giving rise to the Citation is to be a mitigating factor in determining sanction.

32. The Panel agreed with Mr. Penny that the matter could be analyzed on the basis of what sanction would have been imposed had there been no mental disability, and while the Panel didn't come to an exact determination, it concluded that there would have been a suspension somewhere in the order of six to twelve months and likely more towards the twelve month range. As a result of the mitigating factor of the Member's mental disability as well as her cooperation in the admission of guilt and streamlining the hearing procedure, the period of suspension should be three months. The Panel accordingly determined that the Member should stand as suspended for a period of three months effective October 28, 2008. The Panel noted that the Member would have to apply for reinstatement under Rule 115 following the three month suspension period.

33. The interim suspension of the Member is terminated effective as of October 28, 2008.

34. The custodianship of the Member's practice through Mr. Steve McNeil shall continue until the Member is reinstated.

35. The Panel ordered that the Member would have 60 days from the date on which the actual costs of this hearing were submitted to the Member or her counsel within which to pay such costs.

36. The Panel ordered that the Member pay the invoice of Ms. Ellergodt in the sum of \$6,427.08 prior to making an application for reinstatement pursuant to Rule 115. The Panel specifically noted that this payment order is not intended to limit or restrict the exercise of discretion in potentially ordering payment of other fees or amounts that might be made during the process of any reinstatement application.

37. A notice to the profession is to be provided.

38. No referral to the Attorney General is required in this matter.

39. This decision, the evidence and the exhibits in this hearing are to be made available to the public, with the name of Member's clients to be redacted wherever they appear. References to Mr. Viccars, Mr. Dorsey, Ms. Leroux and Ms. Ellergodt are not required to be redacted.

Dated this 28th day of November, 2008.

Stephen Raby, Q.C.

Rod Jerke, Q.C.

Yvonne Stanford