The Law Society of Alberta
Hearing Committee Report

In the matter of the *Legal Profession Act,*
and in the matter of a hearing regarding the conduct of John Casuga,
a member of the Law Society of Alberta.

Jurisdiction and Preliminary Matters

1. The Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of John Casuga May 23, 2007, January 14, 15, 16 and 17th, 2008. The committee was comprised of Shirley Jackson, QC, chair, elected Bencher; Rodney Jerke, QC, elected Bencher and Dr. Larry Ohlhauser, lay Bencher. The LSA was represented by Mr. Garner Groome. The member was present throughout and was represented by Mr. Keith Laws.

2. Exhibits one through four, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established jurisdiction of the committee.

3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership of the committee.

4. The Certificate of Exercise of Discretion was entered as exhibit five. Counsel for the LSA advised that the LSA did not receive a request for a private hearing, and there was no application or objection by counsel for the Member, therefore the hearing was held in public.

5. An Exhibit Book with Exhibits 1 to 42 was entered, by consent of counsel. As the Hearing proceeded further Exhibits were added by consent of counsel:
   Exhibit 2A Citation 15
   Exhibit 17(4)

Exhibit 38(1)

Exhibit 38(2)

Exhibit 43 Outline of personal matters of John Casuga

Exhibit 44 September 10, 2004 Notice to AD as per the Real Estate Purchase Contract

Exhibit 45 September 8, 2004 Request for documents to C… on behalf of sale from AD to RR

Exhibit 46 May 22, 2007 Letter from John Casuga to A…

Exhibit 47 June 30, 2005 – February 6, 2006 LSA complaint notes re: LM and SM

Exhibit 48 May 27, 2005 Letter from AF to John Casuga

Exhibit 49 June 21, 2005 Letter from AF to John Casuga

Exhibit 50 February 10, 2006 Letter from AF to John Casuga

Exhibit 51 November 11, 2004 Residential Real Estate Purchase Contract between SR and JR, buyers and JW and LJ sellers

Exhibit 52 Photos of house in real estate matter between DRL, seller and ML and GS, purchasers

Exhibit 53 October 15, 2005 Second inspection of house involved in matter between DRL and ML and GS

Exhibit 54 October 8, 2005 E-mails between ML and John Casuga

Exhibit 55 August 26, 2005 Tenancy at Will Agreement between ML and GS (Purchaser) and DL (Owner)

Exhibit 56 Undated Statement of Adjustments to ML and GS

Exhibit 57 John H.G. Casuga Law Practice – Files opened 2004-2007

Exhibit 58 John H,G, Casuga timeline of LSA Complaints

Exhibit 59 John Casuga – Self Referral – Informal – September 27, 2006

Exhibit 60 John Casuga – Self Referral – Informal November 14, 2006

Exhibit 61 January 4, 2005 Letter from John Casuga to R…

Exhibit 62 January 24, 2005 Letter from John Casuga to RN

Exhibit 63 July 22, 2005 Final Statement of Account July 2005 to E…

Exhibit 64 2007 Letters from the Practice Review Department to John Casuga

Exhibit 65 September 10, 2004 Purchase agreement between AD and RR

Exhibit 66 Documents re: L…

Exhibit 67 September 19, 2005 E-mail from ML to John Casuga

Counsel for the Member submitted a Red binder with respect to his argument on the authority of the LSA to demand a response.

Counsel for the Member submitted written material on Citations regarding LO, RN, BK, LM and SM and ST complaints.

Citations

6. The member faced the following citations:

Citation 1: IT IS ALLEGED that you failed to comply with your undertaking given to opposing counsel, L.O., and that such conduct is conduct deserving of sanction.

Citation 2. IT IS ALLEGED that you failed to respond to opposing counsel, L.O., on a timely basis, and that such conduct is conduct deserving of sanction.

Citation 3. IT IS ALLEGED that you failed to respond to the Law Society on a timely basis in the matter of a complaint by L.O., and that such conduct is conduct deserving of sanction.

Citation 4. IT IS ALLEGED that you failed to comply with your undertakings given to opposing counsel, R.N., and that such conduct is conduct deserving of sanction.

Citation 5. IT IS ALLEGED that you failed to respond to opposing counsel, R.N., on a timely basis, and that such conduct is conduct deserving of sanction.

Citation 6. IT IS ALLEGED that you failed to respond to the Law Society on a timely basis in the matter of a complaint by R.N., and that such conduct is conduct deserving of sanction.

Citation 7. IT IS ALLEGED that you failed to serve and respond to your client, B.K., and that such conduct is conduct deserving of sanction.

Citation 8. IT IS ALLEGED that you failed to respond to the Law Society in the matter of a complaint by B.K., and that such conduct is conduct deserving of sanction.

Citation 9. **IT IS ALLEGED** that you failed to serve and respond to your clients, L.M. and S.M., and that such conduct is conduct deserving of sanction.

Citation 10. **IT IS ALLEGED** that you failed to respond to the Law Society in the matter of a complaint by L.M. and S.M., and that such conduct is conduct deserving of sanction.

Citation 11. **IT IS ALLEGED** that you failed to fulfill financial commitments to A…, and that such conduct is conduct deserving of sanction.

Citation 12. **IT IS ALLEGED** that you failed to respond to the Law Society on a timely basis in the matter of a complaint by A…, and that such conduct is conduct deserving of sanction.

Citation 13. **IT IS ALLEGED** that you failed to submit the Transfer of Land for registration and breached the trust condition imposed on you by S.T., and that such conduct is conduct deserving of sanction.

Citation 14. **IT IS ALLEGED** that you failed to respond to S.T., and that such conduct is conduct deserving of sanction.

Citation 15, **IT IS ALLEGED** that you failed to respond to the Law Society on a timely basis or at all in the matter of a complaint by S.T. and that such conduct is conduct deserving of sanction.

Evidence

7. The Hearing commenced May 23, 2007. On that date Counsel for the LSA applied for an adjournment to January 14, 2008 as an Agreed Statement of Facts and an Exhibit book had been prepared but May 22, 2007 Counsel for the LSA was advised that the Agreed Statement of Facts would not be signed. As a result the LSA had not prepared for evidence to be called and requested an adjournment.

8. Counsel for the LSA presented the Exhibit Books and advised the Hearing Panel that only the matter of jurisdiction, Exhibits 1 to 5, was going to be dealt with as there had been no consent to enter the entire Exhibit Book. Exhibits 1 to 5 were entered and jurisdiction was established.

9. Counsel for the LSA asked that an additional Citation, number 15, be added. Counsel for the Member had been notified of this request March 23, 2007. Counsel for the Member objected. Section 65 of the *Legal Profession* Act (LPA) permits a Hearing Committee to add a Citation, and it and Rule 94 of The Rules of the Law Society of Alberta (The Rules) entitle the Member to be granted an adjournment and an opportunity to prepare the Member's answer respecting the amendment. Counsel for the LSA was already seeking an adjournment due to late notice that all the matters were proceeding to Hearing. The additional citation was added as Citation 15 and Exhibit 2A entered.

10. Counsel for the LSA sought costs of the adjournment and Counsel for the Member opposed that application. Counsel for the LSA asked that the next Hearing date be pre-emptory on the Member.

11. The Hearing Panel, in all the circumstances including the additional citation, granted the adjournment and in view of all of the circumstances did not make an order for costs. The Hearing Panel did not make the next Hearing date pre-emptory on the Member.

12. The matter was adjourned to January 14, 2008 and the Exhibit books were returned to Counsel for the LSA.

13. January 14, 2008 there were two applications made by counsel for the Member

A. Counsel for the Member applied to have each of the complaints heard on the one hearing, but call the evidence on complaint 1 and then call the Member on the complaint and make a summation at the end of each of the 7 complaints (on the face of the citations there appear to be 6 complaints but R.N. made two separate complaints) or

B. He argued that it would be prejudicial to the Member for the Hearing Panel to hear all of the complaints and requested each of the 7 complaints be heard separately.

14. Counsel for the LSA opposed these applications on the basis that having mini hearings within a hearing is irregular and that case law had indicated that counsel for the Member must show manifest prejudice and injustice to meet the application to have each matter heard separately and counsel had not met this threshold.

15. These applications were denied on the basis that s. 49 of the Legal Profession Act (LPA) set out the definition of conduct deserving of sanction and that it contemplated that there may be acts, plural, that may be considered. Further, Hearing Panels have routinely heard a number of citations in one Hearing. Finally, counsel for the Member had not shown manifest prejudice and injustice to his client. There are acts by the Member in particular in real estate transactions that have resulted in a number of these citations. With respect to each transaction the Member has a citation that he allegedly failed to respond to the LSA and with 6 of the citations there is an allegation that he allegedly failed to respond to either the lawyer or the client.

16. Counsel for the Member objected to the Citations of failing to respond to the Law Society. He argued that there was no authority to make the demand and therefore there was no jurisdiction for the Citation, and it was not conduct deserving of sanction if the Member did not respond.

17. Argument on that issue was heard.

Findings of Fact

Citations 13 and 14: breaching trust condition of ST; failing to respond to ST

18. ST was counsel for DRL in a bankruptcy matter that also involved the sale of a house. ST asked JD, another lawyer in her firm, to act on the house sale as lawyer for the vendor, DRL and the Member was counsel for the purchasers, ML and GS. The closing date was September 1, 2005. JD sent a letter to the Member with trust conditions. JD advised the Member that the matter could not

close on September 1, 2005 as she needed the vendor's wife to sign the Consent of Spouse. On September 16, 2005 a letter was sent to the Member from JD that included the Transfer of Land and the Statutory Declaration with Real Property Report attached and a change of the trust letter of August 31, 2005 to make the date for payment of the purchase price or return of the documents September 30, 2005.

19. The Member had the purchasers sign a Tenancy at Will. Initially they were unable to obtain keys and they entered the house through the sliding doors. There were materials that had not been removed by the Vendor from the property.

20. ST and JD became aware through conversations between legal assistants from their office and the Member's office on October 5, 2005 that the Member had not submitted the transfer of land for registration. Their trust provision #5, required the Member to submit for registration or return the transfer to their office by September 30, 2005. No extension of time on this trust condition was requested and no communication was received from the Member as to the failure to submit the documents for registration.

21. There was a provision requiring the Member to obtain and hold on his file at the disposal of JD, a Tenancy at Will in the trust conditions. ST and JD learned that ML and GS had conducted substantial renovations to the property. JD was never told that the Member's clients would be doing construction while on the property under the Tenancy at Will.

22. October 13, 2005 the Member advised the office of ST and JD that there were problems with the house and the purchasers were thinking of walking away from the transaction. October 14, 2005 JD sent a letter to the Member requesting his immediate advise as to his client's position. October 14, 2005 the Member advised his clients wished to terminate the transaction and suggested they could speak to settlement. October 19, 2005, ST wrote the Member about her concern that the trust condition had not been fulfilled and inquired about what the

proposed settlement was and to advise as soon as possible. Upon no reply being received, on October 25, 2005 ST again wrote the Member. October 25, 2005 the Member replied with a proposal and it was rejected by ST's letter of November 2, 2005. ST indicated in that letter that the purchasers had caused significant damage while they were in the premises under the Tenancy at Will and that the terms of tenancy required the Member's client to either restore the property to its original state or to pay damages. November 2, 2005 the Member replied that the Tenancy at Will did indeed obligated the purchasers to restore the property, but that in the circumstances, the purchasers were not prepared to restore the property. No further communication was received by ST from the Member despite repeated requests for a copy of the Tenancy at Will executed by the purchasers; by e-mail sent November 4, 2005, by e-mail sent November 11, 2005 and letters sent November 16, 2005 and November 24, 2005 with a deadline of December 1, 2005. In the last letter there was a request for payment for the period of time the purchaser was in the property under the Tenancy at Will. As of January 14, 2008 no reply and no payment on the Tenancy at Will had been received. As a result of these events foreclosure was proceeded with on this property, the bank was not paid out as they would have been had the purchase finalized; the fees of ST were double because of the extra work ; there was less money recovered by the bankrupt and the events added to his stress and frustration.

23. One of the purchasers, ML, testified he and his partner paid $21,000; $1,000 down payment and $20,000 cash to close was given to the Member on August 26, 2005, that is still retained by the Member in his trust account. ML signed various documents on August 26, 2005, and assumed the Member would be sending them to Land Titles Office for registration. An initial inspection of the property was done but when he started doing renovations on the house he found many faults and had a second house inspection done. He advised the Member of some of the structural defects he found on the property in an e-mail dated October 8, 2005 and the Member advised him that he had not registered the

transfer of land and that the funds to close had not been sent to the Vendor's Solicitor. The Member asked him if he wanted to back out of the deal. ML indicated he would like to make an appointment in order to discuss it.

24. ML never testified with respect to signing or not signing the Affidavit of Transferee.

25. ML and the Member met on October 12, 2005 and discussed the option to ask for a reduction in price to just the land value or just leave the cash to close of $20,000 in the M's trust account. The settlement offer was refused and ML testified that not much occurred after that. He understood from the Member that the Member needed to retain the money until the outcome of this Hearing is decided.

26. The Member told ML that if the matter went to litigation he may well transfer the file to another lawyer. He testified that he thought that litigation was imminent from letters he received and therefore did not want to disclose the Tenancy at Will and did not reply to the e-mails or letters of ST. He did not reply deliberately. He believed trust conditions were not met but the entire transaction had collapsed.

27. After ML had testified the Member brought a copy of an e-mail (Exhibit 67) between the Member and ML that inquired about 'getting out of the contract' and access. The Member testified that he had told ML that ML could not back out of the contract on the basis of no keys and items being left in the garage. ML did not have the second inspection report with respect to the state of the property until October 15, 2005.

28. The Member did not ask his client if he could sign the affidavit of transferee as his agent and never told ML he needed to sign this affidavit.

29. The Member did not provide ST with the Tenancy at Will because he believed the matter was going to litigation and ST could recover it under the discovery

process. He testified that he did not respond because he was busy in his office and thought that her request was not worthy of a response.

Citation 11: failing to fulfil financial commitments to A….

30. A…provided services on three different occasions for two different matters in October 2004 for the Member and sent invoices for each which were not paid as of August 29, 2005. Repeated attempts requesting payment by the Member for these accounts were made on various dates from October, 2004 until August, 2005, by mail, fax and telephone. The total was $433.14.

31. Two of the invoices were with regard to JD, a client of the Member. JD testified that she had agreed with the Member that she was responsible for these services and would pay the amount. The services on her file occurred on October 12th and 19th, 2004. She never saw the invoices. She transferred her file to another lawyer and assumed the accounts had been paid.

32. The Member acknowledged that he is responsible for all financial obligations that occurred in his practice. The invoices were received by him but he overlooked the fact that the three invoices were not for one client, but two clients. He had no money in trust for JD and had transferred the file with the invoices attached to the transcripts to her new lawyer.

33. The Member paid the accounts on advice of his counsel on February 15, 2007.

34. In final submissions by Counsel for the Member, Counsel admitted the conduct in respect to the S. file and that the conduct was conduct deserving of sanction. But with respect to payment for the transcripts in the JD file it was submitted that Counsel relied upon JD's promise that she would pay for the transcripts.

Citations 4 and 5: These Citations concern two real estate transactions involving RN and the Member: failing to comply with his undertakings, failing to respond to RN on a timely basis

35. The first real estate transaction was the sale and purchase of a condominium unit with a closing date of December 15, 2004. The Member acted for the vendor, AD, and RN acted for the purchaser, RR.

36. The Member sent RN a trust letter dated December 9, 2004 and stated at para. 9 'We have ordered the Estoppel Certificate and confirmation of insurance. We undertake to provide both to your office upon receipt'.

37. Despite para. 9 and two written requests for the confirmation of insurance it was not provided to RN.

38. The Member testified that he did not provide the confirmation of insurance but it was not his responsibility as the real estate agent had ordered the condominium documents, which included confirmation of insurance, and provided a copy to the purchaser. The Member brought documentation that was entered as Exhibits. RN was never questioned or provided documents with respect to this argument.

39. When RN sent the Member the cash to close he stated it was on the Member's undertaking that he provide a clear Estoppel Certificate and confirmation of Insurance.

40. The Member testified RN needed the Estoppel Certificate which he did provide but he did not need the confirmation of insurance and it was likely that the purchaser had a copy. No correspondence to this effect was sent to RN and he was never shown the documents that were later entered as exhibits which the Member relies upon to infer that the confirmation of insurance should have been given to RN's client by the real estate agent. The Member testified he felt that RN was complaining to the LSA about strict compliance of an undertaking and that it was because of animosity between himself and RN.

~~41.~~ The second real estate transaction was the sale and purchase of a condominium unit with a closing date of February 18, 2005. The Member acted for the purchaser, NA, and RN acted for the sellers, MC and CT.

~~42.~~ RN sent the Member a trust letter that stated the funds were to be received in RN's Edmonton office by February 18, 2005 no later than 12:00 noon and that time is of the essence. RN indicated in the letter that the funds could be directly deposited to his trust account and, in bold letters, stated "**provided that you fax confirmation of the deposit with a deposit slip stamped by the Royal Bank of Canada. Until such time as the fax has been received by our offices, for the purposes of interest calculation and release of keys, it will be deemed that no funds have been in fact received by us."** On February 18, 2005 RN's secretary spoke to a person in the Member's office at 9:30am and was told the funds would be received by direct deposit in RN's trust account. At 12:15 pm RN's secretary phoned the Member's office and was told that the Member had left to make the deposit and that person was advised that interest would be required until Tuesday after the long weekend. At 12:25 pm RN contacted the Member who confirmed that he had made the deposit to RN's trust account and the Member, albeit reluctantly, agreed that interest was payable until Tuesday. RN agreed to check with his client to see whether interest would be waived. The fax confirming the deposit was received by RN at 12:53 pm. By phone at 12:55 pm RN confirmed once again that interest was payable until Tuesday.

43. The Member testified he told RN that he was extorting him and it was an unjust enrichment and he would report it to the LSA. Upon speaking to the Practice Advisor, he was advised that RN was entitled to have compliance with his trust conditions but he did not send the interest until advised by his counsel to do so.

44. RN testified he was able to complete the transaction on the Friday afternoon. The Member testified that the practice in Calgary is that extensions on real estate deals are granted all the time but he does not know what the practice in Edmonton is. None of the other lawyers who testified were asked what the practice in Calgary or Edmonton was.

45. Despite further requests the Member did not respond and the interest was not paid. The Member, on advice from his counsel paid the interest January 23, 2007. (Exhibit 23)

46. It should be noted that In RN's trust letter on this sale of a condominium, he undertook to provide an Estoppel Certificate and confirmation of insurance. (Exhibit 18 Tab 1)

Citation 9: Failing to serve and respond to his clients, LM and SM

47. LM and SM were clients of the Member. They had purchased a condominium unit under construction. When they received notice from the condominium seller advising the possession date would be early July, 2004, they then sold their house. Then they received notice that the possession date of the condominium unit would be delayed, and had to store their furniture, find accommodation (with their daughter) and then move into their condominium. They had taken the letter advising of the July possession date, the letter of the later possession date and three receipts for the additional expenses to the Member to seek reimbursement of their expenses. The Member had had a similar experience with the same condominium owner. After the sale and purchase had been completed LM contacted the Member to find out the status of the claim for extra expenses and the Member never replied to their repeated phone calls, e-mails, and a couple of attendances at the Member's office.

48. LM and SM contacted a new lawyer, AF, to deal with the extra expenses matter and to obtain the documents they had given the Member. AF wrote to the Member May 27, 2005 (Exhibit 48) and June 21, 2005 (Exhibit 49) requesting the entire contents of the file for his review. AF provided a written authorization from LM and SM.

49. There was still no reply from the Member and so LM and SM wrote a letter of complaint to the LSA July 8, 2005.

50. On contact from the LSA, the Member advised that he had not replied because AF requested the entire file and he could not locate the copies of his letters to LM and SM as they were on the computer. There were problems with the computer and the letters are lost. The Member agreed to send the receipts and keep looking for the letters.

51. After two further telephone calls from the LSA, on August 30, 2005 the Member sent the receipts to AF. AF wrote the Member August 31, 2005 requesting any correspondence to/from the condominium vendor concerning possession dates, expenses incurred, etc.

52. AF believes he sent another request to the Member in November 2005. He was unable to assist LM and SM without receiving the entire file.

53. In a letter dated February 10, 2006, AF told the Member that he had not received any reply or the materials he had requested and was still requesting them.

54. AF told LM and SM that economically the cost of pursuing the claim would be more than their claim. The Member did not forward the possession date letter and the subsequent letter of the change in possession date to AF and LM and SM did not have a copy of the letters. LM and SM did not pursue their claim.

55. The Member testified that he recalled in May or early June the condominium sellers sent out a newsletter that set out the possession date and stated that the purchasers could sell their houses. LM brought it to him but he did not leave it with him at that time. At a later meeting, LM discussed the letter about the amended purchase date. LM and SM did bring in receipts. The Member told LM that the issue of the claim for expenses was a separate matter and the Member would take care of it. The Member was given the receipts and he recalled asking LM for the newsletter. Based on the fact that they were not on his file, the Member believes the possession date documents were not given to him. The Member recalls writing a letter to the condominium owners and he gave it to his

assistant to send but he is not sure that she sent it. The documents would have been on his computer but it is lost. The Member had a paperless system set up but it was never fully functional. He never did any follow up on the letter and never heard from the condominium owners.

56. Owing to a "backup" problem encountered when making a change to his computer system, the letter the Member recalls writing can not be found.

57. The Member agreed that he had never communicated with AF and he should have contacted him. He felt he was too busy and he did not respond to 'these little things'. He felt that there was some question about whether LM would have been successful. But now he agrees that his lack of communication with LM and AF was 'out of line, insufficient, and unprofessional".

58. In submissions, Counsel for the Member admitted that the Member failed to serve and respond to his clients, and that this conduct by the Member is conduct deserving of sanction.

Citations 1 and 2: failing to comply with an undertaking on a real estate file with LO, failing to respond to opposing Counsel

59. The Member was Counsel for the seller and LO was counsel for the buyer in a real estate action involving a house with a closing date of January 28, 2005.

60. Clause 4.11 of the Real Estate Purchase Agreement (REPA) provides as follows:

> "…the seller will provide the buyer, … a real property report reflecting the current state of improvement on the property, according to the Alberta Land Surveyors' Manual of Standard Practice, with evidence of municipal compliance or non-performance."

61. The Member sent a trust letter with a trust condition, para 9 that stated: Once we have obtained a Real Property Report, we will forward same to the City of Calgary for a Compliance Stamp. If Compliance cannot be obtained, we undertake to obtain the necessary Relaxation and/or Encroachment Agreements

and forward the Real Property Report (RPR) with a Compliance Stamp endorsed thereon to your office.'

62. An RPR dated August 10, 1990 was sent to LO March 16, 2005. It did not show a front deck and fence and the Statutory Declaration was dated February 13, 2002 and was signed by the previous owner of the property, not the seller (the client of the Member).

63. LO informed the Member, via telephone message, that the RPR was old and the statutory declaration was not signed by his client. On April 4, 2005 she faxed the documents to the Member and asked that he obtain a current RPR with compliance as per his undertaking. There was no response from the Member.

64. LO was required to send these documents to a financial company for the mortgage her client had obtained. The effect of the non response of the Member was that she had to explain this to the LSA, her client and the lender and she was now in breach of her undertaking to the lender.

65. LO complained to the LSA in a letter dated May 6, 2005.

66. After repeated requests by the LSA, the Member replied August 15, 2005.

67. LO disagreed with the Member's explanation and the LSA Manager, Complaints, wrote the Member September 2, 2005, stating 'while you may be making some effort to co-operate' she did not agree with his opinion. The Manager asked 'what steps (do) you intend to take to resolve this matter…' and asked for his reply by close of business of September 19, 2005.

68. On March 6, 2007 the Member, on advice of his Counsel sent LO the updated RPR with the Certificate of Compliance.

69. The Member testified that he thought initially that the RPR, as provided by his client, was current. When it became plain that it was not, he could not reach his client and had no money in trust. The Member testified that the obligations in the

REPA are the clients and that he complied with the strict wording of his undertaking.

70. The Member testified that his attitude was that this was unworthy of his attention and that he had done everything he was going to do. He felt this complaint was a difference in obligation between LO and himself and that it was not common to have a complaint to the LSA because of a difference in opinion.

Citations 7: failing to serve and respond to BK

71. BK had written a complaint to the LSA concerning the Member February 9, 2006 complaining that he was never sent a receipt for the fees he had paid the Member.

72. On the first date of the Hearing in January 2008, BK had been expected to attend. He left a message at the LSA that he was unable to attend. Counsel for the LSA attempted to have him contacted numerous times but BK was unable to be reached and did not testify. The Exhibits were entered regarding his complaint by consent.

73. The Member testified BK paid the account and did not wish to wait for the receipt but wanted it sent to him. Subsequently BK left phone messages, and voice mails asking for the receipt. The Member believed he had already sent it and ignored BK's requests. The Member acknowledged that he should have just reprinted the receipt and sent it.

74. Just before the Hearing it was pointed out to the Member by his Counsel that he had the incorrect postal code on his letter.

Citations 3, 6, 8, 10, 12 and 15: Failing to respond to the LSA in a timely fashion

LO Complaint

75. Correspondence requesting a response was sent to the Member by the LSA June 2, 2005, July, 4, 2005, and August 9, 2005. The Member provided a response August 15, 2005.

76. Correspondence requesting a response was sent to the Member by the LSA September 2, 2005, and September 20, 2005. No response was ever provided by the Member to the LSA.

RWN Complaints

77. Correspondence requesting a response was sent to the Member by the LSA June 2, 2005, July 4, 2005, and August 9, 2005. No response was ever provided by the Member to the LSA.

BK Complaint

78. Correspondence requesting a response was sent to the Member by the LSA February 10, 2006. No response was ever provided by the Member to the LSA.

LM Complaint

79. After informal attempts to resolve the complaint ended, correspondence requesting a response was sent to the Member by the LSA February 10, 2006, and March 3, 2006. No response was ever provided by the Member to the LSA.

A….. Complaint

80. Correspondence requesting a response was sent to the Member by the LSA December 9, 2005, January 25, 2006, and February 16, 2006. No response was ever provided by the Member to the LSA.

ST Complaint

81. Correspondence requesting a response was sent to the Member by the LSA December 8, 2005, February 10, 2006, and March 3, 2006. No response was ever provided by the Member to the LSA.

General

82. The Member attributed his failures to respond to his attitude problem in 2005/2006. He testified that this coloured his view of the LSA. He saw the complaints as "BS", felt he was too busy to deal with unimportant matters, that the LSA "was out to get him", and that he wasn't going to help the LSA to do so.

83. The Member had a conversion experience when his brother, also a lawyer, was suspended in 2005, and later disbarred. He testified that his interim suspension hearing on unrelated matters in 2006 had also served as a wake up call for him.

84. The Member testified that his attitude has changed and is changing, that he still has some way to go, but now he has trust in the LSA. He now understands his need to cooperate with the LSA.

85. There was a Preliminary Objection by the Member that there is no jurisdiction for the LSA to request a response from a Member during proceedings under Part 3 of the LPA, and therefore, failure to respond is not conduct deserving of sanction.

86. S. 49, LPA, defines conduct deserving of sanction by Members of the LSA. S, 52(1)(d) states that the Benchers may make rules respecting the powers and duties of the Executive Director (ED) and of members and other persons in relation to any proceedings under this Part. S. 53(1) states that any conduct of a Member that comes to the attention of the LSA shall first be reviewed by the ED. S. 53(1) states that the ED may require the Member to answer any inquiries or furnish any records that the ED considers relevant for the purpose of the review.

87. Subsequent to the Hearing, the Panel was provided with a copy of the Report of the Hearing Committee regarding Lenhardt dated July 19, 1999. The Panel there found that there was authority pursuant to s. 53 and s. 54 of the LPA to request answers to inquiries and that Lenhardt failed to answer inquiries posed by a Conduct Committee Panel in the course of the Conduct Committee Panel's review of his conduct and this conduct was conduct deserving of sanction. The Panel held:

> "Thorough and complete investigations by the Law Society are fundamental to the mandate of the Law Society to protect the public and to govern its member. Such investigations, from time to time, require that the members being investigated must provide further information in respect of the matter being investigated. Both the investigator for the Law Society and the Panel of the Conduct Committee properly demanded that the Member provide responses to the questions posed."

88. This matter was appealed to the ABCA and the decision was upheld. In Wayne Lenhardt v. LSA [1] the ABCA considered 'the statutory obligation of a lawyer to produce information to the Society' (para [3]). In that case the lawyer was asked to respond to 14 questions that arose from a complaint about the lawyer. He did not do so. At para [5](1) the Court stated: The duty (to answer questions) rests on all members, not just ones guilty of something else. At para. {5}(2) the Court states: 'The Act requires that a lawyer answer the Society's requests for information, and the obvious way to enforce that is discipline proceedings. The power to make such demands for information was obviously enacted to let the Society investigate complaints against lawyers.' "And if a member could not be disciplined for failing to answer questions, the obligation to answer would become hollow.'

89. The Panel finds that there is authority for the ED or his designate to demand a response for the Member regarding a complaint and that failing to reply to that

[1] 2001 ABCA 147 ABCA

demand in a timely manner is conduct deserving of sanction under CPC C. 3 Rule 3.

Loss of Jurisdiction: Counsel for the Member argued that because the Manager, Complaints, offered an opinion in her request letter that this creates bias which results in a loss of jurisdiction to Citation 1.

90. Under the LPA, Part 3 Division 1 Proceedings Respecting Conduct Deserving of Sanction, the ED or his Designate shall first review a complaint when a complaint concerning a Member is received by the LSA. (s. 53(1)) If that complaint involves a dispute the ED may attempt to resolve the dispute before commencing a review.(s. 53(2)). The ED may in the course of the review require the member to answer any inquiries. This conduct did come to the attention of the ED by way of a complaint and s. 53(5) states that the ED **shall** endeavor to resolve the complaint but shall perform the duties under subsections (1) t0 (4) whether the complaint is resolved or not. (emphasis added)

91. In dealing with Citation 1, the Manager, Complaints, was attempting to resolve the complaint when, in her letter to the Member at Exhibit 12, she stated that her thought was he had not complied with the undertaking, explained why and then asked what he intended to do to resolve this matter.

92. The Panel found that the actions of the Manager, Complaints, endeavoring to resolve the complaint in accordance with Section 53, LPA, do not show a reasonable apprehension of bias by the Manager, Complaints.

93. Further, no reasonable apprehension of bias of the Hearing Committee is shown where the Hearing Committee was provided with the written opinion of the Manager to a matter potentially in issue. The Member had himself provided a contrary written opinion on the same issue which was also included in the Exhibits entered in the Hearing. Both opinions were entered as Exhibits with the

agreement of Counsel for the Member. The Member testified confirming his opinion.

Decision as to Citations

94. The Panel in following Ringrose v College of Physicians and Surgeons of Alberta [2] is aware of the burden of Proof:

> 'The burden of proof … is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities. '
>
> '…The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the issue with respect to which that burden must be met.'
>
> '…The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established.'

Citations 3, 6, 8, 10, 12, and 15:

95. Chapter 3, Rule 3 of the Code provides:

> "A lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply."

96. The undisputed facts clearly show that the Member chose, for his own reasons, not to respond to his governing body, the LSA.

97. The Hearing Committee finds that the Member is guilty of each of the Citations for failing to respond to the LSA on a timely basis, and that in each case, the Member's conduct is conduct deserving of sanction.

13 and 14: breached trust condition of ST; failed to respond to ST.

[2] Ringrose v CPS of Alberta [1978] 2 WWR 534 ABCA

98. Counsel for the LSA argued that the Member did breach the trust condition, that trust conditions can not be ignored on the basis that there may be impending litigation, and that compliance with trust conditions is not situational.

99. He referred the panel to Carling Development Inc. v. Aurora River Tower Inc. [2005] AJ No 988 where the Court thoroughly analyses aspects of trust conditions in Alberta.

100. Para. 59 states: The rule barring set-offs and arguments about the contract of sale between the clients is founded on more than precedent. It is a corollary of the fact that trust conditions between solicitors are really a trust, and that the recipient solicitor holds the document entrusted as a trustee for the entrusting solicitor, not as the agent or trustee of the recipient's client. Without such rules, trust conditions would be largely useless.'

101. Para. 64 states: 'Alberta solicitors have built a handsome high bridge quickly crossed every day by thousands of clients with valuable transactions. To remove any struts from the structure now would wreck the bridge, flinging down into the deep valley all the clients now crossing. It would also condemn all future clients to a long descent down one side of the valley and a labourious climb up the other.

102. Counsel for the Member argued that because the Affidavit of Transferee was never signed that the trust conditions did not come into play because the Member was not obligated to register the Transfer of Land without having this signature.

103. Counsel for the Member argued that the Member believed that litigation was imminent and he did not return the Tenancy at Will or respond to ST's repeated requests, as it would not be in the best interest of his client.

104. The Panel finds that the Member did breach the trust conditions imposed on the Member by ST, which obligated the Member to file the Transfer of Land or return

the documents on or before September 30, 2005. He did neither, nor did he request an extension. The Member could have, with authorization, sworn the Affidavit of Transferee for the client, or had the client do so and submitted the documents for registration.

105. The Panel finds that the Member did fail to respond to ST and this conduct is conduct deserving of sanction on Citation 14. The trust condition obligated the Member to hold the requested Tenancy at Will at the disposal of the Solicitor for the Vendor. The E-mails and letters of ST should have been responded to. The Member testified he was busy and felt they were not worthy of a response, and he did not respond.

Citations 11: Failed to fulfil financial commitments to A…

106. The Member admitted that the fact he did not pay for one of the transcripts was conduct deserving of sanction.

107. The Panel finds that the conduct of the Member in not paying the accounts for all the transcripts is conduct deserving of sanction and Citation 11 is made out. The Code of Professional Conduct (CPC) Chapter 8 Rule 3 applies. The Member was the one who received the request for payment of accounts from A… The Member testified that he believed the transcripts with the accounts were forwarded to JD's new counsel but there was no correspondence to that effect. JD testified she never saw the accounts and assumed that accounts were paid.

Citations 4 and 5: failing to comply with undertakings to RN; failing to respond to RN

108. The Member argued that his undertaking to provide confirmation of insurance to the Solicitor for the purchaser was met because the vendor's real estate agent had likely provided it directly to the purchaser. The Panel finds that this was insufficient to show that the Member complied with his undertaking, and that this conduct is conduct deserving of sanction contrary to the CPC c. 4 rule 10 and the commentary. The Panel finds the Member guilty of Citation 4 on this transaction.

109. The second real estate transaction between the Member and RN involved a trust condition with respect to a direct deposit that the money be deposited before noon and RN be notified by fax confirmation that this was done by noon. When that condition was not strictly met, the Member agreed/undertook to pay interest. The Member argued this was not an undertaking that required his compliance. The Panel does not agree that it is not an undertaking. The Member agreed to pay the interest and failed to do so until January 23, 2007.

110. It is clear that in the end RN was able to complete the transaction on the closing date. It is hoped by the Panel that in the normal course of business that there could have been a relaxation of the strict conditions or fax confirmation of proof of deposit. But it is clear that the undertaking to pay interest was not complied with and the Panel finds that this conduct is conduct deserving of sanction. The Panel finds the Member guilty of Citation 4.

111. RN requested compliance with the undertaking to provide the Certificate of compliance by letter dated December 14, 2004, faxed letter dated January 28, 2005 and telephone call March 31, 2005. No response was received.

112. RN requested compliance with the undertaking to pay interest by faxes dated March 7, 2005 and March 18, 2005 and telephone call March 31, 2005. There was no response by the Member by April 1, 2005 when the complaint was made to the LSA. The only response was payment January 23, 2007

113. The Panel finds that the Member failed to respond to RN on both transactions and that this conduct is conduct deserving of sanction and finds the Member guilty of Citation 5.

Citations 9: failing to serve and respond to LM and SM

114. The Member admitted his lack of communication with LM and SM and their new lawyer AF was “completely out of line and insufficient and unprofessional”. Counsel for the Member in final argument admitted this conduct and that the

conduct was deserving of sanction. The Panel accepts the guilty plea to Citation 9, and the Member's conduct is therefore deemed to be conduct deserving of sanction.

Citations 1 and 2: failed to comply with an undertaking to LO; failed to respond to LO on a timely basis

115. Counsel for the Member argued that the provision by him of an incorrect, old real property report with a two year old Statutory Declaration was sufficient compliance with his undertaking.

116. The Member's trust letter at para 9 (Exhibit 6 Tab 1) stated: Once we have obtained a Real Property Report, we will forward same to the City of Calgary for a Compliance Stamp. If Compliance cannot be obtained, we undertake to obtain the necessary Relaxation and/or Encroachment Agreements and forward the Real Property Report with a Compliance Stamp endorsed thereon to your office.

117. In *Kutilin v. Auerbach*, 34 B.C.L.R. (2d) 23, 54 D.L.R. (4th) 552 (BCCA), the Court stated, at par. 27:

> "In these matters, all depends on the specific terms of undertakings which, all too often, are expressed in casual and indefinite language. Even where the undertaking is in writing, it must be construed, as Macdonald C.J.A. said in *Re Killam & Beck,* supra, at p. 388, "by reference to the intention of the parties to be deduced from the writing itself and the circumstances in which it was given.""

118. The Panel finds that the wording of the undertaking, particularly when viewed within the commercial context in which it was given, is consistent with the RPR being current. The Panel finds that the Member did not comply with his Undertaking and this conduct is conduct deserving of sanction and finds the Member guilty of Citation 1.

119. The evidence is clear that the Member failed to respond to LO in a timely manner, or at all, and finds this conduct is conduct deserving of sanction and finds the Member guilty of Citation 2.

Citations 7: failed to serve and respond to client, BK

120. BK was aware of the Hearing and the date, knew he was required to attend and failed to do so. BK did not testify and Counsel for the Member had no opportunity to cross-examine BK. Counsel for the Member argued that by virtue of this fact alone, the Citation should be dismissed.

121. The Panel did not agree and evaluated the evidence before it, including the testimony of the Member on this Citation.

122. Exhibits were entered by consent. BK sent a letter of complaint to the LSA February 9, 2006 regarding the Member and his failure to respond to his request for a receipt. This evidence was not given under oath or subject to cross examination.

123. The Member produced Exhibit 63, a letter to BK dated July 22, 2005, with a Final Statement of Account. The Member believed that he had already sent the Statement of Account to BK so did not reply to his messages or voice mail. He now realizes that he had the wrong postal code.

124. The Panel found that the burden of proof, as set out in *Ringrose v. College of Physicians and Surgeons of Alberta*, has not been met with respect to Citation 7. The Member's explanation was reasonable, and the Citation was therefore dismissed.

ADJOURNMENT

125. On application by the Member, and with the consent of Counsel for the LSA, the Hearing Committee adjourned the Hearing to a date to be arranged for continuation of the Sanction phase of the Hearing. The matter was adjourned to March 3, 2008.

SANCTION AND ORDERS

126. On March 3, 2008 Counsel for the LSA argued that the actions of the Member were contrary to maintaining the public confidence in the integrity of the profession and the ability of the profession to effectively govern its own members, and should therefore result in a global sanction that shows a strong denunciation, both general and specific, of this conduct. The aggravating factors were that by his actions he had torn down the 'high handsome bridge' of the system of conveyancing and raised questions as to his governability in failing to respond to the LSA. The Member did not engage in the discipline process until two or three months before the Hearing. Counsel argued that if the panel finds that he has shown genuine remorse and a genuine desire to improve his practice and attitude the sanction should be in the range of a suspension of one to two years with a referral to Practice Review. If the panel finds that his attitude and desire to change is insincere, then the sanction should be disbarment. Counsel requested that the Member pay the actual costs of the Hearing.

127. Counsel for the Member argued that these events occurred in 2005 during the time his brother was disbarred and he had the extra responsibility of assuming his brother's practice. Counsel urged that a global sentence would not be appropriate and suggested individual sanctions for each citation. Counsel indicated the Member has had a 'wake up call', has paid some of the complainants what was owed and did obtain the real property report and compliance.

128. The Panel found that his resistance to be governed by the LSA is serious and ought to result in a suspension. The Panel considered the case law provided. The Panel found that the Member's failure to respond to other lawyers and his clients, his failure to comply with trust conditions and undertakings were also aggravating factors. The mitigating factors the Panel took into consideration were: his current participation in the LSA processes although it was not a complete participation; his acknowledgement of some of the complaints and response to the complaints by payment or complying with the trust condition or undertaking although just

before the Hearing; his guilty plea to only one aspect of one citation; and his testimony that he recognizes that he had a very negative attitude and was trying to correct it. As a result the Panel found that the closest factual situation was LSA v Britton[3], although in Britton there was an admission of guilt and fewer citations. The Panel imposed a suspension for four months commencing March 3, 2008.

129. The Panel further found that this suspension alone does not sufficiently denounce the Member's treatment of other lawyers and service providers and in recognition of those facts imposed a fine of $5000.00. The Panel also ordered that the Member pay the actual costs of the Hearing and thus the fine is less than what it would have been if the actual costs of the Hearing had not been ordered.

130. The Panel further ordered a referral to Practice Review that is to commence prior to his application for re-instatement:

A) The Practice Review Committee is directed to carry out a general review and assessment of the Member's practice generally.

B) The Member is to cooperate with the Practice Review Committee and to satisfy any conditions which may be imposed upon the Member by the Practice Review Committee, which conditions will include but not be limited to the following:

a) To continue with the office consultation process begun by the Member in 2005;

b) The Member shall cooperate with any Practice Assessor appointed by the Practice Review Committee and

c) The Member shall engage in the Practice Review process to the satisfaction of the Practice Review Committee prior to reinstatement and shall remain in the Practice review process for

[3] LSA v Britton [2006] LSDD No 15

such period of time as the Practice Review Committee may impose.

CONCLUDING MATTERS

131. The Exhibits and proceedings will be available for public inspection except the addresses in Exhibit 5 and the names on the postal receipts except the Member's in Exhibit 8 Tab 1, which includes copies of Exhibits for a reasonable copy fee. All Exhibits and proceedings shall be redacted to exclude the names of any third parties.

132. No referral to the Attorney General is required.

133. There shall be a notice to the Profession.

134. The Member has time to pay the costs of the hearing by August 31, 2008 and the fine by June 30, 2008.

DATED this 13th day of May, 2008.

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Shirley Jackson, QC, Chair and Bencher

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Rod Jerke, QC, Bencher

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Dr. Larry Ohlhauser, Lay Bencher