IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
DONALD LARSON, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

On January 21, 2008, a Hearing Committee composed of Bradley G. Nemetz, Q.C., (Chair), Steven Raby, Q.C., and Dr. Larry Ohlhauser, convened at the Law Society offices in Calgary to inquire into the conduct of Donald Larson. Mr. Kenneth Warren, Q.C. appeared for the member who was also present and Mr. Michael Penny appeared for the Law Society.

INTRODUCTION

[1] The Member is charged with failing to return funds to a third party or, alternatively, failing to enquire from the third party concerning the terms associated with the provision of the funds. The Member's client was a promoter of real estate investments who procured from investors signed lending/investment agreements, and cheques payable to the Member representing each investor's investment. After the Member deposited the cheques to his trust account, upon instructions from his client, he paid the funds to the client.

[2] The Member never met the investors and did no substantial work in connection with the investment. His role, with respect to this particular complaint, appears to have been solely that of receiving from his client the lending documents and a trust cheque of $25,000 made payable to his firm, which he in turn deposited to the trust account and paid over to his client at his client's request.

[3] The lending documents provided that the client would keep the funds in a segregated trust account and advance them under a first mortgage to be secured against the property.

[4] The real estate project did not proceed, no mortgage was obtained, the Alberta Securities Commission ordered that the client cease promoting such investments, and the investor lost its funds.

[5] The Hearing Committee concluded that the citation against the Member was not proven, that the funds were dealt with in accordance with the agreement signed by the investor and that, while it is imprudent for a lawyer to allow a client to use his trust account as a clearing house for the raising of investment funds, the Member did not owe the non-client investor, with whom he never dealt, a duty to enquire as to whether the investor was making a prudent investment and had adequately protected itself in making the investment. For the Member to have either returned the funds or to have ignored the terms of the agreements between the client and the investor, and inquired from the investor if the investor wished additional security or protection in

connection with the advance of the funds, would have been contrary to the Member's instructions, would have placed the Member in a conflict with his client, would have been contrary to the agreement signed by the investor and his client, and indeed contrary to the duties that the Member owed to his client.

JURISDICTION

[6] Jurisdiction was established by entering as exhibits the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Further, the member's counsel accepted the jurisdiction and composition of the panel.

OTHER PRELIMINARY MATTERS

[7] The principal behind the corporate investor and the principal's daughter, who also advanced funds of her own which were lost, attended by telephone and the Hearing Committee ordered that the hearing proceed in public.

THE CITATION

[8] The member was charged with the following citation:

> IT IS ALLEGED that you failed to either return the funds to the Complainant or to make an inquiry of the Complainant into the intent of the funds being provided to him, and that such conduct is conduct deserving of sanction.

FACTS

[9] The Member's client is a corporation which was in the business of identifying and providing funding for real estate developments. The client had developed, with a former lawyer, a set of investment contracts and related agreements and directions. It had a source of investor clients, including two trust companies that held RRSP accounts for individuals.

[10] The particular investment that is the subject matter of the complaint was the development of a community health centre on Bowfort Road in north-west Calgary. The client was seeking to raise $6,600,000 from investors which would be lent to the developer under a mortgage, the interest rate of which would be 12% and the term of which would be one to two years. The client handled all contact with potential investors.

[11] Before Mr. Larson became involved with the client, the client, using another lawyer, had developed a set of documents which evidenced the agreement between the client and a prospective investor. Those documents involve both a description of the real estate project

and set out the legal relationship between the investors and the client. The documents submitted to the investors included: "1st Mortgage Investment Opportunity", Term sheet Arms-Length Mortgage Investment Opportunity, CO-LENDER COMMITMENT, AGREEMENT TO LEND AND POWER OF ATTORNEY, and INVESTORS' ACKNOWLEDGEMENT & WAIVER.

[12] In addition, but unknown to Mr. Larson, clients were provided instructions concerning the completion and return of the documents which included, as an instruction for cash investors, that trust cheques were to be made to "Donald N. Larson Professional Corporation In Trust".

[13] The Member is a single practitioner with no support staff. He was admitted to the Bar in 1987 and his practice consists principally of the handling of general corporate and real estate matters. In late 2004 he was approached by the client and he agreed to act for the client under a general retainer of $7,000 per month. He understood that for this he would be assisting in mortgage investments, doing some general corporate work, and assisting with some real estate acquisitions.

[14] The Member further understood that the client had been represented by two previous lawyers and that those lawyers had prepared the documents listed above. He reviewed those documents and had some comments with respect to them, but he felt that they generally were satisfactory and no changes to them were made.

[15] The Member also enquired of the client as to whether or not it needed to be registered as a mortgage broker or otherwise registered. He was told that the client had received an opinion from previous counsel that it required no registrations.

[16] The Hearing Committee was not provided with any details concerning the other work that the Member did for the client. With respect to the project in question the Member's role was quite limited. It consisted of receiving, from the client, executed packages of the investment documents together with cheques made payable to the Member or his Professional Corporation, sometimes said to be "in trust", and sometimes with no trust designation appearing on the face of the cheque.

[17] The Member never met any of the investors and in this particular case never met the complainant or the principals behind the complainant. As he had no staff, no staff had any

communication with the complainant or the principals behind the complainant. The $25,0000 cheque for the investment that is the subject matter of this complaint was made out to the Member's professional corporation and was not indicated as having been paid "in trust".

[18] In addition to being provided the lending documents with respect to the complainant, the Member received a similar set of documents from the complainant's daughter and from the trust company that handled the complainant's RRSP account. In the latter case the trust company forwarded the cheque to the Member on trust condition that he retain it in trust until the first mortgage was registered. Such a condition was part of the regime applicable to Administrators of RRSP. The Member was unable to comply with this trust condition and raised the matter with his client. His client spoke with the investor and it was agreed that the Member would hold the cheque uncashed until the first mortgage was obtained. The first mortgage was never obtained and, after it became apparent that the investment would not proceed, the Member returned the cheque to the trust company, thus those funds were not lost.

[19] As for the project itself, the Member testified that it was initially delayed due to a need to obtain subdivision approval, and eventually subdivision approval was not obtained. Further, the Alberta Securities Commission issued an order against the Member's client shutting down its business by prohibiting it from raising funds from the public through the mortgage investment programme. When this happened the client was either unable or unwilling to repay the funds raised. The result of this was that the RRSP funds were returned to the trust company, the complainant's funds were lost as were his daughter's funds.

[20] It should be noted that the client was not a scam artist and that, to the Member's knowledge, the client had been involved in a number of other such real estate projects which had proceeded.

[21] The Member advised that the practice of his client was to wait until the client had signed up a number of investors before forwarding the lending documents and the cheques to the Member.

[22] The Member would then deposit the cheques to his trust account and, subsequently when requested to do so, would issue a trust cheque to the client representing all of the cheques so cashed. With respect to the complainant's money, those funds were received by

the Member on or about December 31, 2004 and were subsequently paid to the client by cover letter of February 25, 2005.

[23] The Member's role with respect to this investment has now been fully described. The Member provided no services to the client with respect to the specific project, the obtaining of the mortgage, the obtaining of the subdivision approval, or any other matters. His role was limited to receiving copies of the lending agreements, receiving the cheques, and paying the cheques over to the client as requested.

[24] There was evidence before the Hearing Committee that another investor, who advanced $25,000 of her own funds to the Member which the Member passed on to this client and was lost, sued the Member for compensation concerning the loss. The case was heard by Justice Hunt MacDonald who held that Mr. Larson was not liable to the individual "by virtue of the fact that he cashed the cheques and subsequently disbursed [the] funds upon the request of his client…". The judge noted that the documents clearly indicated that the Member was in no way acting on behalf of the investor and that the Member had dealt with the trust funds in strict accordance with the terms of the documents that the investor signed.

[25] Turning to the documents that the complainant investor signed with the client and which were provided to the Member along with the cheque, certain of those documents and their provisions is of sufficient importance to set out here.

[26] One of the documents signed was "INVESTORS' ACKNOWLEDGMENT & WAIVER", which stated, in part,

> … The undersigned further acknowledges that the undersigned has obtained a copy of the Term sheet, Commitment Letter, and the Co-Lender Loan Administration and Agency Agreement and Power of Attorney each in respect of the above lands, and has either obtained or waived independent legal advice in respect of these agreements and all documents necessarily related thereto.

[27] Also, the Co-Lender Agreement stated:

> … The Administrator shall establish and maintain an account at a Canadian chartered bank in which it shall deep and deposit, or cause to be kept and deposited, the Mortgage Fund and all monies received by the Administrator for the account of the Co-Lenders including all amounts to be received by the Borrower, from time to time, until such time as the funds are advanced to the Borrower and secured by the Mortgage.

The "Administrator" is the Member's client.

[28] The Hearing Committee finds that the documents signed by the complainant clearly made the client its agent to deal with the loan and the funds.

[29] In providing the funds to his client by letter of February 25, 2005, the Member included the following in his letter and obtained the client's signed acknowledgment and agreement with respect to the provision of the funds:

> These funds are forwarded to your office in accordance with the terms and conditions of the Agreements and I.I.S. Ltd.'s ("I.") specific undertakings to comply in every respect with the terms and conditions of the Agreements and, without restricting the generality of the foregoing, I.'s obligation under Article 6.1 of the Co-Lending Loan Administration and Agency Agreement to establish and maintain an account at a Canadian chartered bank in which it shall keep and deposit all monies received by I. for the account of the Co-Lenders (as the same is defined in the agreements) until such time as the funds are advanced to the Borrower and secured by the Mortgage.
>
> In the event that I. is unable to comply with the terms and conditions or the undertakings as set-out herein, or in the Agreements, you are to immediately return the funds forwarded herein, to this office for immediate return to the individuals so noted above.

[30] The Member clearly acted in accordance with both the documents and the instructions that he received from his client. He further reminded his client of its obligations concerning the funds.

DISCUSSION

[31] The complainant never intended Mr. Larson to be its lawyer. It signed a document stating that it waived or had obtained independent legal advice. The documents it signed placed upon the Member's client, not the Member, the obligation of securing the funds until the mortgage was advanced.

[32] The investor now complains to the Law Society of Alberta that the Member failed to protect the investor and the charges and the position of Law Society counsel is that the Member should be disciplined for such failure. The thrust of the charges is that the Member should have acted contrary to the provisions of the agreements and his client's instructions.

[33] The case law and two decisions of professional disciplinary panels provide some guidance to this committee.

[34] First the Alberta Court of Appeal in *Luckiw Holdings (1980) Ltd. v. Murphy* (1986) 49 Alta. L.R. (2d) 200, deals with a promoter who secured from an unrepresented investor a cheque payable "in trust" to the promoter's lawyer. The promoter gave the cheque to his lawyer who deposited it to his trust account and then, from time to time on instructions of the client, paid all of the funds out of his trust account. The court held that the investor, by giving the promoter the cheque payable to the lawyer, had constituted the promoter his agent in dealing with the funds. The lawyer was not liable to the investor for the loss.

[35] While that case does not address professional responsibility or professional propriety as opposed to liability for loss, it is instructive as to the legal relationship between the unrepresented investor, the client and the lawyer.

[36] The Hearing Committee notes that Judge Hunt Macdonald came to the same conclusion with respect to the Member's legal liability to one of the investors in this project.

[37] The Hearing Committee also notes that in the case before it the documents signed by the complainant made it explicit that the client was the investor's agent, that the client was the one who was to hold the funds in trust until payment, and that the investor had waived or obtained independent legal advice with respect to the investment.

[38] In the disciplinary case of *Law Society of British Columbia v. Hops* [1999] LSBC 29, Mr. Hops was charged in connection with funds wired by a third party to his trust account, which were then paid out on instructions from the lawyer's client. The Law Society of British Columbia noted that more was needed to impose trust conditions on the funds or to give rise to an obligation to inquire, than merely providing the funds. In the *Hops*' case the Law Society of British Columbia relied upon the Alberta Court of Appeal decision in *Luckiw*.

[39] The Alberta Law Society's decision in the *Hotzel* disciplinary proceedings (May 2007) dealt with circumstances where a non-client wired funds to a lawyer's trust account, the lawyer having provided to its client the details of the trust account so that the third party could wire funds to it. The Hearing Committee concluded that the mere placing of funds in the lawyer's trust account did not make the funds trust funds and did not impose upon the lawyer the obligation to make inquiries from the third party as to the trust terms upon which the funds were provided. It held that the lawyer could accept instructions from its client and it

dismissed the citations. In particular, the Hearing Committee made the following comments at paragraph 68 of that decision:

> In our view the Law Society of Alberta ought not to impose upon Mr. Hotzel a duty to search out Mr. C. and try to find out if he had forwarded the funds in trust, what any trust conditions might have been, and then try to reconcile those trust conditions with the obligation that [the client] had with respect to the funds.

[40] In the case before us the Member was placed under no trust conditions by the investor. He dealt with the funds in accordance with the instructions received from his client, and in accordance with the contractual agreement between his client and the investor. He reminded his client, when he forwarded the funds, of the contractual obligations the client had concerning the funds and obtained a written acknowledgment from the client that the client understood and agreed to comply with the obligations imposed in the agreements between the client and the investor.

[41] For the Member to have done more would have placed the Member in a conflict with his client. It would have resulted in his interfering with the contract between his client and the complainant and would have exposed him to both civil liability and possible professional misconduct. While trust funds are to be handled with care and caution, a trust relationship is not to be lightly implied nor are trust obligations to be quickly assumed to exist. It is not the role of a lawyer representing a client to protect those parties who are dealing with his client and ensure that they get the maximum protection in connection with their dealings with a member's client. Further, lawyers acting for one client do not become guarantors of investments in favour of third parties who choose not to use lawyers and feel that they can adequately represent themselves in a commercial transaction. The Law Society should not be quick to create trust obligations, infer them into such situations, or discipline a lawyer for failing to raise the issue of trust and trust conditions with third parties. To do so would put the lawyer under difficult conflicting duties. If individuals wish the protection afforded by lawyers and by the Law Society, they should retain them rather than attempting to impose trust conditions or obligations to enquire and protect third parties and, eventually, to backstop the losses that third parties have as a result of commercial transactions that do not go as they had expected.

[42] Accordingly, the Hearing Committee concludes that Mr. Larson is not guilty of conduct deserving of sanction in failing to return the funds to the complainant or to make inquiries of

the complainant concerning what trust conditions the investor might prudently wish to impose upon the lawyer to protect its interests.

[43] However, we cannot conclude this matter without expressing our concern about the circumstances of this matter and the role assumed by the Member with respect to the project.

[44] While the Member did not breach any duties to the unrepresented and incautious investor, we question why the Member became involved in receiving and disbursing funds when he was providing no real or substantial legal services in connection with the matter. Lawyers should not allow their names to be used in circumstances where they have no real role in the provision of legal services, and where unrepresented individuals are involved. Trust accounts should not be used as deposit accounts for the aggregation and payment out of money from investors in circumstances where the lawyer had no real connection with the provision of legal services with respect to the investment.

[45] We heard no evidence that Mr. Larson made inquiries of prior lawyers concerning why they were no longer acting for the client. Perhaps they were more cautious than Mr. Larson was and were not prepared to provide their trust accounts as a conduit for the raising of third party funds.

[46] It should have been clear to Mr. Larson that there was no business purpose for the investors providing the cheques to him. He should have been alert to the fact that his client might be adopting this mechanism of collecting third party funds with the intention of providing the investor with illusory comfort that a lawyer was somehow involved in the transaction. We feel that it is inescapable that the client was using the Member's name to lend an air of propriety or additional comfort to investors. The situation was replete with the possibility of mischief: a shrewd promoter client, a lawyer who had no real association with the underlying transaction, and unrepresented members of the public putting their savings at risk.

[47] We trust that Mr. Larson's experience, both in being sued civilly and in having a disciplinary complaint launched against him, will make him more cautious in the future and more attentive to his role in acting for clients rather than merely lending his name and trust account to accommodate a client in matters unassociated with the provision of legal services.

CONCLUDING MATTERS

[48] As the Hearing was held in public, the materials are available to the public with the names of clients, other than the name of the complainant and the complainant's principal being redacted, the complaint and the complainant's principal having agreed that their names could remain on the record.

[49] There will be no referral to the Attorney General.

Dated this 30th Day of January, 2008

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Bradley G. Nemetz, Q.C. (Chair)

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Steven Raby, Q.C.

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Dr. Larry Ohlhauser