LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"), and in the matter of a Hearing regarding the conduct of MARY JO ROTHECKER, a Member of the Law Society of Alberta

## INTRODUCTION

[1] On November 10 and 11, 2006, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Mary Jo Rothecker, a Member of the LSA. The Committee was comprised of Dale Spackman, Q.C., Chair, Peter Michalyshyn, Q.C., Member and Wilf Willier, Member. The LSA was represented by Lindsay MacDonald, Q.C. and the Member was represented by Hersh Wolch, Q.C.. The Member was present for the Hearing. Also present at various times during the Hearing were the Complainant, S.G., witnesses, J.D. and D.M. and the wife of S.G. as an observer. W.G. (referred to below) was the father of S.G. Also present at the Hearing was a Court Reporter to transcribe the proceedings of the Hearing.

## JURISDICTION AND PRELIMINARY MATTERS

[2] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member, and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.

[3] The Chair introduced the Members of the Committee and there was no objection by the Member's Counsel or Counsel for the LSA regarding the constitution of the Committee.

[4] The Certificate of Exercise of Discretion of no Private Hearing Notice required as a result of no private hearing application being received pursuant to Rule 96(2)(b) of the Rules of the LSA and the Affidavit of Service of a Notice to Attend the Hearing on D.M., J.D. and S.G. were entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and Counsel for the Member confirmed no such request was being made. Accordingly, the Hearing was held in public.

## CITATIONS

[5] The Member faced the following Citation:

> IT IS ALLEGED that you engaged in a business transaction with your client, who did not have independent legal representation, without the client consenting to do so and in circumstances where the transaction was not fair and reasonable to the client in all respects, and that such conduct is conduct deserving of sanction.

## SUMMARY OF RESULTS

[6] In the result, on the basis of the evidence entered at the Hearing, and for the reasons set out below, the Committee found that the Member was guilty of conduct deserving of sanction in respect of the Citation. The Member was levied a fine of $5,000 and ordered to pay the actual costs of the Hearing, less one-half of the costs incurred for the attendance of J.D. at the Hearing. The Member was further ordered to attend at the Practice Review Committee of the LSA in order to satisfy the Practice Review Committee that she is conversant with the Code of Professional Conduct of the LSA and her ethical duties as a barrister & solicitor thereunder.

## OPENING STATEMENTS OF COUNSEL

[7] Counsel for the LSA advised that this could be a case for suspension but that Counsel would not be arguing incompetence. Counsel advised that it would be calling J.D. as an expert witness and would further be calling S.G. and D.M. as witnesses. Counsel advised that the wife of S.G. was in the audience. In his opening statement, Counsel for the LSA referred the Committee to Exhibit 8, being a promissory note dated February 27, 1998 in the principal amount of $600,000 executed by Alberta Ltd. (the "Numbered Company") to W.G. and presented the argument that the said promissory note is void for public policy reasons. As support for this argument, Counsel referred to the case of *Co-op Centre Credit Union Ltd. and Greba*, Alta. C.A., [1984] A.J. No. 1002, 55 A.R. 176, PL No. 16098. Counsel referred to Rule 9 of Chapter 6 of the Code of Professional Conduct of the LSA relating to Conflicts of Interest, the commentary accompanying such Rule and the relevant definitions from the Code. Counsel pointed out that this is the Rule of the Code giving rise to the Citation against the Member. The Rule reads as follows:

> **A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects.**

Counsel put forth the proposition that the consent required by the Rule must be an informed consent after full disclosure by the lawyer.

[8] Counsel for the Member declined to make an opening statement.

## EXHIBITS

[9] Exhibits 1 through 71 were entered as evidence with the consent of Counsel at the commencement of the Hearing. Exhibits 73 and 74, the Certificate of Record of the Member from the LSA and the Estimated Statement of Costs, were entered with the consent of Counsel at the sanctioning stage of the Hearing.

## EVIDENCE

### EVIDENCE OF J.D.

[10] J.D. was administered the oath by the Chair.

**Examination by LSA Counsel**

[11] Counsel for the LSA indicated that Counsel for the Member was contesting the qualification of J.D. as an expert witness and, accordingly, Counsel for the LSA withdrew that request. The objection of Counsel for the Member was in part that J.D. has a vested interest in the proceedings as being a Complainant. On questioning from the Chair, J.D. acknowledged that he considered himself a Complainant by virtue of his duties to the LSA.

[12] J.D. testified that he was called to the Alberta Bar in 1997 and practiced primarily in the areas of mortgages, foreclosures and debt instruments. He has since retired from the practice of law and manages a variety of investments. Counsel for the LSA went through the qualifications of J.D. J.D. testified that S.G. was his client in the matters in question. Reference was made by J.D. to his letter of July 11, 2001 to the LSA which initiated the LSA involvement in this matter. In that letter is listed the security provided for the $600,000 loan (the "Loan") from W.G. to the Member, which gave rise to this Hearing. J.D. indicated that S.G. was his client in this matter until he turned the file over to D.M., another lawyer in his law firm, when he left that firm to practice with another law firm.

[13] J.D. referred to Exhibit 18, being his letter of July 11, 2001 to the LSA containing the initial Complaint on behalf of his client, S.G. and also details as to security taken by the Member for the loan made by W.G. to the Member of her Professional Corporation. J.D. also referred to Exhibit 8, being the promissory note in the amount of $600,000 dated February 27, 1998 granted by the Numbered Company to W.G. (the "Promissory Note") and Exhibit 9, the guarantee dated February 27, 1998 (the "Guarantee") whereby the Member guaranteed repayment of the indebtedness secured by the Promissory Note. The guarantee refers to a loan in the amount of $600,000 (the "Loan") having been made to the Member's Professional Corporation for the purpose of purchasing the lands and premises located at in Cochrane, Alberta (the "Premises"). The witness referred to Exhibit 17, being the state of title to the Premises at the date of the Promissory Note. J.D. then referred to Exhibit 15, being the mortgage (the "Mortgage") against the Premises dated September, 1999 granted by the Numbered Company to S.G. and registered against title. The witness pointed out that although the Mortgage refers to the Loan being made to the Numbered Company, it was his understanding that the Loan was actually made to the Member's Professional Corporation. J.D. points to the first recital in the Guarantee as further support for this proposition. The witness also referred to the first recital of a second guarantee (the "Second Guarantee") dated February 27, 1998, granted by the Member in favour of W.G. in respect of the Loan. The witness indicated that it was not apparent there was any promissory note ever executed by the Member's Professional Corporation to evidence the Loan. The witness testified that his understanding of the transaction from the documentation reviewed by him is that the principal debtor for the Loan appeared to be the Member's Professional Corporation and that the Numbered Company agreed to guarantee the repayment of the Loan and provide a collateral mortgage over the Premises as security for such guarantee. Personal guarantees were to be given by the Member for the primary debt of the Professional Corporation and the obligations of the Numbered Company under the Mortgage. The Member testified that it would have been normal in a transaction of this nature to also obtain security by way of assignment of rentals to be registered by caveat and the necessary corporate authorities to authorize the securities. J.D. testified that in

June 2004 when he left his law firm to move to another law firm, D.M., another lawyer in his office, took carriage of the foreclosure action and that the litigation was ongoing at that time.

**Cross Examination by Member's Counsel**

[14] Counsel for the Member asked the witness whether the main concern of the vendor in a transaction of this nature would not be the identity of the borrower, but whether the security held for the Loan was good and inquired as to whether it would not be better to have the title to the lands forming the subject of the Mortgage in a Numbered Company without other business interests. The witness acknowledged this to be the case, Counsel for the Member asked J.D. if he knew the value of the property which he said he did not.

**Re-Examination by LSA Counsel**

[15] Counsel referred to Exhibit 6, being a letter from the Member to W.G. dated February 23, 1998 requesting the Loan and containing, *inter alia*, the following statement:

> *"I believe the cost of the building is in excess of market value but the extra cost can be justified because of the benefits received in advertising the business on an attractive, highly visible corner in Cochrane"*

The witness testified that this would be a reasonable conclusion.

**EVIDENCE OF S.G.**

[16] S.G. was administered the oath by the Chair.

**Examination by LSA Counsel**

[17] S.G. testified that he had been a client of the Member from the early 1990s and that his father became a client of the Member when he moved to Calgary from Quebec sometime later. He testified that up until February 1998, the Member did corporate filings for his recording business, wills work, and he believed, some real estate transactions. He testified that he had no experience with commercial mortgages. Counsel referred to Exhibit 6 (as described above) and asked the witness whether he had discussed this letter with his father. The witness testified that he had discussed the Loan with his father and that he had also had discussion with the Member while living in British Columbia at the time. The witness testified that his father had left it to the decision of S.G. as whether to go ahead with the Loan.

[18] S.G. referred to telephone records which are contained in Exhibit 72 and that on February 25, 1998 he advised the Member by telephone to go ahead with the Loan. The witness referred to a 17 minute conversation early in the morning on February 26, 2006. He indicated that he didn't sleep that night worrying about the Loan moving too fast and called the Member to say that we "can't go ahead". The witness testified that the Member indicated she had committed on the purchase of the Premises and that he had no choice as she had made commitments based on his advice the day before, upon which the witness indicated he "*relented*". The witness testified that the advance of the

Loan was arranged by wire transfer from Harris Bank in Toronto to the bank account of the Member.

[19] Counsel for the LSA referred to Exhibit 48, being a letter dated July 15, 2003 to the LSA, and asked the witness if this was his letter, to which he replied that it was. The witness testified that the letter had been drafted by his lawyer. In the last paragraph of the second page of that letter under item 4) reference is made to the call of February 26, 1998 where it states:

> *"I called [the Member] as early as possible to tell her that I had changed by my mind and it didn't feel right "to get into bed with our lawyer". [The Member] said it was too late; she had already committed herself"*

Reference was made by Counsel to Exhibit 15, being the Mortgage from the Numbered Company to S.G. The witness indicated that he had discussed this with his father and they had agreed that it would be better if he (S.G.) acquired the Loan and paid his father a discounted amount. He indicated that, as far as he was aware, all documents relating the Loan and the Mortgage were prepared by the Member. On questioning, the witness testified that he had not been advised by the Member to get independent legal advice and he was not aware that his father was so advised. J.D. was hired by S.G. to foreclose on the Premises when the Loan went into default. The property was sold and his lawyer received funds within a week of a "quieting agreement" being entered into in respect of the foreclosure.

**Cross Examination by Member's Counsel**

[20] S.G. testified that he was proud of his father's accomplishments; that his father was an immigrant to Canada and became very successful and established "double digit millions in net worth". He indicated that his father was frugal but charitable and generous. His lawyer was a partner at Martineau Walker in Montreal and he also had an accountant and financial advisor who he would consult from time to time. The witness testified that his father was in Florida at the time of Loan and does not believe his father sought advise in connection with the Loan from his lawyer, which was confirmed to S.G. in a subsequent conversation with his father's lawyer. The witness testified that he had no personal legal dealings with the Member after his move to British Columbia (other than in respect to the Loan and Mortgage) but that her office still did his corporate filings.

[21] The witness was referred by Counsel to Exhibit 6 (as described above) and he indicated that his father did not want to become a "banker" for the Member. He recalled from the letter that the Member recommended a Mortgage. The witness testified that he conveyed to his father the content of the November 26, 1998 conversation with the Member where he told the Member he didn't want to go ahead with the Loan. His father made it his decision whether to go ahead with the Loan and he told the Member this. Counsel then referred the witness to Exhibit 13, being a letter from W.G. to the Member dated October 27, 1998 which contains the statement:

> *"Since my son, S , also spoke to me on your behalf."*

The witness indicated that this was true and that he supported the transaction on the basis of discussions with his father. He reiterated that his father did not want to act as a "banker" and had no experience with commercial mortgages. His father's sister had died

two months previous and the family, especially his father, were emotionally distraught at the time.

[22] The witness was referred by Counsel to Exhibit 14, being a letter from W.G. to the Member dated June 27, 1999 outlining various proposed options in respect of the amount, interest rate and repayment of the Mortgage. Counsel asked the witness whether this did not show sophistication of his father on commercial mortgages and the witness said it was merely information obtained by his father from the internet and did not show such sophistication. On questioning, the witness testified that he paid his father $100,000 in consideration of transfer of the Mortgage to him, which agreement the Member drafted, and funds were exchanged. The witness testified that his father had indeed written the letter of June 27, 1999 contained in Exhibit 14, but that Exhibit 48 (his letter of July 15, 2003 to the LSA) was written by J.D.

[23] On questioning from a Member of the Committee, the witness testified that he had no other lawyer other than the Member and the lawyer who acted for him in respect of the purchase of his B.C. property. With respect to Exhibit 48, Counsel for the LSA pointed out that the witness advised that there is nothing in respect of the transaction he didn't tell J.D. before he wrote this letter.

[24] Counsel advised that during the lunch break he had clarified with Counsel for the Member that Exhibit 48 had in fact not been written by J.D., but by S.G. and his wife. It was also clarified that S.G. did have a conversation with his father on February 26, 1998 after his telephone discussion with the Member.

**EVIDENCE OF D.M.**

[25] D.M. was administered the oath by the Chair.

**Examination by LSA Counsel**

[26] The witness testified that he was called to the Alberta Bar in 1993 and practiced with the Howard Mackie firm for three years, then with the Federal Department of Foreign Affairs and that he joined the firm of J.D. in late 2000. In July 2004, D.M. joined a firm known as Proventure Law. For the past two years prior to joining the firm of J.D., his practice was mainly in the foreclosure area and that his current practice was 40-50% in the lending and foreclosure area. The Member testified that he foreclosed on the Mortgage (Exhibit 15) and that the Member acted for the Numbered Company in defence of the foreclosure action. On questioning regarding the part of the Member's defence referring to the fact that there was no consideration given for the Mortgage, the witness testified he did not believe this was dealt with by the Courts other than to express "incredulity" at the suggestion. D.M. testified that it was necessary to have accountants involved in determining the arrears on the Mortgage due to the uncertainty in the amount due under the Mortgage. He indicated that the Mortgage was drafted by the mortgagor, rather than the mortgagee, which would be unusual, and that the issue of the amount owing was finally settled by negotiation. The witness believed that there were approximately six Court applications in the course of the foreclosure action. The witness testified that the Premises were eventually sold by the mortgagor outside of the foreclosure proceedings and that the sale price was sufficient to pay the agreed amount owing.

**Cross Examination by Member's Counsel**

[27] The witness testified that his involvement in the foreclosure on the Mortgage was after the death of W.G. and that it was fair to say that there was a considerable dispute by the parties as to the value of the Premises throughout the proceedings.

**EVIDENCE OF THE MEMBER**

**Examination In Chief by Member's Counsel**

[28] The Member testified that she possessed a Bachelor of Laws degree and a Masters in Business Administration, both obtained from the University of Alberta. She graduated in law in 1987 and articled with the Witten Binder firm in Edmonton. The Member purchased a law practice in Cochrane in 1988 and restructured her practice to include matrimonial, corporate, wills and estates and real estate law. The Member testified that S.G. had been referred to her by her husband who did architectural work for the company owned and operated by S.G. She was introduced to W.G. through S.G. shortly after in the early 90s. W.G. became her "mentor" and they talked several times a year. The Member was referred by Counsel to Exhibit 6 and she testified that she had moved into the Premises in 1996 with her firm having the "head lease" on the Premises and an "option to purchase" which came due in 1998. The Member testified that she sublet a portion of the Premises.

[29] On questioning from the Chair, the Member indicated that she did not have any interest in the company that owned the building prior to it being transferred to the Numbered Company. On questioning as to whether she had any interest in the Numbered Company (who purchased the Premises), the Member testified that she had incorporated and been the initial director of the company but that she was not a shareholder. On further questioning, the Member indicated that she thought the option to purchase on the Premises was owned by her Professional Corporation. She further testified that a transfer back of the Premises was given to S.G. during the course of the proceedings.

[30] The Member testified that W.G. was in business in Montreal for many years and that this was where most of his wealth was accumulated. She understood that the lawyer for W.G. was Mr. Martineau of Martineau Walker and that Mr. Martineau originally referred W.G. to Burnet Duckworth and Palmer in Calgary when he moved to Alberta, but that he subsequently moved his legal work to the Member. The Member testified that:

> *"[W.G.} didn't like real estate transactions"*

Her recollection was that the response to her letter of February 23, 1998 (Exhibit 6) came from W.G. who "*quickly said he would proceed under*" and "*would look at some ways to do it*". The member assumed this meant he would seek advice and "*not be concerned with documentation*". The Member further testified that W.G. indicated to her that he "*would not do a mortgage*". The Member testified that she understood she would do all of the documents in the transaction and "*assumed by the way he spoke to me …, that someone else would review the documents on his behalf*". The Member testified that she "*knew he had business acumen and was a very successful businessman*". The Member testified that in hindsight she should have ensured that W.G. consulted another

lawyer. She understood he consulted with his financial advisor in respect to the Loan and thought he didn't want a mortgage or caveat on title for tax reasons. The Member did not recall that S.G. was involved in the transactions until she received a copy of the letter of J.D. to the LSA dated July 11, 2001 (Exhibit 18). The Member testified that she did not know that S.G. was "*calling the shots*". She thought W.G. would have done the transaction regardless of his son's advice. The Member testified that the Numbered Company was used at the last minute to be the purchaser of the Premises under the option to purchase so it would not subject her Professional Corporation or her family to exposure due to her practice of law. The Member ultimately arranged a new first mortgage for up to 60% of the value of the Premises on "bad terms". W.G. advised her not to do this and the Member testified that it is at this point when she first learned from W.G. of S.G.'s involvement in the Mortgage and assignment of the Loan. The Premises were sold in 2005 and the Mortgage paid in full.

**Cross Examination by LSA Counsel**

[31] The Member testified that based on her discussions with W.G., she did not think the Mortgage would have been absolutely required in connection with the Loan and that W.G. did not want it. The Member testified she would have put the property in the name of W.G. if he had requested this. Counsel suggested that the Member was the advisor to W.G. in connection with the transactions and the Member denied this. She did not consider herself as legal advisor and that the transaction was "friend to friend".

[32] The Chair inquired as to the identity of J.F. (a director and 100% shareholder of the Numbered Company) and the Member testified that this is her father. The Member further testified that M.R., the other director of the Numbered Company, is her son. On questioning from the Chair, the Member was asked as to whether she drafted the Statement of Defence in the foreclosure proceedings to which she answered in the affirmative. She was asked whether she earlier testified that she knew of the assignment of the Loan from W.G. to S.G. and she also applied in the affirmative. The Member was questioned by the Chair as to why she would draw the Mortgage to S.G. if she thought there was an issue in respect of the advance of funds as alleged in the Statement of Defence. Her response was that this was a "standard defence" in the foreclosure proceeding. The Member was referred to Exhibit 21 being her letter to the LSA of August 7, 2001 responding to the Complaints against her. The Member reiterated that she thought that the reason W.G. did not want a caveat or mortgage in respect to the Loan was she had advice that required that he treat the payment as income. On questioning from the Chair as to what difference it would have made on the assumption that the interest on the Loan would be treated as income to W.G. in any event, the Member replied that she didn't know. The Chair questioned the Member as to whether, in her experience, W.G. was in the habit of hiding income on the basis of advice received from his financial advisors and the Member indicated that she did not know the answer to this question.

[33] The Member was referred to Exhibit 8, being the Promissory Note from the Numbered Company to W.G. and questioned as to whether there was another promissory note from her Professional Corporation. The Member testified that she thinks there was a promissory note from her Professional Corporation, but doesn't know what happened to it and was never asked to produce it until now. The Member testified that she does not have the transfer back of the Premises give to W.G. in her possession and that she was not aware of the decision in *Co-op v. Greba* referred to above.

**Re – Examination by Member's Counsel**

[34] On questioning, the Member testified that the executors of the estate of W.G. were S.G. and a friend of W.G., J.B. The Member testified that W.G. had asked the Member to be executor of his estate, but that she had refused.

**Re – Examination by LSA Counsel**

[35] Counsel inquired of the Member regarding her response to the question posed by the Chair about the Statement of Defence filed in the foreclosure proceeding. The Member testified that she doesn't do many foreclosures and this is her standard defence.

## CLOSING ARGUMENTS

**LSA Counsel**

[36] Counsel for the LSA submitted that the Member had manipulated a "friend" for her own personal advantage without advising the client's to obtain independent legal advice. This was exacerbated when S.G. had second thoughts on whether to advise his father to go forward with the Loan and she didn't advise him to get independent legal advise and told them that they were committed. Counsel referred the Committee to Rule 9 of Chapter 6 of the Code of Professional Conduct of the LSA, the commentary accompanying such Rule and the definitions of "affiliated entity", "consent", "disclosure", and "business transaction" contained in the Code and argued that each of the requirements to establish a breach of Rule 9 of Chapter 6 of the Code had been fulfilled in this case as follows:

- The Loan and the Mortgage and surrounding transactions were clearly a "business transaction" as contemplated in the Code.

- The business transaction was clearly entered into with a client or clients of the Member and the clients had "no independent legal representation" as contemplated in the Rule.

- The clients did not consent to the lack of independent legal representation in the manner contemplated by the Code as there was no "disclosure" as defined in the Code whatsoever and therefore any implied or imputed "consent" would not be "fully informed and voluntary consent after disclosure" as contemplated by the Code.

- That the transactions were not "fair and reasonable to the clients in all respects" is clearly established due to the "shaky" nature of the documents and the Mortgage not being granted for approximately 1 ½ years after the advance of the Loan, together with the other circumstances surrounding the transactions.

Counsel alleged that it was the Member's duty not to allow this transaction to go forward, that is, the Loan without any protection for the clients. Counsel submitted that the fact

that W.G. did this as a favour to the Member does not absolve her of her duty to protect her clients.

Finally, Counsel for the LSA submitted the "transfer back" issue was probably just negligence and not a conduct matter.

**Member's Counsel**

[37] Counsel questioned the application of the *Co-op v. Greba* case referred to above and why the transfer back would not have been registerable under the circumstances. Counsel referred to Exhibit 6, being the letter from the Member to W.G. requesting the Loan, and submitted that there was no pressure exerted by the Member and that there was clear disclosure as to the terms upon which the Loan would be made. Counsel pointed to the statement by the Member in that letter that the cost of the building may be above market value shows her honesty, integrity and candour, with "full disclosure and no pressure". Counsel referred to Exhibit 13, being the letter from W.G. to the Member dated October 27, 1998 advising of default of repayment of the Loan is the key to establishing the Member was not taking instructions from S.G. Counsel referred to Exhibit 14, being the letter from W.G. to the Member dated June 27, 1999 outlining certain options in respect of the repayment of the Mortgage showing that W.G. was a sophisticated investor with sophisticated financial advisors and this therefore implied consent as the Member should have been entitled to assume that W.G. would get appropriate advice from appropriate professionals. Counsel submitted the term "fair" in the Rule means "understanding what's going on".

**LSA Counsel**

[38] LSA Counsel submitted that Member's Counsel had an interesting definition of "disclosure" and that this means explaining, *inter alia*, the legal implications of a lack of security for a loan.

## FINDINGS OF FACT

[39] The Committee found that, based on the evidence and the Exhibits, W.G. and S.G. were clients of the Member and that the Member was engaged in a business transaction with her clients, W.G. and S.G.

[40] The Committee found that throughout the transactions giving rise to this Complaint, including the Loan, the Mortgage, the purchase of the Premises by the Numbered Company and the foreclosure proceedings on the Premises, the Member not only acted for her clients, W.G. and S.G., but also for herself, her Professional Corporation, the Numbered Company in respect to its formation and as purchaser of the Premises, the mortgagor under the Mortgage and the Defendant in the foreclosure proceedings on the Premises, as well as her father and son, as shareholder and directors of the Numbered Company.

[41] The Committee found that the Member did not advise the clients to obtain independent legal representation and that the fact that W.G. may have consulted with other professionals (such as his financial advisor) is irrelevant.

[42] The Committee found that the clients, W.G. and S.G. did not consent to not having independent legal representation. The required disclosure under the Code imposes a very high standard on members of the LSA and the Member did not even come close to meeting such standard.

[43] The Committee found that the transaction was not "fair and reasonable to the client, in all respects", as the Member, *inter alia*, failed to fully disclose the details of the transactions (including the purchase of the Premises) and the timing of the provision and registration of the Mortgage to the clients, and in the face of all of this, accepted and used the advance of the Loan.

## DECISION AS TO CITATIONS

[44] Based on the foregoing, the Committee unanimously found the Member guilty of conduct deserving of sanction in respect of the Citation.

## SUBMISSIONS OF COUNSEL REGARDING SANCTION

[45] Counsel for the LSA submitted the discipline record of the Member and asked that it would be entered as Exhibit 73. There was no objection by Counsel for the Member and the Exhibit was so entered. The record shows that the Member has been found guilty of a professional misdemeanour on one occasion, conduct deserving of sanction on three occasions and suspended one occasion for failing to pay costs as ordered by the LSA.

[46] Counsel for the LSA submitted the estimated statement of costs and required that it be entered as Exhibit 74. There was no objection from Counsel for the Member and the Exhibit was so entered.

[47] Counsel for the LSA provided the Committee with copies of the cases of *LSA v. MacKay*, *LSA v. Chiste*, and *LSA v. Crump*. Counsel submitted that the Member should pay all costs of the hearing and that there would be additional costs in addition to those featured in the estimated Statement of Costs due to the witness, J.D. having to travel from Ontario for the hearing. Counsel submitted that these were clear breaches of the Member's ethical duty over a prolonged period with no understanding of her obligations under the Code of Professional Conduct.

[48] Counsel for the Member indicated his disappointment in his opinion as to why these proceedings came before the LSA, which was a concern by Counsel with respect to a shortfall and foreclosure proceedings and that this was a "tactical move" by J.D. Counsel indicated that he did not believe that a claim to the LSA insurers would obtain success in this matter. He submitted that there was no imbalance in the sophistication between the Member and her clients and that there was no ultimate financial loss in the transaction. Counsel submitted that the Member put no pressure on the client to make the Loan. Counsel submitted that there was no "taking advantage, fooling, relying on unsophisticated clients" and that reprimand is appropriate. Counsel indicated that the Member has learned from this experience and will comply with Code of Professional Conduct in the future. With respect to costs, Counsel acknowledged that this is at the discretion of the Committee but that the Member does not have a lucrative practice and is "barely making a living". He submitted that this would be an enormous burden for her and reiterated his previous position that the J.D. evidence was not required. Counsel advised the Committee that the Member participated in practice review for 2002-2004.

Counsel submitted that the only reason that the Member vigorously defended the foreclosure action was that she felt she could get a better price if the Calgary premises was not sold in the foreclosure action but, rather, on the open market. Finally, Counsel indicated that the Member had already expended $40,000 in the litigation proceedings, including billings by J.D. for the Complaint and dealings with the LSA.

[49] Counsel for the LSA indicated that this matter had been set down for the hearing one year ago but due to Member's Counsel being ill it had been put off for one year. LSA's Counsel strongly disagrees with the position of Member's Counsel on the need for the witness, J.D. Counsel argued that this in part was due to the inability of Counsel to agree on an "agreed Statement of Facts" which has been presented by LSA's Counsel to the Member's Counsel in which evidence was corroborated by J.D.

[50] Counsel for the Member submitted that in making the decision on sanction, the Committee needs to consider the harm done and the issue of mitigation/restitution.

[51] Counsel for the LSA acknowledged that loss or no loss is an aggravating or mitigating matter to consider in sanction, but that the Committee also has to consider the stress involved on the clients by the Member due to her actions, including vigorously defending the foreclosure action. Counsel by the LSA submitted the "holding in abeyance" of the hearing is a neutral matter, which was agreed to by Counsel for the Member.

[52] Counsel for the Member submitted that the relevant factor is that there was no effort ever made by the LSA to see if W.G. wanted to pursue a claim against the Member and that the Member offered to transfer the property to W.G.

[53] The Member indicated that her father never played an active role in the Numbered Company and may have provided financing for her practice, the obligation for repayment of which was assumed by the Numbered Company.

## SANCTION

[54] The Chair advised that the Committee considered the conduct of the Member in this case to be a serious breach of Rule 9 of Chapter 6 of the Code of Professional Conduct for lawyers in Alberta. The conduct is further complicated by the Member acting in a clear conflict of interest situation. However, this misconduct is not before this Committee.

[55] It was the unanimous view of the Committee that the proper sanction in this case was the levy of a $5,000 fine on the Member and that the Member pay the actual costs of the hearing, with the exception of ½ of the costs for the attendance of J.D. at the hearing. As well the Committee directed that the Member attend before the Practice Review Committee of the LSA for the purpose of insuring that the Member clearly understands her ethical and other duties under the Code of Professional Conduct of the LSA.

[56] Counsel for the Member submitted that the sanction imposed will cause a great financial burden on the Member. After discussion, the Committee directed that the Member have one year from December 1, 2006 to pay the fine and costs. The amounts may be prepaid as the Member is able.

## MISCELLANEOUS MATTERS

[57] The Chair asked for submissions from Counsel regarding Exhibits. Counsel for the LSA submitted that only the jurisdictional Exhibits form part of the record. Counsel for the Member agreed to this and it was so ordered by the Committee.

DATED this 27th day of March, 2007

Dale Spackman, Q.C. (Chair)

Peter Michalyshyn, Q.C. (Member)

Wilf Willier (Member)