IN THE MATTER OF THE LEGAL PROFESSION ACT

AND IN THE MATTER OF A

HEARING REGARDING THE CONDUCT OF

MARTIN J. MCDONALD,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING REPORT

1. QUORUM

The Hearing Committee upon commencement consisted of three Benchers. After February 18, 2004, the two remaining members of the Hearing Committee continued to act.

2. REPRESENTATION

The Law Society of Alberta was represented by Lindsay MacDonald Q.C.. The Member represented himself.

3. JURISDICTION

Letter of Appointment

Exhibit 1 established that a panel originally comprised of Tracy Brennan, Q.C. (Chair), Brian Peterson Q.C., and Norma Sieppert was appointed to enquire into the said matters. During the conduct of the hearing, Chair Tracy Brennan Q.C. was unable to continue and on February 18, 2004, Brian Peterson Q.C. was appointed as Chair. The Hearing Committee continued with two members in accordance with the provisions of the *Legal Profession Act.* The letter confirming this appointment was admitted as an addendum to Exhibit 1.

Notice to Solicitor

Exhibit 2 established that Notice was given to the Member that a Hearing Committee was directed to deal with his conduct beginning December 3, 2002. The Notice contained the 44 citations upon which the hearing was directed. Receipt of the Notice to Solicitor, was

acknowledged by the member, Martin J. McDonald.

Notice to Attend
Exhibit 3 established that a Notice to Attend and Private Hearing Notice Application had been served on the Member.

Certificate of Standing
Exhibit 4 was the Member's Certificate of Standing, which established that he was on the Suspended List of the Law Society of Alberta.

Certificate of Exercise of Discretion
Exhibit 5 established that no interested party made known their intention to apply to have the hearing held in private.

Affidavit of Service on Interested Parties
Exhibit 5 also established the service on interested parties.

4. OPEN HEARING

The Hearing was open to the public, however, parts of the Hearing, were conducted in private.

5. CHRONOLOGY OF HEARING

The Hearing began on December 3, 2002 and continued through to February 15, 2006. The Hearing began with a *voir dire* on the application of the Member for a stay of proceedings. A decision on the stay of proceedings was made in December 2004, at which time the application was dismissed. From January 2005 through February 2006, evidence was called, exhibits admitted, and closing arguments were made.

The Hearing began considering 44 citations. During the course of the Hearing, a number of the citations were discontinued, by the direction of counsel for the Law Society of Alberta. At the conclusion of argument, Law Society counsel identified the 9 remaining citations upon which he was seeking the decision of the Panel.

6. SUMMARY OF DECISION

The Panel found the Member guilty of conduct deserving of sanction in respect of his dealings with five separate clients, and, his failure to be candid to the Law Society of Alberta. The conduct occurred between March 1991 and May 1996. The Member has been the subject of an interim suspension, and has not applied for reinstatement under the *Legal Profession Act.*

THE P.L. COMPLAINT – The Member acted for P.L. in a personal injury matter arising out of a motor vehicle accident. He asked the client to make a loan to the Member's friend out of the proceeds of the settlement. The client repeatedly refused. When the settlement proceeds were received, the Member transferred funds, due to the client, to two of the Member's own accounts. The client objected and about two weeks later the client received the balance of funds due. Upon conducting an audit, about two years later, these irregularities were noticed by Law Society auditors. When questioned, the Member lied to the auditors making up a story about the withheld funds being a holdback respecting medical reports. He also lied to auditors claiming that the client had actually been advanced the funds earlier, and that the subsequent transfers on the Member's bank accounts was to balance out this early payout to the client. In his office, during the audit, the auditors discovered account ledger cards that contradicted the representations of the Member. The Deputy Secretary of the Law Society sent the Member two requests to explain the discrepancies. The Member intentionally delayed his response, and then lied to the Deputy Secretary when he did respond. The Member falsely stated to the Deputy Secretary, that the client wanted a car and that he gave the client an interest free loan to be repaid from the settlement proceeds. He also falsely stated that the client had "lost" a cheque, which resulted in a "replacement" cheque having to be issued.

The Panel found that the Member failed to be candid with the Law Society auditors, and failed to properly respond in a timely manner to the Deputy Secretary of the Law Society.

THE A.S. COMPLAINT – A.S. had an automotive repair business operating on a property that he rented. The landlords of this property were in arrears on their mortgage, and the trust company that held the mortgage was foreclosing on the property with the intention of selling it. A.S. was referred to B.B. for the purpose of securing a mortgage. B.B.'s business was called MACC, and his office was located in Calgary, in the same office as the Member. B.B. recommended to A.S. that the Member become involved to assist. The Member was sent a $10,000 cheque that was to be held in trust. The cheque was deposited into trust but was NSF. The $10,000 NSF cheque was replaced by a wire transfer of funds, to the Member, of the same amount. This time however, the Member did not place the funds in trust. The Member had provided an undertaking, to the lawyer for the trust company, that he was holding the $10,000 in trust for the vendor and the purchaser. However, this $10,000 was not held in trust, but was paid out in two amounts, to the benefit of the Member. The client A.S. had agreed to pay the Member $7500 for his legal services in the "purchase and sale" of the property. Later, the mortgage was redeemed by the mortgagor, resulting in A.S. being unable to effect a purchase of the property. The client was informed about the redemption by the trust company, not his lawyer. The client A.S. complained to the LSA that the Member failed to keep him informed of the redemption, had failed to reply to the client, and had failed to keep the client informed of the Member's handling of the funds provided.

On May 18, 1993, the Member provided the client A.S. with a Statement of Account that was dated April 5, 1993. The Member claimed that this Statement of Account had been previously provided to the client on April 5th. This Statement of Account was found by the Panel to be a contrivance used by the member as an attempt to account for the removal of the funds that should have been held in trust. The Statement of Account referred, within the body of its text, to the fact of having received a retainer. That could not have occurred because the retainer was not received until April 7th. The Statement of Account also included specific amounts of disbursements that were described as being "estimated". The Statement of Account had an accompanying document that purported to set out the terms of how legal fees would be charged. That accompanying document had a date of April 5th on the first page, and a date of April 22nd on the four subsequent pages of the same document. The Panel found that the Statement of Account was not sent to the client on April 5th.

The Member told the Deputy Secretary in 1995 that he did not put the money in trust because B.B. from MACC had told him that he didn't have to because the deposit money would be coming out of the mortgage funds. The Member told the Panel in 2006 that he did not put the money in trust because a person working for the Trust Company had told him that there was a definite possibility that the mortgagor would redeem the mortgage.

The Member told the Panel that his role in the transaction was limited, and had been concluded by April 5th, 1993. The Panel noted his continued involvement in the attempted purchase of the property and the absence of any other lawyer involved in carrying the proposed purchase to its conclusion.

The Panel found that he failed to serve his client in a diligent conscientious and efficient manner. The Panel also found that he misappropriated funds held in trust for A.S. and that such conduct was deserving of sanction.

THE LAW SOCIETY COMPLAINT RE: CLIENT W.D.Y. – W.D.Y. was a client who had failed to pay a number of his accounts that had been rendered by the Member. After using a number of other lawyers' services, which W.D.Y. similarly did not pay for, he sought to return to the Member to secure his representation in yet another matter. The Member secured, from W.D.Y., a waiver of his right to tax the four previous accounts as well as his right to require the Member to appear at a taxation hearing. The Member sought this waiver in order to have some security in knowing that his past accounts would be paid and that he could now represent the client on this new matter with some confidence that his bills would be paid.

However, Rule 614 of the Alberta Rules of Court provides that a lawyer's charges for services are always subject to taxation, notwithstanding any agreements to the contrary. The reason for this rule is that a client must always know that he can have the right to

challenge any lawyer's charges for services. The Rule exists to ensure that lawyers do not execute agreements to remove that right. Even if such agreements would not be legally enforceable, the act of securing this agreement may leave the client with the impression that he no longer has that right or that he has agreed not to exercise it.

The Panel held that the conduct tended to bring the profession into disrepute, and was conduct deserving of sanction.

THE LAW SOCIETY AUDIT COMPLAINTS RE: CLIENT J.A. AND THE ESTATE OF W.J.F.- Mr. W.J.F. had passed away. His friend and former business associate, J.A., was executor of the estate. The Member had performed some legal services for J.A. in the past and was approached to undertake legal work required for the estate. On October 3, 1994 J.A. provided a cheque for $9000, to the Member, as a general retainer. The Member's "New Matter Report" reflected that there would be a time rate of $250 per hour. The client understood that he would be provided with detailed monthly accounts that would be applied to the retainer. The $9000 was transferred to the Member's general account on October 4, 1994. Requests for detailed invoices were delayed for months before a detailed statement of account was provided. The estate work was undertaken by the Member, but not completed. The client retained a second lawyer, who negotiated an agreement with the Member to refund $1100 to the client. That second lawyer also completed the estate work, approximately one year later.

The Member maintained that, contrary to the information contained on the documentary evidence, there was an oral agreement for a fixed-fee. As a result, the Member maintained that he was not required to keep time records. The Member also maintained that this fixed fee arrangement also allowed him to take the funds before the work was performed.

The Member's evidence was rejected and the Member was found to have deceived or attempted to deceive his client respecting the keeping of time records. The Member was also convicted of misappropriation of funds by taking funds before the work was completed.

THE GST COMPLAINT – The Member failed to file GST returns, or make remittances from May 1991 to October 1993. On May 29, 1995, the Member's accountant sent in ten completed GST returns, which revealed a balance owing of $10,968.22. The funds, which the Member had collected, from his clients, but had failed to remit were used by him, in his practice. The Member was charged with misappropriation. The Member received an order or direction from the Tax Department to comply with his payments. He did not do so, was charged, and pled guilty. The Member came to terms with the Tax Department and made monthly remittances until the outstanding debt was paid.

In a previous decision, a Law Society Panel held that a Member, who was over $13,000

in arrears on his GST remittances, but who made monthly installments until the debt was satisfied, was not guilty of conduct deserving of sanction. The previous decision was applied to this case, and the conduct of the Member was found not to be deserving of sanction.

THE M.H. COMPLAINT – The client M.H., a U of C student, retained the defendant Member to represent him in a lawsuit against J.W.P. and a Hotel respecting an incident in which the client M.H. had been assaulted with a weapon and had sustained injuries. During the course of acting for the client M.H., the defendant member withdrew from his trust account the sum of $1000 as a disbursement for a transcript of the criminal proceedings. The Defendant Member had requested a transcript from the Court Reporters office but then followed that up with a letter requesting a quote on the estimated cost of such a transcript**.** The precise cost of the transcript was unknown at the time the funds were taken, and the funds removed from trust were not sent to the Court Reporters' office but were transferred to the General Account of the Member. This conduct did not amount to the payment of a "disbursement" as had been represented in the statement of account sent to the client M.H.

Such conduct respecting a client's funds held in trust, is conduct that fails to serve the client, and is deserving of sanction.

7. THE P.L. COMPLAINT

18. IT IS ALLEGED that you did fail to be candid in your responses to the Law Society Auditors, and that such conduct is conduct deserving of sanction.

18.1 Particulars of your failure to be candid in your responses to the Law Society Auditor, J.Y., are set forth in the memorandum of J.Y. to B. C. dated July 13, 1993, wherein you are alleged to have falsely advised J.Y. that:

18.1.1 there was a $5,000.00 holdback on the settlement proceeds of the insurance company to be released once P.L. underwent some tests for medical reports;

18.1.2 the $5,000.00 was to be kept in trust until the medical reports were prepared;

18.1.3 you paid the $5,000.00 to P.L. out of your general account before the medical reports were prepared since P.L. was insistent on getting the funds; and

18.1.4 the medical reports were eventually prepared and the $5,000.00 held in trust was transferred to your general account to cover the amount that was previously paid to P.L.

18.2 Further particulars of your failure to be candid in your responses to the Law Society Auditors are set forth in the Final Audit Report of F.L. and J. Y. dated October 15, 1993, wherein you are alleged to have falsely advised that:

18.2.1 prior to the insurance settlement being received from the insurance company, you advanced P.L. $5,000.00 from your personal bank account;

18.2.2 the $5,000.00 advance was forwarded to P.L. in Vancouver;

18.2.3 upon receipt of the settlement proceeds of $40,000.00, the sum of $5,000.00 was immediately transferred to yourself as reimbursement for the previous advance to P.L. by yourself; and

18.2.4 the $5,000.00 advance forwarded by yourself to P.L. in Vancouver did not reach P.L., and therefore, you did presume it was lost.

19. IT IS ALLEGED that you did fail to properly respond in a timely manner to the issues identified by the Deputy Secretary in correspondence to you, and that such conduct is conduct deserving of sanction.

19.1 Particulars are that on or about March 11, 1996, J.M., Deputy Secretary of the Law Society of Alberta, did request that you provide a written response within seven days of receipt of such letter in connection with the complaint of P.L., and in particular, referenced memos of Mr. Y, Ms. L. and G.B. which seemed to indicate that you had been less than candid with your responses surrounding the circumstances of your dealings with P.L. Pursuant to correspondence dated March 25, 26, 28, April 1, 2, 22 and May 7, 1996 you requested and/or were granted four extensions of time, until May 10, 1996, to reply to the complaint of P.L. It is alleged that on or about May 13, 1996, you did forward a response to the Deputy Secretary that failed to properly respond to the complaint of P.L. as requested. It is further alleged that you did fail to respond in a timely manner to the complaint of P.L. upon being granted an additional extension to do so by May 17, 1996 by the Deputy Secretary, and you did not respond until May 27, 1996.

A. The Circumstances of the Complaint

P.L. was a client of the Member. The matter was a personal injury action respecting a motor vehicle accident that occurred on August 31, 1989. During March of 1991, the member received insurance settlement monies on behalf of his client, P.L. The funds

owed to the client were not remitted in their entirety: approximately $5000 of the settlement proceeds was not sent to P.L. After approximately two weeks, P.L. was issued a general cheque for the $5000. However, P.L. was later advised by the Member, that it was not cashable, and then was given a personal cheque by the Member for the same amount.

During the course of a Law Society Audit the Member was asked questions by the Law Society Auditor J.Y. concerning this $5,000 sum, which was part of the settlement, that the Member had not remitted until later, to the client. It was curious to the auditor because the case had been settled and there was no apparent reason why the money had not been sent to the client. When trying to get information on the P.L. file, the member advised that the client's file had been destroyed, as a result of a flood at the house where it had been stored. The flood was supported by an appraisal report. The explanations of the Member were recorded in the memorandum of J.Y. to B.C. dated July 13, 1993. This Memorandum is tab 4 of Exhibit 201. The Member had claimed to the auditor that there was a $5,000 holdback on the settlement proceeds that would be released once P.L. underwent some medical tests. The Member also claimed that the money was to be kept in trust until the medical reports were prepared. He further claimed that the $5,000 was paid out before the medical reports were prepared since P.L. was insistent on getting the funds. The Member claimed that the medical reports were eventually prepared and the trust money was transferred to general to cover the amount that was previously paid out to P.L. The Member's representation was not verifiable, due to the records being destroyed in a flood. However, the auditors found some accounting records that apparently contradicted the Member's position. In order to obtain copies of the financial records and to confirm the information, alternative sources were contacted: including the bank, insurance co., the other lawyer, and the client, P.L.

It was learned from P.L. that, prior to the settlement proceeds being remitted, the member had attempted to persuade P.L. to make a loan of $5,000 to a friend of the member. P.L. refused the offer and he did not receive all of his settlement proceeds: $5000 was held back. This amount was later paid to the client, by a personal cheque, sent by the Member.

B. The Position of the Law Society

The Law Society's position was that the Member failed to be candid in his responses to the Law Society Auditors in that he falsely made a number of misrepresentations to the Auditors who were investigating the Member's conduct concerning a $5000 sum of insurance proceeds which should have been paid to the client P.L. The Law Society Counsel relied upon the exhibits produced at the hearing, the testimony of witnesses, and the admissions of the Member during cross-examination.

The Law Society's position was that the Member's letter of response was an attempt to divert attention from the P.L. complaint, by responding to the letter of the Deputy

Secretary of the Law Society with answers to the other issues raised in the letter. Further, that the banking records did not support the Member's representation, to the Auditors, that he had sent a personal cheque to P.L. prior to receiving the settlement funds.
Also, the Law Society relied upon a handwritten note of the client to the Law Society, wherein the client complained that the Member had kept bringing up with the client that the Member had a friend who needed $5000. The client repeatedly said no to this suggestion of a loan, yet when the settlement funds were received, according to this note, the Member had admitted to the client that he had taken $5000 off of the sum sent to the client, for the benefit of the Member's friend.

C. The Position of the Member

The Member admitted in cross-examination that upon receipt of the $40,000 settlement proceeds on March 18, 1991, he paid $3650 to Sheridan Equities. Sheridan Equities is the Member's own company. He also transferred $1000 to another account relating to one of his files. On March 21, 1991 the Member paid $5350 to his professional corporation. On April 16, 1991 he issued a cheque to the client P.L. for $30,000. The Member admitted that there was a shortfall in one of his accounts, and he used Mr. P.L.'s money to cover that deficiency. The Member admitted that, contrary to what he had said to the Law Society auditors, there was no general account cheque written for $5000. The Member also admitted that when he was responding to the March 11, 1996 letter from the Deputy Secretary of the Law Society, the Member failed to respond to the request for an explanation of the circumstances respecting his dealings with client P.L. By a further letter dated March 25, 1996 the Deputy Secretary asked again for a response. In his response, the Member ignored the P.L. allegations and provided a response on other matters only. The Member finally responded to the P.L. allegations on May 27, 1996. The Members response to the Deputy Secretary of the Law Society is at Tab 45 of Exhibit 201 wherein he provided the following explanation:

> "In the meantime [P.L.] was impecunious and required monies for some reason, for the purchase of a car, perhaps. In any event, because his parents were in the middle of a contentious divorce, I made an interest-free loan to [P.L.], which was to be repaid from his share of a MVA settlement proceeds."

The Member admitted that this statement to the Law Society was false. The Member's response at Tab 45 also contained this explanation:

> "[P.L.] received a cheque and then lost it. We issued a replacement cheque. I was paid from the settlement monies for both the loan to [P.L.] and my account".

The Member admitted that P.L. hadn't "lost" a cheque, and that it was false when he stated that he was paid from the settlement monies for the loan. There never was a loan.

The Member admitted that he had been asking the client P.L. to give him a loan, and the Member definitely knew that the client was refusing to make any loan. By March 21, 1991 the Member had taken $4650 of the client's money for his own purposes. The Member admitted that when he told the Law Society that he had made an interest-free loan to Mr. P.L. he knew that was false. The Member pointed out that he repaid [P.L.] with $5000. The reason the Member gave for adding $350 was that he realized that it was a serious error and he felt very badly about it. He endeavoured to remedy it, in a sense, by providing an extra $350 to the client. He admitted that when the Law Society Auditors came to speak with him, he did not tell them the truth.

The Member explained that his failure to reply to the Deputy Secretary was deliberate, but that it was because of the Member's concern for the bias against him by the Deputy Secretary. He said that it was more or less to pull the Deputy Secretary's chain. The Member said that he deliberately frustrated the Deputy Secretary for a while until he finally sent his response in on May 27, 1996. He sent the response in knowing full well that it was not the truth.

D. The Decision of the Panel

The Panel finds that the Law Society has discharged its onus to establish this citation on a balance of probabilities. The Member admitted the particulars of his failure to be candid to the Law Society Auditors as contained in citations 18.1 and 18.2. The Member also admitted that he failed to properly respond in a timely manner to the issues identified in correspondence by the Deputy Secretary of the Law Society as contained in citation 19.1. The evidence clearly established on a balance of probabilities that the Member falsely and knowingly lied to the Law Society Auditors. The evidence clearly established that the Member failed to properly respond in a timely manner to the Deputy Secretary of the Law Society.

8. THE A.S. COMPLAINT

12. IT IS ALLEGED that you did fail to serve your client, A.S., in a diligent, conscientious and efficient manner, and that such conduct is conduct deserving of sanction.

12.1 Particulars of your failure to serve A.S. in a diligent, conscientious and efficient manner are as follows:

12.1.1 you did fail to keep A.S. reasonably informed as to the status of his file, particulars of which include your failure to advise A.S. in a reasonable time period that the proposed sale of "the property" had been aborted on or about May 4, 1993;

12.1.2 you did fail to promptly respond to the telephone calls and faxes of A.S. and/or his lawyer; and

12.1.3 other conduct as alleged in citation #'s 13, 14 and 16.

16. IT IS ALLEGED that you did misappropriate funds held in trust for A.S., and that such conduct is conduct deserving of sanction.

16.1 Particulars are that on or about April 26, 1993 A.S. did provide M. J. McDonald's Professional Corporation with a cheque deposit in the amount of $10,000 (Exhibit 1, Tab 4) as required pursuant to the terms and conditions of the Interim Agreement to Purchase and Sell as an indication of good faith in making the offer for the purchase of the Property to be held in trust for the vendor and the purchaser (Exhibit 1, Tab 2). It is alleged that you did apply the $10,000 deposit to the account of M.J. McDonald's Professional Corporation in payment of $10,000 in alleged fees owing by A.S. (Exhibit 1, Tab 1, Documents 3 and 4).

A. The Circumstances of the Complaint

A.S., of Winnipeg, was interested in purchasing a property located at Winnipeg, Manitoba. A.S. had an automotive repair business and had been a tenant operating on the property for about 6 months. The mortgage on the property was held by "S". The landlords, P.C. and V.D., were in arrears of their payments and the property was for sale on a mortgage foreclosure. S.R., in Vancouver, was the person working for "S" in the sale and foreclosure of the property**.** "S" lawyer in this matter was A.M., of Winnipeg.

A.S. was referred to B.B. of Calgary, for the purpose of securing a mortgage. B.B. was operating a business called MACC. B.B. was a tenant in the office of the Member Martin McDonald. B.B. agreed to get involved in the purchase of this property and recommended to A.S. that a lawyer, Martin McDonald, become involved to assist in the enterprise.

A letter, dated March 30, 1993, was sent from Martin McDonald to "S". He identified himself as the solicitor for an undisclosed principal who wished to purchased the property in Winnipeg. A fax cover sheet dated April 5, 1993, from Martin McDonald to S.R. at "S", included a copy of an Interim Agreement to Purchase and Sell. Therein MACC offered to purchase the Property for $260,000.

A.S. signed a document saying: "I agree to pay a fee of ($7,500)" in legal fees (plus disbursements) to Martin McDonald for: "Services rendered in connection with the purchase and sale of the above captioned property." This document bears a fax imprint, at the bottom, of April 6, 1993.

A.S. sent a certified cheque for $1000 to B.B. and a regular cheque to Martin McDonald for $10,000, dated April 1, 1993, marked: "in trust for property". On April 7, 1993, the Member McDonald deposited the $10,000 cheque from A.S. into his account.

In a letter dated April 7, 1993, Martin McDonald advised Winnipeg lawyer A.M., solicitor for the "S" (the Vendor), that: "My client has placed the sum of Ten Thousand Dollars with me in trust as the deposit which I undertake to hold as the deposit in trust for the Vendor and the Purchaser pursuant to the terms of the Interim Agreement to purchase and sell as amended."

On April 10th, Martin McDonald took out $2500.

On April 15th, Martin McDonald sent a letter to Winnipeg lawyer, R.U., confirming that R.U.'s account would be $100 for "registering the Transfer of Land through your office".

The $10,000 cheque from A.S. was returned N.S.F. on April 22nd. On April 26, 1993 A.S. made arrangements to transfer the required funds, and by April 27th, the $10,000(replacing the NSF cheque) had been wired to Martin McDonald.

On April 27th, Martin McDonald took out a further $7500.

The mortgage held by "S" was redeemed by P.C. and V.D. on or about May 4th. A.S. was advised, by S.R., on or about May 7, 1993, that the property was no longer for sale.

In June 1993, A.S. complained, in writing, to the Law Society of Alberta that once he found out that the deal was dead, as a result of the redemption of the mortgage, that he then had difficulty in contacting B.B. and Mr. McDonald. He complained that on May 18, 1993 he received a fax statement of account from Mr. McDonald billing A.S. for $10,058. A.S. maintained that he didn't hire Mr. McDonald, and that he only said that he would pay him if the deal went through. A.S.maintained that most of his dealings were with B.B. A.S. claimed that, in fact, the first time that he spoke to Mr. McDonald, was on April 23rd when he called McDonald to arrange for the $10,000 transfer which was to "replace" the NSF cheque. A.S. further complained that neither Mr. McDonald, nor B.B., had informed him that the mortgagors would have the ability to redeem the property up until the end of May.

The Law Society Auditors, F.L. and J.Y., commenced an investigation on June 9, 1993 and concluded field work at Martin McDonald's office on July 8, 1993. They found that no ledger card had been prepared for the money held in an interest-bearing trust account during April 1993 for the client A.S. ($10,000).

A number of documents were received into evidence during this hearing. These included a fax cover sheet dated May 18, to A.S. from Mr. McDonald, which has attached to it a Statement of Account and cover letter, both of which are dated April 5, 1993. Included within that exhibit is a Statement of Account to A.S. for $10,058 that was dated April 5, 1993. Within the body of the Statement of Account, it referred to "receipt of retainer

from proposed purchaser, A.S. and execution copies of documentation." This Statement of Account also contained a line item for Long Distance charges of $30.25, and MAAC brokerage fees of $1800. Both of these line item disbursements were noted at the bottom of the page to be "estimates only and would be revised upon receipt of actual invoices". Another exhibit received into evidence was the cover letter dated April 5, 1993 directed to A.S., which referred to a Statement of Account…. "pursuant to our agreement in that regard". A further letter, which was received into evidence, was a copy of a detailed retainer letter from Martin McDonald to A.S. This letter also bore a date of April 5, 1993 on its first page, and on the next four pages of the same letter, its pages were each dated at the top: "ARRIL 22, 1993".

On January 31, 1995, Martin McDonald was interviewed by, the Deputy Secretary of the Law Society, J.M. Mr. McDonald advised the Deputy Secretary that, while the first cheque (NSF) was being held in trust, the second $10,000 wire transfer was not to be held in trust. Mr. McDonald told the Deputy Secretary that the reason why the second $10,000 was not put in trust was because of B.B.'s advice and direction. The Member said that B.B. had indicated that the entire deposit money would be coming from mortgage funds advanced through MACC and so there was no need to worry about the deposit any more.

B. The Position of the Law Society

The Law Society's position was that the Member failed to serve his client A.S. in a diligent conscientious and efficient manner. The LSA relied upon a number of acts alleged to be proof of failure to keep his client informed of the status of the file. These included:

1. The failure to advise the client within a reasonable time that the sale had been aborted because of the redemption of the mortgage.

2. The failure to promptly respond to the telephone calls and faxes of A.S. and his lawyer.

3. The failure to keep his client informed respecting the handling of funds.

This 3rd allegation was in respect of the Member's handling of the $10,000 cheque and the subsequent wire transfer from the client. This allegation ties in with the Member's conduct that is alleged in the misappropriation citation. The LSA alleged that the Member did not advise the client A.S. that the replacement wire transfer of $10,000 was not put in trust. There is no correspondence or confirming documentation, between the client and the Member, to inform the client of this status. Further, the LSA relied upon evidence that funds were not held in an interest bearing trust account and the client was not informed of this. In fact, the LSA relied upon the evidence of the client, who said that he was told by the Member that the funds would be transferred into a trust account, and

they were not. Further, the LSA relied upon evidence that the Member had failed to advise the client in a timely manner when and why funds were being transferred in satisfaction of legal fees.

In support of the misappropriation allegation contained in citation #16, the Law Society relied upon the following evidence of misappropriation of the funds:

1. The Member having the client sign an agreement for services to be rendered in connection with the "purchase and sale" of a property, and then charging the client his fee at the point when the agreement for sale had been drafted and signed.

2. The Member was provided with a $10,000 cheque to be "in trust". McDonald advised the Vendor's lawyer that he had the money in trust as a deposit that he undertook to hold in trust for the vendor and purchaser. Then he transferred $2500 out, and later transferred a further $7500 out, to himself.

3. The Member took funds out of trust in satisfaction of legal fees when the funds should have remained in trust.

4. The Member applied funds to a statement of account that was rendered prematurely, and was not done in accordance with the agreement with the client, as evidenced by the supporting documentation.

The position of the Law Society was that the documentary evidence supported the *viva voce* testimony of the client A.S. For example, the first cheque (NSF) was marked "in trust". The agreement between the Member and the client referred to the "purchase and sale of the above captioned property", and was not described as merely drafting an interim agreement. The letter to the Vendor's lawyer corroborated the client's understanding that the $10,000 was to be held in trust. Further, the claim by A.S. that he did not receive any statements of account dated April 5th until the May 18th fax was supported by the fact that those documents contained inconsistencies within themselves. For example, if the account had actually been drafted and sent to the client on April 5th then it would not have a reference to the "receipt of retainer from proposed purchaser, when in fact that would not have been received yet. The retainer was received April 7th. Additionally, the long distance disbursements were for a specific amount: $30.25. How can that sum be estimated? Further, the April 5th retainer letter, of 5 pages, had the date of April 5th on the front page, and the date of "ARRIL 22" on the last 4 pages. This letter was alleged by the LSA to be a sham perpetrated by the Member.

C. The Position of the Member

The position of the Member was that he denied that he failed, to respond to his client, or keep him informed. The Member alleged that there were many instances of

communication between he and the client A.S. The member claimed that there were no records of telephone calls from him to his client, because A.S. was always calling B.B. back. B.B. would then call the Member into his office and relate what was occurring. The Member relied upon the telephone bills of B.B. that supported frequent contact between B.B. and A.S. The Member stated that the April 5th statement of account had been delivered to the client A.S. at that time, and because that had been done, the client A.S., was aware that the funds forwarded to the Member were being applied to legal fees. The Member's position was that the written retainer agreement for $7500, signed by A.S., "trumped" any fee letter, and he relied upon that document as his authority to apply the funds to his accounts. Further, the Member argued that the use of the past tense of "rendered", within this signed written retainer agreement meant that the client was acknowledging that the services had already been performed. The Member's testimony was also to the effect that the reason that he did not put the $10,000 wire transfer into trust, was because he had been informed by S.R. that there was no need to put it into trust because there was a definite possibility that the mortgagors would redeem the mortgage. The Member's position was that Winnipeg lawyer, R.U., was going to do the conveyancing, and that the Member was not. The Member's position respecting the $100 fee, referred to in the letter directed to R.U., was that it was only the fee in respect of a title search.

The Member position was also that his client A.S. was not truthful, and therefore his testimony was not credible or worthy of any weight. The Member's position was that the client A.S. had a motive to lie in giving his evidence. The Member argued that the advertisement taken out in the Winnipeg Free Press inviting persons who had complaints about the Member, to contact A.S., was evidence of the client's bias, prejudice, and malice. Further, the client A.S. had only applied for Assurance Fund compensation from the Law Society after he had given testimony in the hearing. This indicated that the client's motive had morphed into a pecuniary one. The Member also claimed that the client A.S. had threatened to put a bomb in the Member's car. Further, the Member claimed that the client was trying to "back-door" his landlord, by failing to pay the rent owed to the landlord, and then trying to buy the same property, through B.B. in Calgary, once the landlords were in arrears. The Member claimed that A.S. had hidden from him the fact that he was a tenant of the property. The Member claimed that this was in violation of the agreement with "S" which spelled out that A.S. did not have a relationship with P.C. and V.D.

The Member also relied upon the evidence that at one time, the client A.S. said that he did not "hire" McDonald, and that this was contradicted by his Assurance Fund Claim that he had hired McDonald. The Member also relied upon the evidence that when A.S. sent a handwritten fax on May 13th or 11th, wherein A.S. said that "you sold me a property you didn't own" was a lie because it was clear that A.S. knew all along that MACC didn't own the property.

The Member also maintained that his client A.S. was aware that the mortgaged property could have been redeemed by the landlords, at any time, because of the contents of the interim agreement. The interim agreement, of which A.S. received a copy, contained a clause that stated that the interim agreement is subject to the rights, if any, of the mortgagor or any other person, to redeem or replace the "S" mortgage in good standing prior to the closing of this transaction.

And, on the positive side, the Member pointed out the very positive evidence of R.D. respecting the Member's conduct and character.

D. The Decision of the Panel

We will deal first of all with citation #16. This is the most serious allegation and is one that alleges misappropriation of a client's funds. At the conclusion of the submissions, L.M., Counsel for the Law Society, acknowledged that this allegation does not rely upon s. 67 of the *Legal Profession Act.* That section provides that when money is received in trust, the burden of proof that it was properly dealt with lies on the member. However, because the LSA has alleged misappropriation, the LSA counsel has acknowledged that the LSA bears the burden of proof. Further, LSA counsel pointed out that the standard of proof has been determined by cases from our Court of Appeal.

In *Ringrose v. College of Physicians and Surgeons of Alberta* [1978] 2 W.W.R. 534 (Alta. C.A.) Clement J.A. stated:

> "…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."

Further, in *Law Society v. Estrin* (1992) 4 Alta.L.R. (3rd) 373 (C.A.) the Court stated: "The evidence required by the Law Society to reach a conclusion of deceit is short of that in a criminal proceeding but must meet a higher standard than the balance of probabilities."

Additionally, the Court of Appeal has specifically dismissed the argument that an allegation of conduct equivalent to criminal behaviour would require proof beyond a reasonable doubt: *K.V. v. College of Physicians and Surgeons of the Province of Alberta* (1999) 4 Alta.L.R.(3rd) 373.

Therefore, in consideration of these cases, this panel is holding the Law Society to a higher standard of proof than the balance of probabilities in respect of citation #16. This allegation requires a higher degree of probability than proof on a balance of probabilities. The degree depends upon the subject-matter, which in this instance involves the misappropriation of a client's funds. Therefore, we will be applying a standard of proof

that approaches that of the criminal standard: proof beyond a reasonable doubt.

The concept of proof beyond a reasonable doubt was described by Zuber, J.A. in *R. v. Gordon (1983) 4 C.C.C. (3rd) 492* (Ont. C.A.): "It is … clear that proof beyond a reasonable doubt and proof to a moral certainty are synonymous terms." Another passage which is often quoted with favour, by other courts, is that of Houlden J.A. in *R. v. Burdick* (1975) 27 C.C.C. 92d) 497: "No difference exists between being satisfied to a moral certainty and being satisfied beyond a reasonable doubt".

Therefore, in determining whether citation #16 has been proven, the Panel will apply a standard that approaches that of proof beyond a reasonable doubt.

It became apparent through the course of the hearing that the documents that related to this citation were not always what they appeared to be on their face. The date recorded on some documents did not, in some instances, accord with what was occurring in the course of the transaction. Further, the testimony of A.S. and the Member was at odds as to when and whether a number of documents had been delivered. It became clear on close examination of the documents, together with a comparison with known facts, that some of these documents had been altered or created at a time which was not borne out by the date on the face of the document. The Martin McDonald statement of account dated April 5, 2003 is such a document. The Member McDonald testified that the April 5 statement of account had been delivered to the client A.S. at that time. A.S. stated that he received the April 5 statement of account as part of the May 18th fax to his office from the Member. The fact that the Member took the money is irrefutable. He has sought justification for this by claiming that he had completed his work, and therefore he was entitled to take the money. Further, that when he did take the money, he complied with his responsibility to advise the client A.S. of that fact because he sent him a statement of account. He relied upon a statement of account dated April 5th. His position was that he had done the work and he had taken the funds that he was due. Now, according to the Member, it was up to R.U. to conclude the matter for the client A.S. The Member also claimed that he had been in constant communication with the client A.S. The client A.S. however, claimed that the first time that he spoke to the Member was on April 23rd.

Counsel for the Law Society took the position that the April 5th Statement of Account was a sham. Upon a close examination of the documents, the chronology of events, and the testimony we are driven to the same conclusion. The April 5th Statement of Account is a contrivance.

The work responsibilities, that the Member had undertaken, on behalf of the client A.S. were not completed, they were only under way. One document which both the Member and client confirm the accuracy of, is the undated document at Tab 8 of exhibit 198. In that document A.S. agrees to pay the Member $7500 plus disbursements for "Services rendered in connection with the **purchase and sale** of the above captioned property".

The only date on this document is the fax print out date of April 6th, located at the bottom. Notably this document does not say that the Member is to be paid for negotiating an agreement of purchase, it clearly refers to "the purchase and sale". This accords with the testimony of A.S. This is not consistent with the testimony of the Member, as to his responsibilities. Notably this is the only document respecting the terms of engagement of services which is signed by the client A.S. The Member claims that the document, was provided by the client A.S., and that is why it doesn't accurately describe the services that the Member was to provide. We noted throughout his testimony, that the client A.S. was not a particularly sophisticated or educated man. Written material authored by him was replete with spelling and grammatical errors. It is doubtful that he could draft Tab 8 with the clarity and succinctness that it embodies. We are far more inclined to find that the document, had been drafted by the Member, however, we are not in a position where we have to determine who created it. The important point is that both parties are in agreement as to the existence and validity of the document – so it speaks for itself. If the document did not accurately reflect the agreement as to the scope of services that the Member was to provide, then it was incumbent upon the Member to correct any error. There was no communication to the client A.S., by the Member, to the effect that this document was inaccurate or wrong. The client was entitled to treat it as accurate. This document is also consistent with the testimony of A.S. on this point.

The Member had testified that he had concluded his responsibilities by April 5th and had rendered his bill accordingly. Other evidence within the hearing is inconsistent with that position. At Tab 28, of Exhibit 198, the Member faxed to the "S" representative a counter offer dated April 7th and signed by MACC. Therefore, as the LSA counsel argued in his "Timeline – A.S. matters": "not only had no offer been completed on April 5, it was still being negotiated…" The Panel agrees. The Member was still continuing to act – which was in accordance with the terms of engagement understood by the parties at that time. Additionally, the Member, at Tab 30, wrote to the R.U. Law Office in Winnipeg on April 15th, requesting that they search title, and the letter states the following: "**We will be registering** the Transfer of Land through your office". As was pointed out by LSA counsel, who would be paying for this agency by R.U. if A.S.'s money was already used up on April 5th? If Martin McDonald had finished his responsibilities he would not have used words to the effect that "**We will be registering**...". Further, McDonald does not have any funds left to hire an agent. It is clear, and we find as a fact, that Martin McDonald had continued to act, his role had not concluded.

Additionally, the Member's evidence respecting R.U., is not credible. To try and explain who was continuing with the client's work, the Member claimed in his interview that: "R.U. is the solicitor that I hired to act on behalf of MACC and to complete the conveyancing once the interim agreement was accepted." (Tab H, Page 4) There is no documentation to support any such suggestion. On April 15th, the Member confirmed

that R.U.'s account would be a $100 fee for registering the Transfer of Land through his office. Nothing more. We find that the Member's evidence on this point is not credible and it is rejected.

It should be remembered that the foregoing conduct is subsequent to April 5th, the date of the alleged Statement of Account. One would think that if a lawyer had concluded his responsibilities in a purchase and sale before the deal had come anywhere near completion, that there would be supporting documentation establishing the continuity of the succeeding lawyer. There is none. Not having completed the purchase and sale, the Member was not entitled to take the entirety of his quoted fee, although he has produced a statement of account to that effect dated April 5th. The funds were actually taken subsequent to that date. He took $2500 on April 10th, and he took another $7500 on April 27th.

A.S. testified that the first time that he spoke to Martin McDonald was on April 23rd. The Member McDonald maintained that there had been constant communication, although there was more between B.B. and A.S. than there was with him. The Member's telephone bill supports the evidence of A.S. on this point. The telephone bill is in tab 237. The first call relating to client A.S. is billed for April 23rd. The call relates to a number of (***) ***-****, which is A.S.'s number. When A.S. made his statement that the first call was on April 23rd, he could not have had access to the Member's phone bill. We find corroboration for A.S.'s evidence in the phone records, and find as a fact that the first conversation between A.S. and the Member occurred on April 23, 1993. The involvement of the Member had not ceased by fulfillment of his responsibilities, he continued because he was supposed to be working in respect of the purchase and sale of the property.

In looking at the April 5th Statement of Account, discrepancies are apparent on its face. This document can be referenced in a number of locations, but a number of other useful documents are present with it at Tab 1. These are the documents that were faxed from the Member's office to the client's on May 18th, 1993. On this point they agree. Firstly, it is surprising that the role of the Member as a lawyer would have been concluded within a few days of the beginning of the process. The deal was not anywhere near completion by April 5th. According to the member, he was done by April 5th. When he was hired, there does not appear to be any documentation or evidence that contemplated a succession of lawyers that would be needed to complete the transaction, nor was there any documentation at all to suggest the limited role to be played by Mr. McDonald. Yet, if Mr. McDonald's evidence is correct, he had completed what he had been hired to do by April 5, 1993. We find that this April 5th Statement of Account is a contrivance, a sham.

LSA counsel has called the April 5th Statement of Account a sham. As he has pointed out, the content of the statement belies the date at the top. An examination of the description of the services rendered supports his argument. The Statement contains the

phrase: "to receipt of retainer from proposed purchaser, A.S. and execution copies of documentation;". As LSA counsel pointed out, this could not have occurred by April 5, 1993. The cheque came in on April 7th, the document retaining the Member was faxed on April 6th.

Additionally, page 2 lists the disbursements for which he charged the client. $30.25 for Long Distance charges, which were described as being an "estimate". Further, an $1800 "disbursement" for a "MAAC Brokerage fee plus disbursements", which is also described as an "estimate". How were these sums arrived at? How were they disbursements when they had not been paid? Why is the Member taking the money when he has not yet paid these "disbursements"?

Further, there is also a five-page letter dated April 5, 1993. This document is supposed to have been contemporaneous to the Statement of Account of the same date. If the Member's area of responsibility had already been completed, and the funds taken, what purpose would this five-page letter serve? The letter sets out the hourly rate and how the fees are going to be charged. It also states on page 2, at the end of the first paragraph: "we are not able at this time to provide an estimate of our complete fee in the matter." That is not true, the Member has just billed the client. Meanwhile, the last four pages of this letter do not bear the date of April 5, 1993. Those four pages all bear the date "ARRIL 22, 1993". The LSA counsel argued that this document is a sham. The document invites the signature of the client A.S. and the return of the signed copy to the Member. No signed copy is in evidence. Upon examination of the evidence, we are driven to the same conclusion as the Law Society counsel: that the document is a sham.

We also find that the $10,000 received by the Member should have been put into trust. The first cheque (NSF) was, however the later wire transfer was not put into trust. We find that the evidence established that the funds were should have been held in trust, and used in completion of the purchase and sale of the property. When the original cheque was sent, A.S. endorsed upon the bottom: "IN TRUST for property". (Tab 24) Additionally, in a letter dated April 7, 1993, Martin McDonald advised Winnipeg lawyer A.M., solicitor for the "S" (the vendor), that: "My client has placed the sum of Ten Thousand Dollars with me in trust as the deposit which I undertake to hold as the deposit in trust for the Vendor and the Purchaser pursuant to the terms of the Interim Agreement to purchase and sell as amended."

The Member never sought release from this undertaking. There are no documents that suggest that a request was ever made to A.M. to relieve the Member from this responsibility. Further, the documentation sent at that time supported the use of the sum as part of the consideration to be used in the transaction. A fax cover sheet dated April 5, 1993, from Martin McDonald to S.R. at "S", included a copy of an Interim Agreement to Purchase and Sell. Therein MACC offered to purchase the Property for $260,000. The $10,000 was included as consideration in that "Interim Agreement" and

was described by the Member as follows: "Cheque Deposit herewith as an indication of my good faith in making this offer to be held in trust for Vendor and the purchaser." The replacement wire transfer of $10,000 should not have been treated differently. The conduct of the member leads us to the conclusion that the Member chose not to put the money into trust because he intended to convert it to his own uses.

The Member's explanation for treating the wire transfer differently than the NSF cheque has been varied. He told the Deputy Secretary that B.B. (from MACC) had told him not to put it in trust, because the entire deposit money would be coming from mortgage funds. He told the panel in testimony that he had been informed by S.R. that there was no need to put it into trust because there was a possibility that the mortgagors would redeem the mortgage. The two different explanations were as follows:

1. On January 31, 1995, Martin McDonald was interviewed by, the Deputy Secretary of the Law Society, J.M. Mr. McDonald advised the Deputy Secretary that, while the first cheque (NSF) was being held in trust, the second $10,000 wire transfer was not to be held in trust. Mr. McDonald told the Deputy Secretary that the reason why the second $10,000 was not put in trust was because of B.B.'s advice and direction. The Member said that B.B. had indicated that the entire deposit money would be coming from mortgage funds advanced through MACC and so there was no need to worry about the deposit any more.
2. The Member's testimony was to the effect that the reason that he did not put the $10,000 wire transfer into trust, was because he had been informed by S.R. that there was no need to put it into trust because there was a definite possibility that the mortgagors would redeem the mortgage.

The two explanations are entirely different stories. They are completely different explanations or justifications for the same conduct. There is no independent evidence to corroborate either version. Neither version is credible. Neither version provides the Member with justification for his use of the money wired from the client A.S.

In the first version, which was given to the Deputy Secretary, even if B.B. had told the Member not to put the funds in trust, B.B. was not in a position to direct the Member on what to do with the money. It was not B.B.'s money it was the property of A.S. Additionally, having advised both S.R. and A.M. that the money would be held in trust, the Member would have to seek their consent for the withdrawal of his undertaking. He did not do this.

In the second version, which was given to the Panel, the Member would still be required to seek the consent of lawyer A.M. to allow him to withdraw from his undertaking to hold the money in trust. He did not do this. The Member's evidence on this point is inconsistent, unsupported by the evidence before the Hearing Panel, and in the view of the Panel has been given for the purpose of justifying what was a misappropriation of the

funds from his client A.S.

The Member's evidence, given the aforementioned analysis, is rejected in its entirety, on the A.S. matter. He has contrived documents, and been untruthful in his testimony and his statement to the Law Society. What he has said or written in this matter is not worthy of belief.

The Panel finds that the Law Society has established through the evidence, applying a standard that approaches proof beyond a reasonable doubt, that Martin McDonald misappropriated funds held in trust for the client A.S. and that such conduct is conduct deserving of sanction. The Member received a cheque deposit of $10,000 to be held in trust for the vendor and purchaser. The Member did not do so. The Member applied the "replacement" deposit of $10,000 to his own account in payment of purported fees. The Panel finds that the fees had not yet been earned and that the funds should have been held in trust as per the Member's undertaking.

The Panel also finds that the Law Society has discharge its onus and has established on a balance of probabilities that the Member failed to serve his client in a diligent conscientious and efficient manner and that such conduct is conduct deserving of sanction. The Panel finds that citation #12 has been proven. Clearly, given the findings on citation #16 above, particular 12.1.3 has been made out, since the conduct alleged and proven in citation #16 has established the Member's failure to serve A.S. in a diligent, conscientious and efficient manner.

In respect of particular 12.1.1, the Panel finds that the Law Society has discharged its onus to establish this citation, on a balance of probabilities, that the Member failed to keep A.S reasonably informed as to the status of the file. This includes the Member's failure to advise A.S. in a reasonable period of time that the proposed sale of the property had been aborted on or about May 4, 1993. The Panel finds that the evidence establishes that A.S. found out about the redemption from the trust company, not from the Member. The Member confirmed that fact during cross-examination at pp. 7662-3. Further, in Exhibit 198, Section H, is the transcript of an interview on January 31, 1995 between the Deputy Secretary J.M. and the Member. At page 15 of that transcript the Member acknowledges that he was not contacting his client A.S. directly but was assuming that his other client B.B. was passing on the Member's comments to A.S. When it was suggested to the Member that because of A.S's May 13th fax (tab 40) the Member should have known that the client A.S. was not getting the information, the Member replied: "I thought everyone knew on May 11th the deal was over". This is confirmation that the Member was not informing or advising his client A.S. and did not inform him that the sale of the property had been aborted on May 4, 1993.

The Panel also finds that the Law Society has discharged its onus to establish this citation, on a balance of probabilities, that the Member failed to promptly respond to the

telephone calls and faxes of A.S. and/or his lawyer, as is particularized in citation #12.1.2. The position of the Member was that he denied that he failed to respond to his client, or keep him informed. The Member alleged that there were many instances of communication between he and the client A.S. The member claimed that there were no records of telephone calls from him to his client, because A.S. was always calling B.B. back. B.B. would then call the Member into his office and relate what was occurring. The Member relied upon the telephone bills of B.B. that supported frequent contact between B.B. and A.S.

A.S. meanwhile testified that the first time that he spoke to Martin McDonald was on April 23rd. The Member McDonald maintained that there had been constant communication, although there was more between B.B. and A.S. than there was with him. However, the Member's telephone bill supports the evidence of A.S. on this point. The telephone bill is in tab 237. The first call relating to client A.S. is billed for April 23rd. The call relates to a number of (***) ***-****, which is A.S.'s number. When A.S. made his statement that the first call was on April 23rd, he could not have had access to the Member's phone bill. We find corroboration for A.S.'s evidence in the phone records, and find as a fact that the first conversation between A.S. and the Member occurred on April 23, 1993.

The Member claimed at p.14 of Section H that A.S. wasn't communicating with him, that A.S. would "always" go through B.B. This position is in contradiction with the Member's whole position that he had concluded his "part" of the deal, being the purchase [not the sale] agreement, by April 5th (the date of the Statement of Account). At p. 7624 line 17 through p.7625 line 10 of the transcript, the Member stated that the funds provided by A.S. were clearly for the work that he had done up until April 7th, and that: "…nothing further was required of me or my firm" and, "…nothing further was required because my services had been rendered, and that's what I understood".

If, as the Member claimed, that his services had been rendered and that it was clear that nothing further was required of him, then why was he even attempting to communicate with A.S.? The Member stated at p. 15 of Section H that he couldn't communicate with A.S., that he wouldn't answer the Members calls and the Member would leave messages on A.S.'s answering machine and would get messages back. Why would the Member be doing this if nothing further was required of him and his services had been rendered? And, why would the Member be continuing to be involved with his other "client" B.B. who the Member said he believed was passing the Member's information on to A.S.? The answer to these questions is that the Member has given totally inconsistent answers at different times in this matter. We reject the Member's testimony because of the inconsistent versions as well as for the reasons given in respect of his credibility on citation #16. It is clear to the Panel, and we find as a fact that the Member had not concluded his part of the deal, and that he continued to be the lawyer for A.S. Further, while continuing to attempt to complete the purchase and sale, we find that he failed to

promptly respond to the telephone calls and faxes of A.S.

The Member position was that his client A.S. was not truthful, and therefore his testimony was not credible or worthy of any weight. Having reviewed much of the evidence in some detail at this point, our reasons and findings confirm that the evidence of A.S. has been corroborated on a number of material points by the documentary evidence. We also find that the evidence of A.S., as it relates to the specific citations alleged is credible. There were a number of points that were not directly relevant to the citations and were the subject of argument by the Member. Unlike the Member's evidence, there was nothing that arose in the course of the client A.S.'s evidence to cause us to consider rejection of his testimony.

The Member's position was that the client A.S. had a motive to lie in giving his evidence. The Member argued that the advertisement taken out in the Winnipeg Free Press inviting persons who had complaints about the Member, to contact A.S., was evidence of the client's bias, prejudice, and malice. Further, the Member argued that the client A.S. had only applied for Assurance Fund compensation from the Law Society after he had given testimony in the hearing. This, it was argued, indicated that the client's motive had morphed into a pecuniary one. The Member also claimed that the client A.S. had threatened to put a bomb in the Member's car. Further, the Member claimed that the client was trying to "back-door" his landlord, by failing to pay the rent owed to the landlord, and then trying to buy the same property, through B.B. in Calgary, once the landlords were in arrears. The Member claimed that A.S. had hidden from him the fact that he was a tenant of the property. The Member claimed that this was in violation of the agreement with "S" which spelled out that A.S. did not have a relationship with P.C. and V.D.

With respect to the Member's position on the credibility of A.S., we do not accept his argument. With respect to the ad in the Winnipeg Free Press it does not suggest a type of bias, prejudice, or malice that would cause us to reject the testimony of A.S. Nor did we find or observe such conduct when the client A.S. was testifying. What the ad does, is that it demonstrates that the client A.S. felt aggrieved by the conduct of the Member, and that he suspected others had experienced similar difficulties and he was trying to find out who else had been treated in this fashion. It may have been an unusual tactic by A.S. but the taking out of the ad itself, given the context of the situation, and the conduct of the Member, is understandable. Any enmity manifested by A.S. arose from the nature of the conduct of the Member, and there was no credible evidence that A.S.'s feelings affected his testimony in any respect. As for the timing of the Assurance Fund application, there was no evidence to suggest that this application fueled or had any affect on A.S.'s testimony at all. This was merely an unsubstantiated suggestion by the Member. As for the allegation of a "bomb threat", there is no evidence to support this bald allegation raised during the Member's testimony. Respecting the allegation that A.S. was trying to "back door" his landlord, whether this was happening or not, the evidence clearly established that the Member was guilty of citations 16 and 12. Even if the client A.S. did

not have "clean hands", or even if he had not disclosed to the Member that he was a tenant of the property in foreclosure, those factors could not erode the case against the Member, nor could it affect the Member's lack of credibility.

9. THE LAW SOCIETY COMPLAINT RE: CLIENT W.D.Y.

20. IT IS ALLEGED that you did conduct yourself in a manner which tends to bring the profession into disrepute in that you solicited from your client, a general waiver of the client's right to taxation and to an accounting of funds received by yourself, and that such conduct is conduct deserving of sanction.

> ***20.1 Particulars are that in or about February, 1996, you did request and W.D.Y. did execute a Waiver wherein he did, inter alia, waive his right to a taxation of certain accounts dated November 30, 1995, December 22, 1995, January 12, 1996 and January 31, 1996 as well his right to require you to appear at the taxation to justify the said accounts or to require an accounting in respect of any monies received from W.D.Y.***

A. The Circumstances of the Complaint

W.D.Y. was a client of the Member. The services provided by the Member had resulted in the issuance of four statements of account dated November 30, 1995, December 22, 1995, January 12, 1996, and January 31, 1996, which were unpaid. The client stopped using the Member's services and retained lawyers other than the Member to assist him with his legal matters. The client W.D.Y. decided to return to the Member, and to again retain the Member's services. The Member sought and obtained a waiver from the client of his right to tax the four aforementioned prior Statements of Account. The waiver did not extend to any subsequent accounts that may be rendered by the Member in continuing to act for the client W.D.Y. On May 6, 1996 the client executed a statutory declaration wherein he stated that he was completely satisfied with the services rendered and with the accounts rendered on the four above-noted dates. He also stated within the document, that he was giving up any present, or future rights, to have the four accounts taxed, and further, that the mortgage he had granted to the Member on the client's home in Airdrie is a binding mortgage. This Statutory Declaration was made before a lawyer who is a member of the Law Society of Alberta. That lawyer had advised the client that a lawyer's right to ask a client or former client to give up the right to tax any account is questionable. The Statutory Declaration forms part of Exhibit 9 in this hearing.

B. The Position of the Law Society

The Law Society's position was that it was conduct deserving of sanction to have the Member's client execute a general waiver of his right to tax a Member's accounts. The LSA relied upon Rule 614 of the Alberta Rules of Court, which states as follows:

"**614. The charges of barristers and solicitors for services performed by them are, notwithstanding any agreement to the contrary, subject to taxation as provided by these Rules."**

The Law Society takes the position that a Member should not have a client sign something that would not be legally binding as the client may not realize that it is of no force and effect. The Law Society also took the position that while a lawyer may wish to have the comfort of knowing that his prior accounts cannot be taxed when he undertakes a new retainer for a client, he is not allowed to do so. The client has the right to tax a lawyer's account and that right may not be done away with by any agreement. The Law Society took the position that such is the case regardless of whether the client has failed to pay any number of lawyers previously or whether he has taxed a Member's accounts before.

C. The Position of the Member

The client W.D.Y., had indicated that he had fired the Member because the client's father had been informed by someone at the Law Society of Alberta that the Member was suspended. This was not the case. Subsequently, when the client learned that the Member was not suspended he wanted to rehire the Member. The Member had outstanding accounts and there were a number of other lawyers who had provided services to W.D.Y. and they too were unpaid. So, the Member drafted a waiver that was based upon the document used by the counsel in the *Helmut Buxbaum* case. The member sent this waiver to the LSA. This was then referred to the Professional Responsibility Committee of the Law Society. The Member testified that, after receiving the complaint from the Law Society respecting this matter, he advised Mr. Y. to obtain independent legal advice. Mr.Y. did so and that attendance and advice is documented in the statutory declaration that is contained in Exhibit 9 herein. The member maintained that this was a situation where a client, who wanted to be a client again, was resolving any potential issues with respect to those unpaid solicitor/client accounts and that the member was only receiving security. The Member maintains that this is not conduct deserving of sanction.

D. The Decision of the Panel

The Panel finds that the Law Society has discharged its onus to establish this citation on a balance of probabilities. The Panel finds that the Member requested and obtained a waiver from his client respecting the Client's right to tax the Member's accounts, as well as the client's right to require the Member to appear at the taxation to justify the accounts or provide an accounting. Rule 614 of the Rules of Court provides that a lawyer's charges for services are always subject to taxation, notwithstanding any agreements to the contrary. The reason for this rule is that a client must always know that he can have the right to challenge any lawyer's charges for services. The Rule exists to ensure that lawyer's do not execute agreements to remove that right. Even if such agreements would not be legally enforceable, the act of securing this agreement will leave the client with the impression that he no longer has that right or he has agreed not to exercise it. To execute

such an agreement in the face of this rule is wrong and breaches the rule and the rationale and necessity for having the rule. Clients must know, that they have an absolute right to challenge a lawyer's charges. The Member in this case knew of the existence of the Rule. He proceeded in any event. It is the decision of the Panel that this securing of a waiver in the face of a right that cannot be waived by agreement, was an act which tended to bring the profession into disrepute, and is conduct deserving of sanction.

However, the Panel recognizes that the Member was in a very difficult position. Having unpaid accounts, a client that wished to retain him with respect to further matters, and the knowledge that other lawyers accounts had gone unpaid. The Member did have some recourse to the *Buxbaum* case and drafted a waiver based upon the one employed in Ontario. However, Rule 614 of the *Alberta Rules of Court* is explicit. The circumstances are sympathetic and the Panel is of the view that while the rule is inviolate, the conduct here merits the smallest of sanctions.

10. THE LAW SOCIETY AUDIT COMPLAINTS RE: CLIENT J.A. AND THE ESTATE OF W.J.F.

21. IT IS ALLEGED that you deceived or attempted to deceive your client, J.A., in that you stated in a retainer letter to your client dated September 2nd, 1994, that time records would be kept when time records were not kept and had not been kept by you for an extensive period of time and that such conduct is conduct deserving of sanction;

22. IT IS ALLEGED that you misappropriated funds in relation to the estate of W.J.F. as the work or service to be performed was not completed until April 26, 1996, and the funds were deposited to general on October 4, 1994, and that such conduct is conduct deserving of sanction;

A. The Circumstances of the Complaint

Mr. W.F. had passed away and Mr. J.A. was the executor of the estate. The Member had assisted J.A. and W.F., on an earlier occasion, with legal services, in relation to a buy-sell agreement. J.A., as executor, retained the Member to assist him with legal services in respect of the estate. Exhibit 205 Tab 7 is a letter signed by Mr. J.A. and dated October 3, 1994. J.A. went to see the Member and brought in this letter and a cheque for $9,000. Exhibit 205 Tab 2, which is the fee letter, states, on the second page in the third full paragraph: "It is this firm's policy to require a general retainer in the amount of $9,000 in cash or by cheque." At Tab 1, the "New Matter Report" states that there would be a time rate of $250 per hour and a new general retainer of $9,000. Exhibit 205 Tab 16 contains J.A.'s letter wherein he states that he has made three requests for a detailed invoice showing where and how the $9,000 was spent, and he hasn't received same. Almost six months later, the client J.A. receives a detailed statement of account (Tab 17).

This account does not provide an hourly breakdown in respect of the work performed. The $9000 retainer had all been taken by October 3, 1994 and the Statement of Account reflecting that is dated October 4th. The Client J.A. retained another lawyer and an agreement was reached with the Member to refund $1100 to the client.

B. The Position of the Law Society

In view of the signed letter contained in Exhibit 205 at Tab 2, it was the Law Society's position that the client J.A. knowingly was providing $9,000 to Mr. McDonald to cover legal fees that may be incurred in the provision of his services on the W.F. estate matters. Further, the client J.A. understood that he was going to get a monthly bill and the hourly amounts worked would be reduced from the $9,000. The Law Society pointed to Tab 2 on Page 2 as written confirmation of that understanding evidenced from the client. Further, the "New Matter Report" is argued by the Law Society to support J.A.'s understanding, because this document indicates that there would be a time rate of $250 per hour, and a new general retainer of $9,000.

The Law Society maintains that Mr. McDonald had taken all the money without doing the work. LSA counsel points to the fact that there never was a detailed accounting made to the client J.A. with an hourly breakdown as per their agreement. Further, it is not until almost 6 months after J.A.'s letter, which requested a detailed breakdown, that the Member actually provides a detailed statement. (Tab 17)

C. The Position of the Member

The Member acknowledged that the retainer letter stated that time records would be kept. He further acknowledged that he did not keep time records. The Member's position was that there was a fixed fee agreement entered into between the Member and the client J.A. After this negotiation, an all-inclusive fee of $9,000 was settled upon. The Member's position was that it was a fixed fee agreement entered into by both parties. Therefore there was no requirement to keep time records, and correspondingly, no conduct deserving of sanction. The Member maintained that he acted *bona fides*, and that he fully intended to complete the legal work, had not his engagement by the client been terminated prematurely. The Member remitted the agreed settlement amount because the work had not been completed. The Member's position was that the Law Society requirements respecting the use of general retainers, and their transference to a member's general account, were not as rigidly defined in 1994 as they are now. He submitted that these rules were not in place back then. The Member maintained that he was entitled to take the funds before the work was performed, and that his conduct was not deserving of sanction.

D. The Decision of the Panel

We find that the Law Society has met the necessary onus on these two citations. The evidence has established, on a standard approaching proof beyond a reasonable doubt, that the Member deceived or attempted to deceive his client J.A. in that he stated in a

retainer letter to his client dated September 2nd, 1994, that time records would be kept, when time records were not kept, and had not been kept by him for an extensive period of time, and that such conduct is deserving of sanction. The evidence has also established, on a standard approaching proof beyond a reasonable doubt, that the Member misappropriated funds in relation to the estate of W.J.F. as the work or service to be performed was not completed until April 26, 1996 and the funds were deposited to general on October 4, 1994, and that such conduct is conduct deserving of sanction.

Citation 21 alleges that the Member deceived or attempted to deceive his client by stating in his retainer letter that time records would be kept when they were not. Citation 22 alleges that the Member misappropriated funds because he transferred the funds to his general account long before the work was completed.

The Member had this to say in his final argument (at p. 7874):

> "It is true that the retainer letter states the time records would be kept. It is true that the defendant member had not kept time records since - - in fact, it was since March of 1993, when his legal assistant left, just prior to Laurel Zacharias coming on. That was the last time the defendant member had kept time records. And that they had not been kept since that time. That's admitted."

The Member acknowledged that the evidence established that he had taken the funds (at p. 7877):

> "…as far as the ultimate fee that was paid, which was the 9,000 net of the $1100 which was rebated to him by the defendant member, …"

The Member also acknowledged, in final argument, that the evidence established that he had not completed the work, and that it was a long time before it was completed (at p. 7877):

> "…the defendant member was acting *bona fides*, fully intending to complete the work; and had his engagement not been terminated by Mr. A. would have completed the work in the normal course.

Now, the work was subsequently completed after the engagement was terminated on or about June of 1995. It took approximately another year before his new solicitors completed the work. "

The issue is, whether there was a fixed fee agreement entered into between the Member and the client J.A. for, an all-inclusive fee of $9,000? Did that agreement mean that there

was no requirement to keep time records, and that the Member was allowed to take the funds before performing the work?

In determining whether this offence has been proven, we have considered that the two citations have alleged a deceit or an attempt to deceive, and a misappropriation of funds. As was previously discussed herein, in our view the Law Society bears the onus of proof, and the standard, to which they must prove the citations, approaches that of proof beyond a reasonable doubt, and we have applied that onus of proof to these citations.

Upon a thorough review of the evidence, the Panel finds that the agreement between the Member and the client J.A. was that the Member was entitled to bill out his services at a rate of $250 an hour, and that time records would be kept by the Member. Further, we find that the client was to get a monthly bill, which would be applied to the $9000 held in trust. This was certainly the client's understanding, and would, be the understanding of anyone who was in a similar position to himself. We do not accept the Member's evidence that there was a fixed fee agreement entered into by the two parties. Such an agreement would fly in the face of the documentary evidence and the conduct of the parties. The New Matter report stated that there would be a time rate of $250 per hour. The retainer letter stated that time records would be kept. Records confirmed that $9000 was provided. This documentary evidence is only consistent with the evidence of the client J.A. He understood that he was going to get a monthly bill delineating the work, charged at an hourly rate, which would be taken from the retainer provided. When that didn't happen, the client understandably sent a letter, which referred to his three requests for a detailed invoice regarding how the money was spent. All of the client's understanding and actions are consistent with the evidence as to the existence of an hourly rate, verified by time records and a monthly account, to be applied to a retainer provided. We find that the documentary evidence establishes the arrangement between the two parties and is corroborated by the evidence of A.S.

The Member contended that there was subsequent oral negotiation and agreement, which completely changed the nature of the terms. The Panel observed that if such an oral agreement had been arrived at, we would have expected the lawyer to have provided these new terms in writing to the client and have obtained the client's written confirmation. Such was not the case here. Additionally, a lawyer in such a situation would want to ensure that the client was aware that the former terms were no longer applicable and would ensure that any potential ambiguity was addressed by clear written instructions or advice. Such was not the case here. Further, had such an oral agreement been negotiated and concluded one would expect that the client would have some recollection of it. Such was not the case here. One would not expect a client to write a letter asking for detailed accounts, if the agreement had been changed to the extent that these accounts were no longer required. Further, why would the client J.A. agree to allow the $9000 retainer to be paid to Mr. McDonald before he performed the work? Why is there no written, signed record of this total alteration of the original terms? Why

would the member create and keep records, which did not reflect what he claimed was the actual agreement, and yet he did not create and keep any records to support the claim that the client endorsed the new agreement? Quite simply, the reason that there were no documents was because there had not in fact been any subsequent oral agreement changing the terms. We find that the Member lied.

The Member maintained that, with respect to the $9000 retainer that J.A had provided, the Member was at liberty to pay himself, and absent any lack of bona fides, as long as he intended to do the work, he was entitled to pay himself. This sum had been referred to as a "general retainer". The Member was being cross-examined respecting the use of the words "retainer" and "general retainer". At p. 7670 he replied:

> "As I indicated to you there are many different meanings general retainer, retainer has, over the years, developed many general meanings. One of the meanings is the meaning I explained this morning. I thought at the time I was entitled to enter into a fixed-fee agreement where I was agreeing not only to do work but to take my staff and myself through a series of courses, educate ourselves as to the estate administration new rules, and I entered into a fixed-fee agreement. Mr. A. was paying me up front for the work that I was going to do, which I intended to do for him."

Later Mr. McDonald is asked:

> "**Q**. So when you put down "general retainer," when you show general retainer of a certain amount in your new matter report, that may mean something that you don't have to do any work for in the future, or it may mean that it's a fixed fee?
> **A**. There are a number of different meanings. At the time I believe that my practice was in accordance with the policy of the Law Society as set out in the fee brochure, which I referred to you, and which I will introduce into evidence in re-examination. In other words, that I could enter into an agreement where I, in fact, was undertaking to educate myself and my staff; I took two Legal Education Society of Alberta courses, I sent Mr. Heighes to a Legal Education Society of Alberta course, I purchased software and various other materials on estate administration, none of which was charged to Mr. Algeo. We did that to ensure we would be proceeding under the new estate administration rules which weren't in effect on October 3rd, 1994, but which we knew were coming into effect.
> **Q**. Madame Reporter, can you read back that question, please?
> **[So when you put down "general retainer," when you show general retainer of a certain amount in your new matter report, that may mean something that you don't have to do any work for in the future, or it may mean that it's a fixed fee?]**

> **A.** It has a meaning appropriate to the circumstances of the case. I believe I've explained to you the circumstances concerning Mr. A. There are many different meanings of the term "retainer" over the years. This was the agreement Mr. A. and I reached, that I would educate myself and my staff in the meaning and with respect to the forms and precedents under the new estate administration rules, which were to come into effect so that the probate would be done under those rules and not the existing rules. So that's what I was agreeing to do, and I did it.
> **Q.** How is a client to know which one of the meanings you have picked?
> **A.** Mr. A. and I had an agreement. He wanted a fixed-fee agreement. He didn't want to be charged on a hourly basis. He wanted a bottom line, including disbursements and GST. So he said to me how much is it globally for the entire amount of the work you need to do, and I'm not interested in knowing how much time you have, how many courses you have to take, what forms you have to buy, whether or not the new estate administration rules are done, I'm not interested in that, Mr. McDonald. I want to know globally what it's going to cost me for this work, and I agreed to enter into a fixed-fee agreement of $9,000 with him, including GST, and I absorbed all the disbursements for everything we did."

In summary, Mr. McDonald could not provide an answer to the question of what "general retainer" meant when it was in his documents. His responses were dilatory and evasive. He was prevaricating for the purpose of providing enough smoke to conceal the truth about his use of the term "general retainer". When Mr. McDonald used the term "general retainer", he used it to mean whatever definition suited his purposes.

Counsel for the Law Society aptly described the Member's use of the term "general retainer" in the closing argument as follows (p. 7804):

> "A note, what does the member mean by general retainer? We're not sure, but it brings to mind a phrase that Lewis Carroll used in Through the Looking Glass. And I will quote from it, "When I use a word, Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean, not neither more nor less." And that's what retainer means to Mr. McDonald, whatever he chooses it to mean. And which is kind of problematic, especially when he doesn't give that meaning to the client, the layperson who is about to obtain services from Mr. McDonald."

We find that the use of the term "general retainer" does not in any measure, convey to a client, that the Member was at liberty to pay himself, as long as he intended to do the work. The Member strained to provide meanings to the term, which would encompass his conduct. He failed.

We also find that the Member's alleged negotiation and agreement with the client did not occur. Such a suggestion is in direct contradiction to the documents, conduct of the parties, and testimony of the client. We found Mr. A. to be a reliable and truthful witness. His version of events was internally consistent, logical, and was in accord with the documentary evidence. We did not find the Member to be reliable or truthful. His evidence was inconsistent or in contradiction with the documentary evidence. He deviated from the truth. The Members conduct was purposeful and performed with the intention of deceiving the client and misappropriating the funds to his own personal use.

We find that the Law Society has met the necessary onus on these two citations. The evidence has established, on a standard approaching proof beyond a reasonable doubt, that the Member deceived or attempted to deceive his client J.A. in that he stated in a retainer letter to his client dated September 2nd, 1994, that time records would be kept, when time records were not kept, and had not been kept by him for an extensive period of time, and that such conduct is deserving of sanction. The evidence has also established, on a standard approaching proof beyond a reasonable doubt, that the Member misappropriated funds in relation to the estate of W.J.F. as the work or service to be performed was not completed until April 26, 1996 and the funds were deposited to general on October 4, 1994, and that such conduct is conduct deserving of sanction.

There was another issue that arose during the course of the hearing, which merits inclusion. That issue involved Mr. McDonald's questioning of witnesses surrounding the length of time he allegedly spent with the client J.A. on the first day's meeting. At page 3557 of the transcript, Mr. McDonald was questioning the Law Society Auditor P.P. Mr. McDonald was questioning the Auditor about the validity of McDonald's fees, and said to the Auditor: "You didn't know, for example, that we had a meeting from 9:00 until 3:00 for seven hours". Later in these proceedings, J.A. testified. J.A. was also questioned by the Member about the duration of this meeting. At p. 6246, witness J.A. replied, to the effect that, no, the meeting had not lasted six hours. Then, at p.6261 Mr. McDonald put to J.A how did he know that he didn't stay for six hours? The Member was suggesting, by the nature and manner of the question that this was a six-hour meeting, challenging J.A. as to how he knew that it wasn't that long. . At page 6262, J.A.'s reply is recorded: "I am certain that we didn't spend from 9:00 until 3:00 together." Mr. J.A.'s answer was that the reason that he knew it was not 6 hours, was, that he would have to have had lunch. Mr. McDonald then changes the nature of his suggestion of facts in the question to: "Sir, I suggest to you that you returned to the defendant member's office in the afternoon…" Therefore, Mr. McDonald went from suggesting that there was a six-hour meeting to now suggesting that J.A. had left (for lunch) and then returned. This was not a question seeking information. It was an assertion to the Law Society Auditor, which was intended to have the effect of justifying that the work on the file, and the billing, were proper. As Law Society counsel argued, in order for any counsel to make such an assertion, he has to, at the very least have a good faith basis for doing so. We agree. Mr. McDonald did not have a good faith basis to

make that assertion. However, this issue and our finding thereon did not impact on either our finding on this citation or upon the sanctioning process. We have not considered this issue in respect of our determination on either.

11. THE GST COMPLAINT

28. IT IS ALLEGED that you misappropriated funds received from clients in payment of the GST and which funds were not remitted, and that such conduct is conduct deserving of sanction;

A. The Circumstances of the Complaint

The Member failed to file any GST returns from May 1991 to October 1993. On May 29, 1995, the Members accountant sent in ten completed GST returns, which revealed a balance owing of $10,968.22. The Member had failed to file the returns and had failed to remit the funds. The funds which he had collected from clients, but had failed to remit, were used by the Member in his practice. Exhibit 224 contains documents relevant to this citation.

B. The Position of the Law Society

The Law Society's position was that the Member had received the GST funds for a period of years from his clients and did not transmit it to the government. LSA counsel acknowledged that the Member was not required to keep the money in trust, but he was required to pay it, when due to the government. It was argued that it was not the Member's money to use, and yet he did use it – he was using money that was not his. The counsel for the Law Society defined the issue as the determination of whether this conduct amounts to misappropriation in the circumstances.

C. The Position of the Member

The Member admitted that he had failed to file ten quarterly returns and had owed a debt of about $10,000 to the Federal Government. He was charged and pled guilty. The Member relied upon the *Mullen* case, which was a decision of a Hearing Panel of the Law Society dated October 31, 2005. The Member acknowledged that he was prosecuted, and that there was not a prosecution in the *Mullen* case. The Member acknowledged in questioning from the Panel that when you are delinquent in your GST payments, you will get an order or direction from the tax department to comply within 30 days, and if you don't comply then you are then charged.

D. The Decision of the Panel

The Law Society has alleged "misappropriation" of funds received from clients. This Panel has considered the use of that term in Citation # 16 and have reviewed the requirement of the Law Society, which bears the burden of proof when it alleges something in the nature of "misappropriation" of funds. This allegation requires a

higher degree of probability than proof on a balance of probabilities. The degree depends upon the subject matter, which in this instance involves the misappropriation of a client's funds. Therefore, we will be applying a standard of proof that approaches that of the criminal standard: proof beyond a reasonable doubt. We need not consider whether the onus is shifted to the Member by virtue of s. 67 of the *Legal Profession* Act, because as LSA counsel acknowledged earlier, the LSA bears the burden. Further, members are not required to retain GST funds in their trust accounts, and therefore this onus may not be engaged in any event.

In the *Mullen* case, the Panel examined the requisite conduct necessary to support a conversion or misappropriation of trust funds deserving of sanction. In order to find a misappropriation, that Panel held that it would be necessary to find an element of dishonesty. They also held that there would have to be a finding of knowledge on the part of the lawyer concerned that at the time that the funds were used, the entitlement of the claimant was wrongfully denied. However, the Panel did not decide whether a member's failure to keep GST current was a breach of Chapter 8, Rule 2 of the *Code of Professional Conduct.* What they did decide was, that in the *Mullen* case, his conduct was not conduct deserving of sanction.

Mr. McDonalds situation is similar in some respects. The failure to remit occurred over a period of time and was also in the general area of a $10,000 failure. One distinguishing feature is that in Mr. McDonald's case he was also prosecuted and fined for his failure to remit. This prosecution proceeded after an order or direction was served on him, which the Member did not comply with. If the Member had been charged with his failure to obey the order or direction of the tax department to remit monies collected by the Member and owed to them, our decision may have been different.

In the Mullen case, a Law Society Panel held that the member was not guilty of conduct deserving of sanction. The decision in the *Mullen* case was applied to this hearing, and the conduct of the defendant Member was found not to be deserving of sanction.

12. THE M.H. COMPLAINT

IT IS ALLEGED that you failed to serve your client, M.H., in a diligent, conscientious, and efficient manner, and that such conduct is conduct deserving of sanction;

A. The Circumstances of the Complaint

The client M.H., a U of C student, retained the defendant Member to represent him in a lawsuit against J.W.P. and a Hotel respecting an incident in which the client M.H. had been assaulted with a weapon and had sustained injuries. During the course of acting for

the client M.H., the defendant member withdrew from his trust account the sum of approximately $1000 as a disbursement for a transcript of the criminal proceedings. The Defendant Member's office had requested a transcript from the Court Reporters office, but then followed that up with a letter requesting a quote on the estimated cost of such a transcript. The transcript had not been obtained nor had the Court Reporters office been forwarded any funds at the time when the Defendant Member removed the funds from trust. The removal, by the Member, of these funds from trust, was noted as a "disbursement", in the issued Statement of Account. Eventually, due to dissatisfaction with the defendant Member, the client had the file transferred to another lawyer and the claim was ultimately settled. Subsequently, the client submitted a complaint to the Law Society respecting a number of allegations concerning the conduct of the Member. Other complaints, encompassed by this citation, involved the alleged conduct and representations of the Member when he and the client encountered each other at a local bar; an allegation of failing to send statements of accounts to the client; and lastly, a complaint that the Member pressured the client M.H. into making a telephone call to the Law Society respecting the Member.

B. The Position of the Law Society

Counsel for the Law Society advised the Panel that the only citation that had been made out by the evidence, in relation to the complaints by M.H, were the allegations contained within citation 33. On this matter, he submitted that the onus was on the Law Society to establish the conduct on a balance of probabilities. The LSA counsel particularized, within this citation, four matters of conduct by the Member, which he submitted established this citation. They were: the nature of an encounter between the two parties at Senor Frog's bar, a complaint by the client M.H. that he did not receive any statements of accounts, the complaint respecting the request for transcripts, and a claim by M.H. that he was acting under duress from the Member when M.H. made a call to the Law Society. LSA counsel pointed out that these complaints were basically a credibility determination between the two opposing accounts given by M.H. and the Member.

C. The Position of the Member

The Member relied upon his own testimony respecting the meeting at a local bar and submitted that M.H.'s recollection was suspect due to the consumption of alcohol. The Member submitted that M.H.'s *vive voce* testimony was in contradiction to the documentary evidence, respecting matters touching upon the statements of account. The Member admitted that he rendered an account for $1000 for trial transcripts and suggested that the problem was really only a matter of the delay in obtaining the transcripts, which was attributable to his legal assistant's inability to secure them by sending the two letters submitted in evidence. The Member also contended that M.H. was not the subject of any pressure or conduct deserving of sanction by the Member, in respect of the telephone call made by the client to the Law Society.

D. The Decision of the Panel

The Panel found that it was not satisfied, on a balance of probabilities, that the citation had been made out in respect of the allegations concerning the conduct of the Member at Senor Frog's bar, the providing of statements of accounts, or the claim of duress respecting a telephone call to the Law Society by the client M.H. Each of these three aspects of conduct, embraced by this citation, was a matter of conflicting testimony between the Member and the client. The evidence as a whole failed to establish on a balance of probabilities that the conduct of the Member was deserving of sanction.

However, in respect of the allegation concerning the transfer of $1000 to the Member's general account, in respect of the "disbursement" for the trial transcript, we find on a balance of probabilities that the Law Society has discharged its onus to prove that the Member failed to serve his client in a diligent, conscientious, and efficient manner and that such conduct is conduct deserving of sanction. As was pointed out in the course of the cross-examination of the Member, and as was evident on the face of the documentary evidence, the Member's office had requested a transcript from the Court Reporters' office in its first letter, but in a subsequent letter, asked for an estimate. This course of action meant that the transcript was not ordered, because the original order was replaced by a request for an estimate of the cost first. It is indisputable that the funds were taken from trust respecting the proposed amount for the transcript. The precise cost of the transcript was unknown at the time the funds were taken, and the funds removed from trust were not sent to the Court Reporters' office but were transferred to the General Account of the Member. This conduct did not amount to the payment of a "disbursement" as had been represented in the statement of account sent to the client M.H. Such conduct respecting a client's funds held in trust, is conduct, which fails to serve the client, and is deserving of sanction.

13. SANCTION AND ORDERS

A. The Member's Record

Exhibit S-1 established that on October 4, 1991 the Member was found guilty of one count of professional misdemeanour, when he removed a file from the office of another lawyer without permission; and the penalty was a reprimand, $500 fine, and fixed hearing costs. Additionally, on September 23, 1996 the Member was found guilty of one count of conduct deserving of sanction, failing to respond promptly to the Law Society; and the penalty was a reprimand, $1000 fine, and hearing costs of $3200.

Counsel for the Law Society referred to the record of the Member as a minor one. The Panel finds that the record is not significant. Although it does confirm that the Member is not a neophyte in respect of these types of proceedings. Further, of the two previous matters, the latter is of some relevance because it involves a failure to respond promptly to the LSA. The Member has again been found guilty of similar conduct within this hearing.

B. The Issue of Remorse

We have considered the evidence and the representations of both counsel, and in doing so we do not find remorse to be present in this case. The Member had submitted that he was remorseful concerning the manner in which he had conducted himself, and acted towards his client, P.L. The Member admitted the allegations respecting P.L. during the course of the hearing, but this admission was late in the course of the proceedings, and was subsequent to the Member's ill treatment of P.L. as a witness. Upon our review of the facts, we see that the only positive thing that was done by the Member, to the client P.L., was his act of giving the client an extra $350. This act was done without the benefit of informing the client that he was getting extra money, and without providing him with any accompanying explanation. Had the Member in fact been remorseful, had he been truly conflicted by his actions, had he actually felt remorse for his conduct, then we would have expected to see an identifiable remorseful action. We would have expected to see acts of contrition, an apology, or a promise to act in a certain fashion in future. We would have expected an acceptance of responsibility. That is not what we saw here.

Further, the evidence of the conduct of the Member before us clearly establishes a lack of remorse. What we saw here was that when the Law Society auditors later came to the Member's door, they were met with lies. There was no contrition, or acceptance of responsibility, the Member lied to the auditors. There is a legal and ethical obligation to tell the auditors the truth. The Member failed to meet that responsibility and compounded his original misconduct by lying to the auditors. We now have 7500 members, and we have very few auditors. An audit and the prospect of an audit are tools that are meant to ensure that the members conduct themselves ethically. Self-governance is an important responsibility of our profession, and public confidence in this governance is necessary to allow us to continue to perform this duty. Erosion of public confidence occurs when Members lie to the Law Society. Clients are often aware of the misconduct of lawyers. They may not voice a complaint to the Law Society, but they will tell their friends. Concealing one's misconduct from the Law Society compounds the misfeasance. The consequence of these misconducts is that the profession is diminished in the eyes of the public.

Additionally, the continuing conduct of the Member did not support a suggestion that he was remorseful for his conduct. In fact the opposite is true. In 1996, when the Member was responding to the Deputy Secretary of the Law Society of Alberta, he delayed his answer, and he lied again. The member failed in his responsibility to reply, and to reply truthfully, to the Law Society. That conduct does not countenance any support for the member in the consideration of whether to allow him to be reinstated to the profession. In 1993 the Member dealt dishonestly with the auditors. In 1996 he continued to deal dishonestly in the same matter with the Deputy Secretary.

As counsel for the Law Society pointed out, the conduct of the Member in the course of

this hearing also suggested that the Member was not remorseful for his conduct. Counsel referred to detailed passages exemplifying the forceful and unmeritorious cross-examination of P.L. by the Member. Counsel submitted that it was an abuse of process for the Member to conduct himself in the fashion in which he did, and that such conduct may have been in further breach of the Code of Professional Conduct. The Law Society took the position that, applying the principles in the *Sawchyn* case, that the misconduct in the course of the defence may indirectly affect one's sentence by negating the existence of remorse. Counsel maintained that the misconduct proves that there is no contrition for the offence committed, and that rehabilitation has not begun. We agree with counsel for the Law Society to the extent that the conduct of the defense by the Member is relevant to the issue of remorse, in the sense that it confirms a lack of remorse in the Member. This is not an aggravating factor, but it is the confirmation of the absence of a potential mitigating factor. Based upon all the evidence, and upon hearing the arguments, we have no hesitation or any qualification whatsoever in finding that the Member was not remorseful.

C. Character References and Attributes

A number of reference letters were submitted by the Member, marked as exhibit S-4, and were reviewed by the Panel. The letters spoke highly of the Member, referring to his intellect, collegiality and manner of conduct in church, at work, and in a number of other activities. Earlier testimony during the hearing also referred to the attainment of the gold medal award in Grade 12 for Catholic schools in Calgary by the Member. This was an amazing accomplishment and reflected the Member's intellect and his work ethic. The Member was noted to have a tremendous vocabulary, and a general command of the English language. To many of these persons, the Member was trustworthy, intelligent, and engaging. It was also noted, parenthetically, that the references were all from people who were not lawyers.

While the reference letters, and testimony given on the Member's character during the hearing assisted us in understanding that the Member was, in some respects, a positive and contributing member of society, it was not determinative in the sanctioning process or in resolving credibility. In our view, this evidence respecting character could not overcome the weight of the evidence concerning his conduct towards clients and the Law Society. In deciding the issues of governability and the need to protect the public, it could not tip the scales in his favour. On these issues, the impact of his references was little more than a feather's counterweight to the heavy chain of misdeeds wrought by his conduct.

D. Sanctions on Citations 20 & 33

The Panel held that two of the citations, 20 and 33, were matters which were less serious and did not materially affect the broader issues to be determined in imposing an appropriate sanction for the other citations. In respect of citation 20, the LSA complaint respecting the purported waiver of taxation of accounts, the

Member was ordered to pay a fine of $100 and was given time to pay until July 28, 2006. In respect of citation 33, the charging to a client of a "disbursement" not yet incurred or quantified, the Member was ordered to pay a fine of $1000 and was given time to pay until July 28, 2006.

E. Sanctions on Citations 12, 16, 18, 19, 21, & 22

We have a responsibility to look at whether now we are going to impose a suspension, fine, or disbarment. We are in agreement, and we have no hesitation in coming to the decision that the sanction in respect of these citations is disbarment.

We have to look at our responsibility to the public and we look at the manner in which the Member has conducted himself over a period of time respecting a number of different clients. The citations upon which he is being sanctioned involve conduct in the years 1993, 1994, and 1996. Further, there were a number of persons directly affected by this sanctionable conduct: P.L., A.S., J.A., as well as the Law Society of Alberta. We find it to be an aggravating factor that the Member's misconduct occurred over a period of years and was inflicted upon a number of different clients as well as the Law Society staff.

We sometimes hear in these matters, by way of mitigation, that a Member may have been having a particular difficulty during a period of time, which may not excuse the conduct, but may help to understand it. Such difficulties may include: substance abuse, depression, extreme financial pressures, marital discord, or other circumstances, which may have played a part in the misconduct. However, in this Member's case, we don't see such manifest influences overtaking a member's judgment. What we see here, and what we find to be the driving motivation in this case is that the Member wanted the money. In fact, he acted upon his desire and took the money before he was entitled to it. He may later have actually earned it, and he may even have done very good legal work, but what the Member did was take the client's money and put it to his own use before he earned it.

Not only did he take the money, but, in order to avoid detection, he was prepared to lie, and he did so repeatedly and to a number of people. He lied to his clients, he lied to the auditors, and he lied to the Deputy Secretary of the Law Society. These lies accumulated over a period of years. Given the nature of the misrepresentations, which we have found, the period of time over which they have occurred, and the number of different people affected, we are driven to the conclusion that the Member's integrity has been seriously impugned. We have no hesitation in saying, that considering the need to protect the public, we cannot countenance the Member's reinstatement to the profession.

Further, the Member's misconduct has a public dimension to it. His conduct has diminished the reputation of the legal profession in the eyes of his clients and the public. When we consider the manner in which the Member treated clients like J.A., P.L., and A.S.; as well as how he acted towards Law Society staff, we find that the Member's actions have diminished all of us in the legal profession. We find support for this finding

within the *Hearing Guide*, at paragraph 58, where there is reference to the *Adams* case and the impact of a lawyer's misconduct upon the profession:

> "58. The privilege of self-governance is accompanied by certain responsibilities and obligations. The impact of any misconduct on the individual and generally on the profession must be taken into account. "This public dimension is of critical significance to the mandate of professional disciplinary bodies." "The question of what effect a lawyer's misconduct will have on the reputation of the legal profession generally is at the very heart of a disciplinary hearing….". *Adams v. The Law Society of Alberta*, [2000] A.J. No. 1031 (Alta. C.A.)

As a self governing profession, it is necessary to demonstrate to the public, that when it has been proven that a Member, over a period of time, and with a number of clients, has acted dishonestly, and has misappropriated trust money, then we will not allow that Member to practice law.

Our decision to disbar the Member is not based upon a need to specifically deter the Member. We have considered the impact of the significant suspension that he has already served: 10 years. We have found that there is no need here for specific deterrence of this Member. The threshold point, for the need for any individual deterrence, has long since been passed. It is not an objective of this sanction to deter or punish the Member. We do find that there does still need to be some denunciation of the Member's misconduct, and we do take that into account. However, the sanction primarily needs to reflect our determination that the public needs to be protected. We need to maintain public confidence in our profession, in our integrity.

In our judgment, the Member's misconduct, in respect of the P.L. matters alone, would not give anyone, any confidence, in returning the Member to the legal profession. In the matters relating to P.L., the Member admitted to taking settlement proceeds and using the money for his own purposes, to cover a deficiency. He lied to auditors by claiming that he had issue a general account cheque for $5000, as a cover for his lie about the deficiency in P.L.'s account. He failed to respond to the request by the Law Society to explain the deficiencies, and when he finally did respond, the Member did not answer the question. When pressed into answering the Law Society's inquiries, the statement he gave was false. Given the Member's conduct in respect of these P.L. matters contained in citations 18 & 19, disbarment was warranted. Add to that, the misconduct concerning J.A. and A.S., and the appropriateness of the decision to disbar the Member is validated.

The Member exhibited a lack of integrity with respect to his dealings with his client J.A. The Member deceived or attempted to deceive J.A. in that he stated in a retainer letter to his client dated September 2nd, 1994, that time records would be kept, when time records were not kept, and had not been kept by him for an extensive period of time. The client J.A. knowingly was providing $9,000 to Mr. McDonald to cover legal fees that may be

incurred in the provision of his services on the W.F. estate matters. Further, the client J.A. understood that he was going to get a monthly bill and the hourly amounts worked would be reduced from the $9,000. That did not happen. J.A.'s letter confirms that he made three requests for a detailed invoice showing where and how the $9,000 was spent, and he didn't receive one until almost six months later. That account still did not provide an hourly breakdown in respect of the work performed. The $9000 retainer had all been taken by October 3, 1994 and the Statement of Account reflected that. Mr. McDonald had taken all the money without doing the work.

The Member's lack of integrity was certainly evident in his dealings with A.S. The Member's April 5, 2003 Statement of Account was a contrivance. It was inconsistent with the Member's responsibilities and with other documentation. The Member claimed he had performed all required services by then, but the evidence stood in sharp contradiction. He faxed a counter offer to "S" **after** his responsibilities had supposedly concluded. Then over a week later he sent a letter to a Law Office in Winnipeg requesting a title search and saying that "we" will be registering the Transfer through their office. Further, the Member's testimony was not credible and there was no documentation to support it, which one would have expected to be generated given the nature of the Member's story. Yet, documentation (the Member's own phone bill) does corroborate the testimony of A.S. on the issue of when the first telephone call between the Member and A.S. occurred. Further, A.S. made his statement at a time when he could not have had access to these phone records for verification. The Member's testimony on this point is incapable of being accepted. Additionally the April 5, 2003 Statement of Account is replete with errors. The deal was nowhere near completion on April 5th. The Statement of Account referred to the "receipt of a retainer", which is an event that didn't happen until April 7th. Specific amounts for disbursements were charged when the sums could not be justified or arrived at on April 5th. Further the five-page letter that supposedly was made contemporaneously to the Statement of Account states: "We are not able at this time to provide an estimate of our complete fee in the matter". How can that be if the Member has just sent out the bill for the completion of the work? The last four pages of this letter of "April 5th" bear the date "ARRIL 22, 1993". These documents were an irrefutable contrivance of the Member. Further the Member advised a Winnipeg lawyer A.M., by letter, that he undertook to hold the funds as a deposit. That letter was two days after the purported date of the April 5 Statement of Account. When the wire transfer was eventually received the money was never put into trust be it was converted to the Member's use. And when the Deputy Secretary asked for an explanation, the Member gave an explanation that was entirely different from his testimony to the Panel. Neither version given by the Member was credible, and, there was no independent evidence to corroborate either version. The Member's evidence was rejected.

We accept the Member's representation, that there has not been a pecuniary loss suffered by these clients, as being an accurate one. The *Karoles* case, which the Member referred

to during the hearing, was somewhat similar in that respect. In *Karoles*, but for one instance, there was no loss to the clients. However, that factor did not prevent the Panel from imposing disbarment. That Panel, and this one, have considered the lack of pecuniary impact on the clients, in determining an appropriate sanction. We agree that the specific pecuniary injury on these matters was minimal. Although, in the instance of client J.A., we can never determine what the correct amount of the fee should have been, given the Member's failure to account for the hours worked. We find that the nature and quality of the conduct of the Member, and the lack of integrity are more of a concern than the presence or absence of a financial loss. In that case for example, J.A. was a very careful man who was handling another person's money: that of a friend who had passed away. J.A. had come to the Member for assistance. The Member had apparently done a good job on a previous buy/sell agreement. J.A. came to the Member with some confidence, but he was not treated with integrity, he was treated with dishonesty. Similarly, P.L. and A.S. were not served in a diligent, conscientious and honest manner. Were the Member to be reinstated to active practice as a Law Society member, we are of the view that such a return would represent a risk to the public of a recurrence of his misconduct.

In his argument, the Member referred to a number of precedents, suggesting that there has been a departure or a derogation from the general principles applied in earlier cases like *Bolton*, which is being relied upon by counsel for the Law Society. We do not see that the cases cited by the Member have departed or derogated from the general principles in the *Hearing Guide* or in *Bolton*. Integrity was, is, and will remain a fundamental principle of the privilege of practice. Our *Code of Professional Conduct*, in its preface, states:

> "Two fundamental principles underlie this code and are implicit throughout its provisions. First a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach".

The Member stands in breach of these fundamental principles and we cannot find, within the material before us, the straw from which to fashion the bricks to provide a foundation for the future.

The Member has failed his clients and he has failed himself. He has failed in his responsibilities to the Law Society. Governability is an issue. He has not been candid with either Law Society auditors or the Deputy Secretary. There is no reason for the Law Society to have confidence in dealing with the Member, nor would there be any reason for other lawyers or members of the public. Disbarment is ordered.

14. COSTS

In respect of the hearing costs from December 3, 2002 to December 1, 2004, those costs will be borne, in their entirety, by the Member. The Hearing began with a *voir dire* on the application of the Member for a stay of proceedings. A decision on the stay of proceedings was made in December 2004, at which time the application was dismissed. Our decision respecting that application was that it was unsupported by the evidence, and was an allegation of conspiracy that was contrived by the Applicant. The Member bears full responsibility for the conduct of the application. The Member shall bear the costs of that application which continued through to December 1, 2004, at a cost of $89, 267.96.

In respect of the hearing costs from December 1, 2004, through June 28, 2006, these costs were in respect of the hearing on the merits of the citations. The Panel considered the number of citations that the Member was found to have committed, and the large number, which were discontinued. The Panel made a determination, taking these facts into account that the greater portion of the hearing costs should be borne by the Law Society rather than the Member. The Member shall only bear $15,000 of the costs for this second portion of the hearing, resulting in a total cost to the Member of $104,267.96. Time to pay is given to June 28, 2007.

15. CONCLUDING MATTERS

A. Exhibits

The only Exhibits that will be open to inspection will be the jurisdictional ones wherein the citations will be vetted to remove any client's names before exhibiting them.

B. Publication

The notice to the Profession is mandatory.

C. Referral to the Attorney General

The matter shall be referred to the Attorney General.

DATED this "20th" day of "November", 2006.

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B.E. Peterson Q.C. (Chair)

N. Sieppert (Bencher)