THE LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT*,

AND

IN THE MATTER OF A HEARING REGARDING

THE CONDUCT OF RICHARD MIRASTY

A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Robert Harvie, QC
Gillian Marriott, QC

Appearances:

Counsel for Richard Mirasty – Simon Renouf, QC
Counsel for the Law Society – Nicholas Maggisano

Hearing Dates:

July 7, 8, 2015

Written Decision:

August 14, 2015

Sanctioning Hearing Date:

March 4, 2016

Written Sanction Decision:

April 14, 2016

Hearing Location:

Law Society of Alberta, 800 Bell Tower, 10104 – 103rd Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

A. INTRODUCTION AND SUMMARY OF RESULT

1. On July 7, 2015 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Edmonton to inquire into the conduct of the Member, Richard Mirasty. The Committee was comprised of Robert G. Harvie, Q.C., Chair, Julie Lloyd and Gillian D. Marriott, Q.C.

2. The LSA was represented by Mr. Nicholas Maggisano. The Member was present throughout the hearing and was represented by Mr. Simon Renouf, Q.C.

3. At the commencement of the hearing, panel member Julie Lloyd disclosed to the panel a potential conflict of interest. After discussion and consideration with the other panel members it was determined that said conflict prevented Ms. Lloyd from sitting on this matter. This issue was canvassed with the parties, and upon no objection being raised, the panel released Julie Lloyd from the panel and continued with the hearing as a panel of two, permitted under s. 66(3) of the *Legal Profession Act*.

4. Counsel for the LSA and Mr. Mirasty presented the Hearing Committee with a Statement of Admitted Facts marked as Exhibit 51 in these proceedings. The hearing proceeded, with witnesses being called by the LSA and on behalf of Mr. Mirasty.

5. After hearing all evidence and argument presented by the LSA and by Richard Mirasty, the panel found Richard Mirasty guilty of three of the four citations against him, and determined that such conduct was “conduct deserving of sanction” in accordance with s. 49 of the *Legal Profession Act*.

6. Mr. Mirasty sought an adjournment to allow evidence to be called on his behalf regarding the issue of sanction, which was not opposed by the LSA. The adjournment was granted, and accordingly, the matter stood adjourned pending further hearing on the issue of appropriate sanction resulting from said conduct.

Jurisdiction and Preliminary Matters

7. Prior to the hearing, counsel had agreed to the preparation of an exhibit book, containing documents relevant to the within hearing. Contained within the exhibit book were the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, which establishes the jurisdiction of the Hearing Committee. The Certificate of Exercise of Discretion was also contained therein. These documents were entered into evidence by consent, marked as Exhibits 1 to 5 respectively.

8. There was no objection by the Member’s counsel or counsel for the LSA regarding the constitution of the Hearing Committee.

9. The was no application to have the hearing, or any part of it, held in private and as such, the entire hearing was conducted in public. It was noted, however, that in the context of this matter, due consideration is required regarding the Order of the Court of Queen's Bench of Saskatchewan, granted October 21, 2010, entered as Exhibit 19, requiring that there be a ban on media publications relating to the proceedings in Saskatchewan, such that it was directed that prior to publication of these proceedings, specific attention be taken to assure compliance with the said Order.

Citations

10. The conduct of the member relates to a complaint brought by the Public Guardian and Trustee (PGT) of Saskatchewan, represented by lawyer Carolyn Decker, who filed the complaint dated January 28, 2011, on behalf of the PGT, resulting in four citations against the member in total, as follows:

    1. It is alleged that Richard Mirasty failed to comply with a Court Order and thereby brought the profession into disrepute and that such conduct is deserving of sanction;

    2. It is alleged that Richard Mirasty failed to respond promptly and completely to communications from the Law Society and that such conduct is deserving of sanction;

    3. It is alleged that Richard Mirasty failed to respond to communications from the Trustee promptly or at all and that such conduct is deserving of sanction; and

    4. It is alleged that Richard Mirasty failed to be candid with the Law Society and that such conduct is deserving of sanction.

Evidence

11. As noted above, Exhibits 1 to 5 (the jurisdictional exhibits) were entered into evidence by consent, in addition to additional documents outlining the history and circumstances of the complaint where contained within the exhibit book, marked as Exhibits 6 to 50.

12. The Statement of Admitted Facts was marked as Exhibit 51 and was entered into evidence by consent. The Statement of Admitted Facts was signed by the Member on July 7, 2015.

13. There were two witnesses called on behalf of the LSA, those being Carolyn Decker, legal counsel with the PGT, and LSA investigator, Steven Bach. Richard Mirasty gave evidence on his own behalf, with further exhibits being entered into the Exhibit book relating to their testimony.

Facts

14. The Statement of Admitted Facts (Exhibit 51) is not reproduced in this report; however, it outlines the chronology of the matters in issue relative to the complaint.

15. Richard Mirasty graduated law school from the University of Ottawa in 2000. It should be noted that Mr. Mirasty is a person of aboriginal descent, and grew up in the Big River area of Saskatchewan, was raised by his grandmother and became fluent in the Cree language. In the context of his upbringing, Mr. Mirasty became acquainted with renowned aboriginal artist, AS - who originated from the same area of Saskatchewan.

16. In 2000, Mr. S's business manager was retiring and at that time, Mr. Mirasty was approached by relatives of Mr. S to assist him in managing his affairs. Mr. Mirasty was initially reluctant, and agreed only to assist him in one trip to Ottawa. During the course of that assistance, it appears that Mr. S placed great trust and confidence in Mr. Mirasty and further pressure was placed upon Mr. Mirasty to become, effectively, the manager of Mr. S's affairs and, for all intents and purposes, a personal assistant. This obligation was then undertaken from 2000 until approximately April of 2008.

17. Initially, it appears that Mr. Mirasty's involvement was relatively informal, doing his best to assist Mr. S respecting various matters, primarily related to the sale and exhibition of his paintings. However, early in his involvement it appears that - to use Mr. Mirasty's words - there were members of his family who "exploited this old man shamelessly". As a result of Mr. S's lack of ability to read and his lack of ability to speak English it appears that with the support of the PGT, Mr. Mirasty's relationship with Mr. S was formalized by way of a granting of an Enduring Power of Attorney executed by Mr. S on April 14, 2004, naming Richard R. Mirasty as his Attorney (Exhibit 55). Mr. Mirasty retained that status until 2008, when a dispute arose between parties seeking to obtain Guardianship over Mr. S – to which Mr. Mirasty was not a direct party, but was involved as a result of his prior formal and informal relationship with Mr. S.

18. During the course of the Guardianship proceedings there were two Court Orders granted by the Court of Queen's Bench of Saskatchewan respecting Mr. Mirasty's prior involvement assisting Mr. S as follows:

    a) **Order dated September 29, 2009**: directing that the Public Guardian and Trustee of Saskatchewan be named as Trustee of a Trust established on behalf of AS, directing specifically that Richard Mirasty provide an inventory of all paintings held by him or various galleries be provided to the Trustee no later than August 31, 2009, and that all cheques held by Richard Mirasty be delivered to the Trustee no later than August 31, 2009. The Order further provided that the Trustee be entitled to obtain accountings from former powers of attorney - which would have included Mr. Mirasty;

b) **Order dated October 21, 2010**: directing that Richard Mirasty provide "a complete accounting from October 20, 2003 to April 15, 2008 to both the Public Guardian and Trustee of Saskatchewan and this Court within 30 days of the date of this Order", and further, that Richard Mirasty pay solicitor and client costs in the sum of $750.00 "forthwith".

19. It is unclear why the Order of September 29, 2009 directed that Mr. Mirasty's obligations be completed by a date that actually pre-dated the Order - making compliance with the Order an impossibility. Mr. Mirasty acknowledges being aware of, and consenting to that Order, however, why it required compliance by August 31 when the Order wasn't granted until September 29 is an anomaly not fully explained to the satisfaction of this panel. While a portion of the complaint relates to the time taken for Mr. Mirasty to provide the inventory and cheques required, it appears clear that those issues were resolved by February of 2010, and the panel finds no fault on the part of Mr. Mirasty in that respect.

20. It should be noted at this time that Mr. Mirasty was a law school graduate and student at law from 2000 to January 28, 2005, when he became admitted as a member of the Law Society of Alberta, such that Mr. Mirasty's conduct was subject to the oversight of his regulator during the currency of his obligations arising from the Enduring Power of Attorney. It should also be noted that the complaints arising in this matter do not relate to legal services provided by Mr. Mirasty, or to a "solicitor/client" relationship. The complaints involved in this matter relate to conduct outside of a solicitor/client relationship.

21. In hearing the evidence and in considering the material submitted by Mirasty, it would be fair to say that his efforts in assisting Mr. S went far beyond what would be called, in any sense, typical of what might be expected of an Attorney pursuant to a Power of Attorney.

22. From time to time it appears that Mr. S and his late wife resided with Mr. Mirasty, were assisted not only in their legal and financial affairs, but in virtually all aspects of their personal affairs, including it appears, demands to assist Mr. S in buying everything from cowboy boots to fried chicken. The demands placed upon Mr. Mirasty were, most certainly, significant - and appear to arise not only as a result of his formal legal status as attorney, but as a result of a deep personal relationship which developed between Mr. S and Mr. Mirasty, strengthened, without question, as a result of their shared cultural experience and in particular Mr. Mirasty's fluency in the Cree language which intrigued Mr. S early in their relationship - as a result of the relative paucity of young Cree-speaking persons in their community.

23. There is no question but that Mr. S would not have been an easy person to assist. As Mr. Mirasty's evidence disclosed, Mr. S was an unsophisticated person, did not read and did not speak English. At the same time, his talent as an artist was world-renowned and his artwork demanded significant prices, according to Mr. Mirasty from $● to $● per piece - with an estimated value of Mr. S's inventory of artworks at the time Mr. Mirasty ended his involvement with Mr. S being anywhere

from $● to $●. As a result, Mr. Mirasty was required to deal with significant income and asset values - while attending to the demands of a principal who appears to have clearly understood the general nature of his wealth, but lacked any real ability to deal with his income or assets in an effective manner on his own.

24. The evidence of Mr. Mirasty, which was not contradicted, and was accepted by this panel, was that Mr. S was at various times very demanding and directive about what should be done with his assets - which, from time to time, was not necessarily in his own interests. There were, for example, requests by Mr. S to provide him with funds to make gifts to persons in his community whom Mr. Mirasty felt were taking advantage of Mr. S's generosity and lack of sophistication. The evidence of Mr. Mirasty, which is again, uncontradicted, was that he would at various times in fact argue with Mr. S about some of his directions respecting use of these funds, but would ultimately respect Mr. S's direction in that regard.

25. It would be fair to say that the evidence discloses Mr. Mirasty as being in a somewhat difficult position - being an Attorney pursuant to an Enduring Power of Attorney over a person who while very limited in his ability to handle his own finances, was nonetheless entitled to ultimate authority over his own affairs.

26. During the course of his assistance, Mr. Mirasty gave evidence that he did receive personal payments from Mr. S, based upon a cultural practice where, as a result of providing Mr. S assistance, Mr. S would, from time to time, direct Mr. Mirasty to “take some for yourself”, which Mr. Mirasty acknowledges he did – however, he maintains that any compensation received does not come close to properly compensating him for the time and effort provided to assist and support Mr. S. On this point, there is no contrary evidence, and the issue of whether or not compensation taken by Mr. Mirasty was appropriate or not is not the subject of these proceedings, and no finding is made in that regard by this panel.

27. However, as they were entitled as Guardians acting on behalf of Mr. S, and as specifically directed by the aforesaid Orders, the PGT requested an accounting be provided by Mr. Mirasty regarding his handling of Mr. S’s finances.

28. As detailed in paragraph 9(f) of the September 29, 2009 Order, the PGT was given authority to obtain an accounting “from any former powers of attorney” for Mr. S.

29. In accordance with that authority, on February 24, 2010, the PGT made a formal request for such accounting from Mr. Mirasty, asking that it be provided no later than March 31, 2010.

30. No accounting was provided, however, it appears that there was some contact made by Mr. Mirasty suggesting that his accounting would be completed by the end of July, which was confirmed in further correspondence directed to Mr. Mirasty dated June 30, 2012 (Exhibit 13).

31. As acknowledged in the Statement of Admitted Facts, paragraph 12, he did not respond to that request and did not provide the accounting, such that in the absence

of any accounting having been provided, a formal application was brought to compel such accounting on October 21, 2010. That application was served personally upon Mr. Mirasty. In the absence of any response or appearance on his behalf, an Order was directed on October 21, 2010, compelling Mr. Mirasty to provide such accounting from October 20, 2003 to April 15, 2008 to the PGT and the Court within 30 days. The Order also directed payment of solicitor/client costs in the sum of $750.00 payable by Mr. Mirasty "forthwith".

32. The said Order was faxed to Mr. Mirasty's office on November 4, 2010 and mailed to him that same date.

33. Mr. Mirasty does not appear to have responded to the said Order, and a further copy of the Order was sent to him by registered mail on December 17, 2010. Mr. Mirasty did not respond to that letter or the Order.

34. As result of Mr. Mirasty refusing to provide the accounting requested and in fact ordered, the complaint of the PGT was sent to the LSA on January 28, 2011, and as a result, a copy of the complaint and a request for response was directed to Mr. Mirasty at his listed address by the LSA on February 11, 2011. When that letter was returned "moved/unknown address" a further copy was sent by registered mail to his box address on February 15, 2011, requesting a reply within 14 days.

35. Mr. Mirasty did not provide a reply to the complaint and a further request for a response was sent to him by the LSA on March 8, 2011, and again failing a reply to that letter, another request was sent by the LSA on March 30, 2011.

36. Mr. Mirasty continued to fail to respond to the LSA and again, a demand for response was made by the LSA by letter dated April 19, 2011, pointing out that a failure to respond is itself, sanctionable conduct.

37. Finally, in the absence of any response by Mr. Mirasty, he was telephoned by Maurice Dumont, Q.C., Manager of Complaints for the LSA, and during that conversation it appears that Mr. Mirasty would provide a response and the accounting ordered – and on May 18, 2011, Mr. Mirasty wrote to the LSA confirming the conversation and advising that:

> *"I have accumulated all records that are necessary to comply with the request for an accounting. A response will be tendered to Ms. Decker before the end of June, 2011."*

38. On May 20, 2011, the LSA confirmed receipt of the said letter and confirmed the agreement to extend the time to reply to the complaint to June 27, 2011.

39. Notwithstanding Mr. Mirasty's promise to provide the accounting and the extension granted by the LSA to reply to the complaint by the end of June, in fact, no accounting was provided and no response to the complaint was provided by Mr. Mirasty – confirmed by letter to Mr. Mirasty from the LSA dated July 4, 2011. Mr. Mirasty's failure to provide the accounting or to respond to the complaint to the LSA

continued, notwithstanding further correspondence directed to Mr. Mirasty dated August 3, 2011.

40. As a result of the foregoing, the LSA directed the matter to a formal investigation, during the course of which, Mr. Mirasty met with LSA investigator Steven Bach on May 4, 2010 providing some general explanation of his response to the matter and a written response from Mr. Mirasty followed on May 18, 2012 (Exhibit 37).

41. Much was made by Mr. Mirasty of the meeting with Mr. Bach. Mr. Mirasty suggests that Mr. Bach was offensive and condescending – such that after what appears to have been a relatively brief conversation, Mr. Bach advised Mr. Mirasty that the balance of the meeting would be recorded. While there were a few indications early in the record that Mr. Mirasty continued to take offense to Mr. Bach's tone and conduct, it is clear from the transcript that notwithstanding what can only be said to be continuing refusal on the part of Mr. Mirasty to comply with the Saskatchewan Court Order or to provide a response to the LSA complaint, going on by this point for well over a year, the conduct of Mr. Bach appears to have been measured and if anything, supportive of Mr. Mirasty.

42. The transcript of the conversation between Mr. Mirasty and Mr. Bach, and the subsequent letter from Mr. Mirasty dated May 18, 2012 in general provide a picture of his broad and significant efforts undertaken on behalf of Mr. S during the tenure of the Enduring Power of Attorney. What they do not provide, however, is an accounting respecting the exercise of his authority as a Power of Attorney. They allude to the difficulty and breadth of his tasks; however, they do not provide anything that could even be loosely referred to as an "accounting" as requested by the PGT and as ordered by the Court.

43. By this point in time, in the absence of any accounting, the PGT had commenced an action in July of 2011 against Mr. Mirasty in Saskatchewan alleging breach of trust and breach of fiduciary duty, seeking damages against him. Mr. Mirasty responded by way of a defence and counter-claim filed April 4, 2012, alleging an entitlement to compensation for services provided to Mr. S on a quantum meruit basis.

44. The letter from Mr. Mirasty of May 18, 2012 confirmed that he would "provide an accounting as requested in advance of the mediation date of June 22, 2012 (referring to mediation of the Saskatchewan civil action).

45. No such accounting was provided by June 22, 2012, notwithstanding Mr. Mirasty's assurances.

46. In his evidence, Mr. Mirasty suggests that he was of the opinion that the accounting would be accomplished in the Saskatchewan action by virtue of a hearing of the respective claim and counterclaim. He then suggests that as that action did not proceed, that somehow excused, in some respect, his non-compliance with the Court Order and the repeated demands of his regulator, the LSA.

47. However, at no time was the Saskatchewan Order directing Mr. Mirasty to provide

the accounting varied, suspended or set aside – and likewise, at no time was there any suggestion from the LSA that their demands for a response were in any manner suspended or abandoned.

48. The LSA continued to seek compliance, in fact, and in a series of emails between Mr. Mirasty and Steve Bach between June 17, and July 3, 2013, it was made clear what was required of Mr. Mirasty by way of a reply and report (Exhibit 42).

49. On December 28, 2012, a ledger showing ledger entries (without any accompanying explanation for same) from January 1, 2006 to December 31, 2007 was provided to the LSA investigator by RS.

50. The ledger entries disclose two accounts, one known as the "●●Account" and one known as "●● Inc.", which ledger includes significant payments to Richard Mirasty totalling $52,700.00 in 2006 and $51,200.00 in 2007 from the ●●Account.

51. On August 21, 2013, the LSA directed yet further correspondence to Mr. Mirasty specifically detailing the information demanded of Mr. Mirasty, and confirming that in the absence of such information being provided within 14 days, the matter would be referred to a Conduct Committee Panel with no provision for any further extensions (Exhibit 46). He did not respond.

52. On November 21, 2013 the LSA sent to Mr. Mirasty its Investigation Report, prepared in absence of further response from Mr. Mirasty, affording him an opportunity to respond to the report within 14 days of the letter. He did not respond.

53. On December 18, 2013, the LSA sent another letter to Mr. Mirasty, cautioning him that his failure to reply may result in an "adverse inference" being drawn against him respecting the complaint.

54. On January 8, 2014, Mr. Mirasty responded to the complaint (Exhibit 50) generally advising as to the difficulty of his efforts on assisting Mr. S, the extent of his sacrifices made to assist Mr. S, and his difficulty in seeking bank records "going back 10 years", advising that "It would be impossible to provide a complete accounting because of lack of records". In response to the specific failure to comply with the Court Order, the essence of Mr. Mirasty's response was that he did not feel obligated as a result of the separate civil action not proceeding and that in any event, further accounting would be "difficult" because of the "unique nature of the relationship with AS and M and his constant demand for monies and other expenditures related to his care." At the conclusion of his letter, Mr. Mirasty advised that:

> "*any further requests for "additional accounting" was simply a non-starter because I did not record every single expenditure for 4.5 years. There was no new information and the only alternative was to proceed with the litigation and let the court sort it out."*

55. The evidence of Mr. Mirasty during the hearing was consistent with this

correspondence. He provided lengthy evidence detailing the special relationship that he had with Mr. S, the unique demands tending to the needs of Mr. S and his wife, and the cultural practice of sharing the benefits of mutual efforts which was encouraged by Mr. S in directing Mr. Mirasty to take advances from time to time. In summary, the difficulty in providing a full and formal accounting appears to be a result of an engagement between Mr. Mirasty and Mr. S based more upon a friendship and familial relationship than what others might have regarded as a mere business relationship. As a result, it appears that Mr. Mirasty did not keep a formal accounting of Mr. S's affairs at any time during his exercise of authority under the Power of Attorney.

Findings of the Hearing Committee

56. As detailed above, there were four citations made against Mr. Mirasty, which, if established, were alleged to constitute "conduct deserving of sanction."

57. In argument, counsel or the LSA suggested that the citations before this panel were "strict liability" citations, such that the LSA was not required to establish any intent on the part of the Member, relying upon the Alberta Court of Appeal decision of *Riccioni v. Law Society of Alberta* [2015] A.J. No 299, (2015) ABCA 62. With respect, the panel does not believe that the Court of Appeal decision goes so far as to suggest that the specific citations in this case are in any sense "strict liability" offenses. The decision in *Riccioni* is a response to the suggestion by the lawyer in that case that for "any" disciplinary offense that the Law Society must establish "intent". The Court in *Riccioni* did not accept that suggestion and stated that "most of the offenses charged here are not ones involving intent" – but does not go so far as to suggest that disciplinary proceedings in general do not require evidence of intent.

58. In this regard, we accept the argument put forward by counsel for Mr. Mirasty, who states properly that the degree of intent depends upon the nature of the citation – that depending upon the wording of the citation, intent may or may not be required – the question being what does a fair reading of the citation require?

59. Further, with respect to citations that might be considered a "strict liability" offense, even in that case, once the Law Society establishes the act complained of, a defence will still lie where the lawyer can establish, on a balance of probabilities, that he took all reasonable steps to avoid committing the offence complained of (*Merchant v. Law Society of Saskatchewan* (2014) SKCA 46 (Sask. C.A.) at para 27).

60. With respect to the specific citations, even if the specific acts impugned in the citations are proven on a balance of probabilities, this panel is still required to then ask whether or not the conduct as determined is of sufficient gravity to invite a determination that such conduct is conduct deserving of sanction.

Citation 1:

61. It is alleged that Richard Mirasty failed to comply with a Court Order and thereby brought the profession into disrepute and that such conduct is deserving of sanction.

62. On October 21, 2010 the Saskatchewan Court of Queen's Bench directed Richard Mirasty to provide "a complete accounting from October 20, 2003 to April 15, 2008 to both the Public Guardian and Trustee of Saskatchewan and this Court within 30 days of the date of this Order", and further, directed that Richard Mirasty pay solicitor and client costs in the sum of $750.00 "forthwith".

63. On a fair reading of this citation, the panel would find this to be a "strict liability" offense. The citation does not suggest such failure was "wilful" or "intentional", simply than Mr. Mirasty failed to comply with the said Order.

64. There is finding by this panel that, on the evidence, there can be no question but that the Order was not complied with. The Order was made in October of 2010, was provided to Mr. Mirasty in November of 2010, and was essentially ignored completely by Mr. Mirasty with no accounting of any type being provided until December of 2012 – long after the 30 days directed by the Court. The costs directed have never been paid and remain outstanding.

65. Beyond that, there is absolutely no accounting for the period from October 2003 to December 2005, or from January 2008 to April 2008.

66. Is there a suggestion that Mr. Mirasty took all reasonable steps to avoid non-compliance? There was no explanation provided by Mr. Mirasty respecting why he did not maintain bank accounts beyond the period of the partial accounting provided. There was no documentation provided by Mr. Mirasty to confirm that it was not possible to obtain bank account statements for the period in question if a request for same was made when the Order was brought to his attention – though there was a reference in his January 2014 response to the LSA that ●● Trust "was having difficulty". The absence of any written confirmation of a request for bank records, and the absence of any written confirmation of a denial of said records suggest a lack of even modest effort to effect compliance.

67. At the end of the day, a two year ledger with no explanatory notes, combined with a two page letter to the LSA over three years after the date of the Order in question does not provide this panel with what might be considered sufficient evidence of due diligence on the part of Mr. Mirasty to answer the demands of the Court.

68. Pursuant to s. 71(1) of the *Legal Profession Act*, we are obligated to then determine whether this conduct is of such a nature as to amount to "conduct deserving of sanction".

69. Section 49 of the *Legal Profession Act* defines conduct deserving of sanction:

> 49 (1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that

> (a) is incompatible with the best interests of the public or of the members of the Society, or
>
> (b) tends to harm the standing of the legal profession generally,
>
> is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta

70. As indicated, firstly, there is no requirement that the conduct in question "relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta."

71. Conduct deserving of sanction need not be disgraceful, dishonourable or reprehensible. *Brendzan v LSA* (1997), 52 Alta. L.R. (3d) 64 (Q.B.), at paras 30 - 32. Error of judgment may or may not amount to conduct deserving of sanction. *Law Society of Alberta v. Oshry*, [2008] L.S.D.D. No. 164; *Law Society of Alberta v. Ter Hart*, [2004] L.S.D.D. No. 25; *Law Society of Alberta v. Smeltz*, [1997] L.S.D.D. No. 144.

72. The fundamental question is simply whether or not the conduct in question is incompatible with the best interests of the public or the practice of law, or whether the conduct, once proven, would tend to harm the standing of the legal profession generally.

73. In this instance, Mr. Mirasty himself commented on his life experience in seeing how abuse of power and authority can be so damaging to parties in a position of weakness or disability. Speaking of his own experiences as a young man, and his experience in a residential school setting, Mr. Mirasty is highly sensitive to those who might use a position of advantage over others to their detriment.

74. While he may not acknowledge it, upon assuming his role as an Attorney under the Power of Attorney, Mr. Mirasty put himself in a position of advantage over Mr. S. Mr. Mirasty was educated, held a law degree, and later became a lawyer during the currency of the Power of Attorney. At the same time, Mr. S did not read and was not, according to the evidence, fluent in the English language. Accordingly, the law regarding fiduciary obligations – particularly in the case of a duty owed to someone largely unable to protect their own interests – requires that the Court be able to properly oversee the conduct of the fiduciary, to assure that the weak are protected against the abuse of the strong.

75. Beyond this, to engender respect for the administration of justice, the public requires a belief that when a Court makes an Order intended to assure protection of those who might be less able to protect their own interests, the Court Order will be followed.

76. While there is no evidence to suggest that Mr. Mirasty abused his obligations – the need for the judicial system to stand up to oversee the interests of Mr. S is manifest,

and should have been understood quite clearly by Mr. Mirasty. Yet, based upon the evidence, we are left with an impression that Mr. Mirasty did not feel that immediate compliance with the Order directing an accounting was a priority – such that even by the present date we are left with a complete absence of any accounting for a significant portion of time contemplated in the Order and, even at this date, a failure to pay the costs as directed in the Order.

77. The Code of Conduct, governing the conduct of members of the Law Society of Alberta provides as follows:

> 1.01 INTEGRITY
>
> 1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

78. The commentary following that section provides the following further explanation:

> Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
>
> Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

79. Accordingly, in assuring public respect for the administration of justice, and assuring trust in the legal profession, for a lawyer to fail to abide by the direction of a Court is an extremely serious act of conduct unbecoming a member of the legal profession. To fail to fully and completely model respect and adherence for the authority of the Court suggests a disrespect for the administration of justice that serves to undermine public confidence in the administration of justice generally, and the legal profession specifically.

80. While Mr. Mirasty suggests that his failure to comply with the Order was based upon an "inability" to comply, there was little if any evidence to establish what might be called "reasonable due diligence" to assure compliance with the Court Order. In particular, we noted that there was no documentation or evidence called by Mr. Mirasty to show;

a) That he had made a formal request for bank statements in a timely fashion,

or at all;

b) That the bank had, in fact, denied such a request, and what the full extent of that denial was; or

c) That he made reasonable effort promptly upon receipt of the Court Order to comply with same.

81. Accordingly, this panel makes a finding that Richard Mirasty failed to comply with a Court Order and thereby brought the profession into disrepute and that such conduct is deserving of sanction.

Citation 2:

82. It is alleged that Richard Mirasty failed to respond promptly and completely to communications from the Law Society and that such conduct is deserving of sanction.

83. There is no suggestion in the citation that Mr. Mirasty's conduct was "wilful" or "intentional", such that, as with the first citation, this citation may be considered a "strict liability" offense, based upon a fair reading of the citation – subject, as stated, to a defence based upon evidence that Mr. Mirasty took all reasonable steps to avoid the breach complained of.

84. In this case, the initial complaint to the Law Society was disclosed to Mr. Mirasty in February of 2011. It should be noted that while the Law Society sought to have Mr. Mirasty make effort to comply with the accounting directed by the Court, the accounting itself is but one element of Mr. Mirasty's failure to answer his regulator. Beginning in February of 2011, the LSA sought a response to the complaint sufficient to allow the LSA to respond to the complainant, and made what can only be described as sustained effort to demand compliance with their requests – and the record clearly establishes repeated and ongoing failure on the part of Mr. Mirasty to provide responses to those requests.

85. The citation alleges a failure to provide "prompt" and "complete" responses. With respect to promptness, a partial accounting almost two years after the complaint and a written explanation explaining why further accounting was "a non-starter" in January of 2014, almost 3 years after the complaint, are most certainly not "prompt" responses. The record of complete absence of any responses notwithstanding repeated demands speaks for itself.

86. With respect to the completeness of the response, again, the accounting requested was ultimately only partial, and as alluded to above, there was very little direct response on the part of Mr. Mirasty respecting what effort was actually made to gather bank statements, receipts, and other documentation that might have been available. The letter of January 8, 2014 was only two pages long, and effectively says, at the end of the day, "I didn't respond because I didn't keep records" – with some explanation why the nature of his relationship with Mr. S would not have been

such as to create an expectation of such records being maintained.

87. With the greatest of respect, this is not sufficient answer. As already referenced above, Mr. S was a man who depended upon Mr. Mirasty almost completely – by Mr. Mirasty's own evidence. Mr. S was illiterate, could not speak English and was completely unsophisticated. It was for these reasons that Mr. Mirasty was retained to assist Mr. S in the first place. Mr. Mirasty himself spoke of others, including other members of his own aboriginal community, who were taking advantage of Mr. S and his misplaced generosity.

88. In such a situation – public respect for the legal profession requires that when a lawyer is asked to respond to Law Society inquiries, our members will reply fully, completely, and promptly. To fail to do so leaves an already jaded public in a position of considering that, with respect to concerns over our profession, "the fox is guarding the henhouse." To maintain respect for the practice of law and public faith in the ability of the profession to govern itself, it is absolutely critical that members of the Law Society respond to questions and demands of their regulator fully, completely and with all due dispatch.

89. This is made explicit in the Code of Conduct, at Chapter 6.01:

> Communications from the Society
>
> 6.01 (1) A lawyer must reply promptly and completely to any communication from the Society.

90. As referenced in *Law Society of Alberta v. Grosh* (2009) LSA 21 (CanLII):

> ...the right to practice law carries with it obligations to the LSA and to its members. The minimum obligations in our view are compliance with rules and communication with the Society as might reasonably be expected."

91. This point was affirmed and expanded in *Law Society of Alberta v. Vanderleek* (2014) ABLS 19 (CanLII), at para 20:

> In this Hearing Committee's view, lawyers have a positive obligation to ensure compliance with the rules of their regulator. This obligation extends to responding to any inquiries from the regulator and doing what is reasonably expected by that regulator to ensure compliance with the Rules.

92. The evidence before this panel exhibits a litany of efforts expended on the part of the Law Society of Alberta to obtain responses to its inquires, and failure on the part of Mr. Mirasty to respond promptly, or in some cases, at all to those inquiries.

93. Accordingly, there is a determination that Richard Mirasty failed to respond promptly and completely to communications from the Law Society and that such conduct is deserving of sanction.

Citation 3:

94. It is alleged that Richard Mirasty failed to respond to communications from the Trustee promptly or at all and that such conduct is deserving of sanction.

95. With respect to this citation, while as stated above, there are serious concerns respecting the promptness of Mr. Mirasty's responses in general, and specifically, to requests by the PGT, as also stated, the burden of proof on the part of the LSA relies upon the wording of the citation.

96. In this case, the elements of the citation, given a fair reading, are conjunctive, such that the LSA is required to establish that Mr. Mirasty not only did not reply promptly, but also, that he didn't reply "at all".

97. While Mr. Mirasty did not respond promptly, he did provide some response, albeit incompletely, and after prolonged effort by the PGT, the Court and the LSA. Nonetheless, it cannot be said that he didn't respond "at all", and accordingly, this citation is dismissed.

Citation 4:

98. It is alleged that Richard Mirasty failed to be candid with the Law Society and that such conduct is deserving of sanction.

99. This citation, using the analysis referenced above, cannot be said to be a "strict liability" offense, given a fair reading of the citation. Inherent in the element of "candor" is an element of intent. In order for the LSA to establish its case, it is incumbent upon them to establish that his communication with the LSA lacked "candor".

100. The Merriam-Webster Dictionary defines, "Candour" as the quality of being open, sincere, and honest.

101. The question, then, is whether or not Mr. Mirasty was being "open, honest and sincere" with the LSA, which implies an element of intent. Mere inaccuracy in his communication with the LSA would not be sufficient to establish the citation. The onus rests upon the LSA to prove, on the balance of probabilities, that Mr. Mirasty communicated in a fashion that was "knowingly" lacking in candour.

102. There is no "smoking gun" in this case where the LSA can point to two diametrically opposed documents, making a clear case of deception; however, in considering this citation we must look to the totality of the evidence.

103. At the end of the day, after years of inquiry, Mr. Mirasty provided a letter to the LSA stating "Any further requests for "additional accounting" was simply a "non-starter" because I did not record every single expenditure for 4.5 years. There was no new information and the only alternative was to proceed with the litigation and let the court sort it out."

104. This is to be contrasted with his letter to the LSA of May 18, 2011, where he stated:

> "As indicated in our telephone conversation, I have accumulated all records that are necessary to comply with the request for accounting. A response will be tendered to Ms. Decker before the end of June 2011."

105. This is also to be contrasted with his letter of May18, 2012, where he advised the LSA:

> *"I will provide an accounting as requested in advance of the mediation date of June 22, 2012.*

106. Upon considering the foregoing, and considering the evidence as a whole, it is inescapable that either Mr. Mirasty knew in early 2011, that he did not have records sufficient to provide the accounting – or, at best, he had made no effort to review his records, notwithstanding ample opportunity to do so, and made inaccurate and misleading statements to the LSA respecting his ability to provide the accounting. Considering the significance of the request, and considering ultimately that the demand for an accounting was actually directed by a Court Order – the failure of Mr. Mirasty to either admit, initially, that he hadn't kept records, or, that he hadn't made effort to determine whether or not such records could be obtained could not, in any sense, be considered dealing with the LSA with "candour".

107. Based upon the evidence, it appears clear, on the balance of probabilities, that Mr. Mirasty knew or ought to have known that he had no accounting records, and no reasonable ability to provide those records back in early 2011, yet rather than admitting same to his regulator, he told them what he thought they wanted to hear – which is a failure of candour on his part.

108. While Mr. Mirasty appears to be somewhat concerned regarding the suggestion that his compensation was inappropriate or at least not properly documented – giving significant time and effort in his evidence to establish the amount of effort and difficulty in assisting Mr. S – his failure to fully and promptly advise the LSA very early on in the proceedings that he did not have documentation and information sufficient to provide a full accounting is ultimately a failure of candour.

109. Accordingly, there is a determination that Richard Mirasty failed to be candid with the Law Society and that such conduct is deserving of sanction.

Adjournment for Determination of Sanction:

110. At the commencement of these proceedings, counsel for Mr. Mirasty advised in advance that if a finding was made that Mr. Mirasty was guilty of conduct deserving of sanction, he would require an adjournment to call evidence on that issue from a party not available at the present date.

111. This request was not opposed by counsel for the Law Society. Accordingly, upon a

determination being made at hearing that Mr. Mirasty was guilty of conduct deserving of sanction, the within proceedings were adjourned pending further hearing on the issue of sanction.

B. BACKGROUND AND SUMMARY OF SANCTION HEARING

112. Richard Mirasty provided assistance and support on a personal basis, unrelated to his practice of law, to a renowned aboriginal artist from 2000 until 2008. While this initially was an informal relationship, commencing in April of 2004 the relationship was formalized wherein Mr. Mirasty's role was affirmed as Agent pursuant to a formal Power of Attorney. When certain questions arose regarding the principal's affairs, Mr. Mirasty was asked to provide an accounting under the Power of Attorney respecting the principal's affairs. When this was not forthcoming, a Court Order directing such accounting was made. When the Court Order was not complied with, a complaint was then made to the Law Society of Alberta resulting in four citations made against Mr. Mirasty.

113. In a separate decision of this panel made August 14, 2015, Mr. Mirasty was found guilty on three citations, namely, that he failed to comply with a court order, that he failed to respond to communications from the Law Society and that he failed to be candid with the Law Society. A fourth citation alleging that he had failed to communicate with the Trustee was dismissed.

114. The matter was then adjourned to March 4, 2016, for the purpose of hearing representations on the issue of sanctions resulting from the earlier findings of guilt on the three citations above.

115. Upon consideration of the representations of counsel for the Law Society of Alberta and for Mr. Mirasty, it was determined that the protection of the public interest and the standing of the legal profession required that Mr. Mirasty be suspended for a period of 45 days, and pay costs of the hearing. The Hearing Committee also recommended that, upon application for reinstatement, Mr. Mirasty should be referred to the Practice Review Committee and should cooperate with recommendations they may make with respect to his ongoing practice.

Citations

116. There were four citations issued against Richard Mirasty:

1. It is alleged that Richard Mirasty failed to comply with a Court Order and thereby brought the profession into disrepute and that such conduct is deserving of sanction;

2. It is alleged that Richard Mirasty failed to respond promptly and

completely to communications from the Law Society and that such conduct is deserving of sanction;

3. It is alleged that Richard Mirasty failed to respond to communications from the Trustee promptly or at all and that such conduct is deserving of sanction; and

4. It is alleged that Richard Mirasty failed to be candid with the Law Society and that such conduct is deserving of sanction.

117. After hearing evidence and representations on behalf of the Law Society and on behalf of Richard Mirasty, the Hearing Committee determined that Richard Mirasty was guilty of citations number 1, 2, and 4, but dismissed citation 3. The conduct amounted to "conduct deserving of sanction" in accordance with Section 49 of the *Legal Profession Act*, for reasons set out in a separate hearing report delivered August 15, 2015.

118. This matter returned to this Hearing Committee for consideration of an appropriate sanction resulting from those findings.

Decision Regarding Sanction

119. Pursuant to Section 72 of the *Legal Profession Act*:

> 72(1) If a Hearing Committee finds that a member is guilty of conduct deserving of sanction, the Committee shall either
>
> (a) order that the member be disbarred,
>
> (b) order that the membership of the member be suspended during the period prescribed by the order, or
>
> (c) order that the member be reprimanded.
>
> (2) In addition to an order under subsection (1), the Hearing Committee may make one or more of the following orders:
>
> (a) an order that imposes on the member conditions on the member's suspension or on the member's practice as a barrister and solicitor, a requirement that the member appear before a Board of Examiners, or any other condition or requirement permitted by the rules;
>
> (b) an order requiring the payment to the Society, for each act or matter regarding the member's conduct in respect of which the Committee has made a finding of guilt, of a penalty of not more than $10 000, within the time prescribed by the order;
>
> (c) an order requiring the payment to the Society of all or part of the costs of the proceedings within the time prescribed by the order.

120. Mr. Mirasty's record reveals that he has no discipline record with the Law Society of Alberta since his admission to the Law Society in January of 2005.

121. Counsel for the Law Society presented several cases to this panel suggesting that in cases such as the one before us, a period of suspension is warranted. Lack of cooperation and responsiveness to the Law Society was cited as a particularly aggravating factor. The Law Society submits that an appropriate sanction would be a suspension for a period of six months, the payment of costs, and a recommendation that Mr. Mirasty be referred to Practice Review as a condition of his reinstatement, on such conditions and for such term as may be recommended by the Practice Review Committee.

122. Counsel for Mr. Mirasty presented to this panel three letters of support, entered as Exhibits 62, 63 and 64 from Robert A. Philp, Q.C., Diana Goldie and James A. Wachowich. These letters spoke to Mr. Mirasty's positive qualities as a person and a lawyer and to his value to the practice. The letter from Ms. Goldie spoke to some difficult personal challenges encountered by Mr. Mirasty regarding the loss of a colleague and friend during the period in question.

123. Counsel for Mr. Mirasty presented several cases as well; suggesting that conduct of this nature would not necessarily attract a period of suspension, and provided certain arguments against the applicability of the cases presented by the Law Society. He submitted that a period of suspension was not warranted, and that an appropriate sanction would include a reprimand and the payment of costs. Such a sanction would also be consistent with other cases brought before this tribunal, which considered what he submitted were similar, if not more serious, levels of sanctionable conduct.

124. In making a determination, this Hearing Committee takes into account those submissions and letters of support, and thanks counsel for their assistance in defining the parameters of our discretion.

125. The Hearing Committee reviewed the cases referenced by counsel, and considered the factors relevant to the determination of an appropriate sanction as well as the nature of the sanctions which have been directed by other Hearing Committees which have considered similar misconduct.

126. It is noted that, while counsel were not in agreement, neither was there significant disagreement regarding the nature of the appropriate sanctions applicable in this case. Counsel for the Law Society did not seek disbarment, nor a suspension beyond six months, and counsel for Mr. Mirasty did not suggest that a mere reprimand was sufficient. Both counsel were of the opinion that the assistance of Practice Review would be helpful in this case.

127. In considering the representations of counsel and the totality of the evidence presented, this Hearing Committee is cognizant that our primary role is to serve the public interest. It is our job to assure that the public maintains confidence that our members will conduct themselves with the highest level of professionalism and integrity. Perhaps more importantly, the public is entitled to expect that, when called upon to account to their regulator, lawyers are compliant and cooperative in taking

all steps necessary to ensure that expected standards of conduct are maintained.

128. To this, all other considerations are secondary.

129. The practice of law is not a right for those called; it is a privilege, and that privilege must be intimately tied to a lawyer's relationship with the regulator. Where a lawyer not only fails to meet the standard of conduct expected of our profession, but fails to respond promptly and completely to the regulator, that is a matter of significant concern to the regulator and to the interests of the public at large. A lawyer's failure to be fully and completely candid with the regulator is a significant aggravating factor which must also be considered.

130. We are cognizant of the mitigating factors of this case and have also taken them into account in arriving at our decision.

131. It is acknowledged that Mr. Mirasty is an aboriginal person, practices in Northern Alberta in the area of criminal law, and has a unique ability, because of his cultural heritage and his ability to speak Cree, to provide access to legal services to a geographic and cultural community which is in significant need of legal assistance and support. By all accounts, Mr. Mirasty has conducted himself in a fashion benefiting that community and the province as a whole, with the exception of those issues which gave rise to this matter.

132. While there was evidence of what might be described as a somewhat combative or uncooperative communication between Mr. Mirasty and the investigator appointed by the Law Society, we do take into account Mr. Mirasty's background and what might be reasonably considered as a unique sensitivity to persons in authority.

133. We have taken into account the personal letters of reference in support of Mr. Mirasty, speaking to his character and to the quality of his service to his community at large, as well as to the aboriginal community in particular. These letters also address his personal difficulties surrounding the loss of a close friend and colleague during the course of this matter.

134. We have taken into account the lack of any record of misconduct on the part of Mr. Mirasty, and that the citation regarding lack of candour is, in this case, more a matter of what might be called "indifference" to accuracy in his reporting to his regulator than any outright effort to deceive his regulator.

135. We considered as well the cases referred to us by Mr. Mirasty's counsel, in support of the submission that more serious misconduct has not resulted in suspensions in other discipline hearings.

136. As conceded by Mr. Mirasty's counsel, however, those cases presented by him could more broadly be described as "failure to serve" cases, as opposed to the issues in this case involving the failure to comply with directions of a court, and the failure to cooperate and be candid with the Law Society.

137. This Hearing Committee also considered the submissions of counsel for the Law Society. Many of the cases in which suspensions were not directed involved full or partial admissions of guilt, which was not the case in this matter.

138. We are very sensitive to the special nature of Mr. Mirasty's contribution to his community and to the practice of law. He regularly assists persons of limited funds, engaging in an area of work that is sorely in need of support. The broader public interest and the interest of the profession must, however, be considered.

139. In determining an appropriate sanction, we made reference to the considerations set out on page 13 of the Law Society of Alberta Hearing Guide. The factors applicable to this case include the following:

i) The need to maintain the public's confidence in the integrity of the profession and the ability of the profession to effectively govern its own members;

ii) Specific deterrence of this member from further misconduct;

iii) General deterrence of other members who may choose to ignore or withhold full cooperation from their regulator;

iv) Denunciation of this conduct;

v) Rehabilitation of the member; and

vi) Avoiding undue disparity with the sanctions imposed in other cases.

140. The nature of Mr. Mirasty's conduct cannot be sufficiently addressed by anything less than a suspension for at least a modest period of time, notwithstanding the absence of any prior record of misconduct.

141. Taking into account those considerations outlined above, the evidence, and the representations made to this Hearing Committee, the Hearing Committee determined that the appropriate sanction would be:

A) That Richard Mirasty be suspended from practice for a period of 45 days, commencing July 1, 2016; and

B) That Mr. Mirasty shall pay 75% of the hearing costs in accordance with the estimated statement of costs presented by the Law Society in Exhibit 61, reduced to reflect the dismissal of the third citation.

142. The Hearing Committee recommends that, upon application for reinstatement following the suspension, Mr. Mirasty be referred to Practice Review. We recognize that this recommendation does not place a condition on Mr. Mirasty’s suspension or on his practice, pursuant to section 72(2) of the *Legal Profession Act.*

143. The direction that the suspension shall commence on July 1, 2016, was made to ensure that the interests of Mr. Mirasty's current clients are not affected.

144. Mr. Mirasty shall be entitled to have one year from the date of this hearing to pay the costs, and they shall be paid in full on or before March 4, 2017.

Concluding Matters

145. There are no considerations in this matter which would require a referral of this case to the Attorney General of Alberta.

146. A notice shall be issued by the Law Society of Alberta, as required by the *Legal Profession Act*.

147. These proceedings and exhibits shall be made public, subject to redaction to protect the privacy of third parties and to assure compliance with the order of the Saskatchewan court set out in Exhibit 18. More specifically, Exhibits numbered 7, 14, 15, 16, 35, 38 40 and 55 shall not be available to the public.

Written reasons from the hearing on the citations were issued August 14, 2015, and written reasons from the sanctioning hearing were issued April 14, 2016. This report contains the combined reasons, and has been prepared for the purpose of publication.

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Robert Harvie, Q.C. (Chair)

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Gillian D. Marriott, Q.C.