IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF MATTHEW MERCHANT, A MEMBER OF THE LAW SOCIETY OF ALBERTA

The Panel:

Larry Ackerl, Q.C., Chairperson
Cheryl Gottselig, Q.C.
Tudor Beattie, Q.C.

Counsel Appearances:

Brian Gifford, for the Law Society of Alberta
James Rooney, Q.C., for Matthew Merchant

Date and Place of Hearing:

March 20, 2012
Calgary, Alberta

REPORT OF THE HEARING COMMITTEE

I. OVERVIEW

1. Matthew Merchant (the "Member") is subject to conduct proceedings under the *Legal Profession Act*, R.S.A. 2000, c. L - 8 on 7 separate citations. These citations were among 12 citations initially confronting the Member. After an earlier hearing and appeal, only these citations remained. Their original numbering is retained for this proceeding. During the hearing, counsel jointly proposed the particularization of citation 6. The Hearing Committee accepted these amendments. The resulting citations, with amendments italicized, are as follows:

   Citation 1: IT IS ALLEGED THAT you applied for *ex parte* garnishee orders when you knew the Complainant had been retained to act on behalf of B.F. and J.H., and that such conduct is conduct deserving of sanction;

   Citation 2: IT IS ALLEGED THAT in applying for *ex parte* garnishee orders, you misled the Court and failed to disclose all of the material facts, and that such conduct is conduct deserving of sanction;

   Citation 5: IT IS ALLEGED THAT you failed to respond to the Complainant on a timely basis, and that such conduct is conduct deserving of sanction;

Citation 6: IT IS ALLEGED THAT you threatened B.F. and J.H. *with criminal proceedings to induce B.F. and J.H. to pay monies that were paid to them by mistake*, and that such conduct is conduct deserving of sanction;

Citation 8: IT IS ALLEGED THAT you failed to render your trust accounting to your clients B.F. and J.H. on a timely basis, and that such conduct is conduct deserving of sanction;

Citation 11: IT IS ALLEGED THAT you lied to B.F. and J.H. that the loan agency was threatening them with criminal charges, and that such conduct is conduct deserving of sanction;

Citation 12: IT IS ALLEGED THAT you threatened criminal proceedings to induce B.F. and J.H. to pay money that were paid to them by mistake, and that such conduct is conduct deserving of sanction.

2. The Hearing Committee unanimously accepted an Agreed Statement of Facts resulting in the Member being found guilty of conduct deserving of sanction on 5 counts. The Hearing Committee also unanimously accepted a joint submission on sanction, issued a reprimand and directed a $5,000 fine on each of the 5 citations. No hearing costs were ordered. Other disposition terms included i) the Member's undertaking to move to inactive status and not apply for reinstatement before January 1, 2013, ii) the Member's acknowledgment that, absent the unusual circumstances of this case, a 2 year suspension was appropriate. Finally, the Member accepted that this sanction will be deemed a one year suspension in any future disciplinary proceeding.

II. JURISDICTION

3. Jurisdiction depends upon the existence of citations directed by the Conduct Committee of the Law Society of Alberta against a member of the LSA and the appointment of Hearing Committee members by the Chair of the Conduct Committee.

4. These jurisdictional requirements were established in Exhibits 1 through 4. Counsel for the Law Society of Alberta and the Member agreed the Hearing Committee had jurisdiction to hear the matter. The Hearing Committee similarly agreed.

5. Counsel for both the Law Society of Alberta and the Member were asked whether there was objection to any of the Hearing Committee members based on bias, apprehension of bias or any other reason. No objection was made.

III. PRIVATE HEARING MATTERS

6. In the interests of transparency, hearings should be conducted in public except to the extent necessary to protect compelling privacy interests.

7. No applications were received from interested parties to have the whole or part of the hearing held in private. Counsel agreed the hearing should be held in public. The Hearing Committee directed the hearing proceed in public.

IV. EXHIBITS

8. The Hearing Committee received and entered into evidence Exhibits 1 through 8.

V. MEMBER'S CONDUCT WAS DESERVING OF SANCTION

9. The parties tendered into evidence an Agreed Statement of Facts (Exhibit 6). The Member admitted guilt on citations 2, 5, 6 (as amended) 8 and 11. The Agreed Statement of Facts is attached as Appendix "A" to this report. The Hearing Committee emphasizes that the entire document was considered in reaching its conclusions.

10. As an overview, all citations arose from the Member's misconduct following receipt of settlement funds for two clients he represented in a motor vehicle accident claim. His office mistakenly provided these funds to the clients without deducting amounts owing to I. for money advanced in anticipation of settlement, despite being in possession of a written direction to repay these funds to I.

11. The Member subsequently left multiple telephone messages with his clients about this outstanding debt. These messages contained various lies and, in effect, were intended to intimidate the clients with the threat of criminal proceedings.

12. The Member then filed an *ex parte* application against the clients to recover the overpayment. He appeared before 3 different Queen's Bench Justices during this process. The Member's conduct and filed material repeatedly exhibited a woeful lack of candour. Particularly notable were the Member's failure to disclose the existence of opposing counsel and his deceptive presentation of factual material.

13. The statement also reveals the Member failed to provide timely trust accountings and was dilatory in responding to opposing counsel's repeated information requests about the *ex parte* applications.

ACCEPTANCE OF ADMISSION OF GUILT

14. Section 60 of the *Legal Profession Act* requires that an admission of guilt be in a form acceptable to the Hearing Committee before it is acted on. If accepted, each admission of guilt is deemed to be a finding of the Hearing Committee that the conduct is deserving of sanction.

15. In this case, Hearing Committee members had the benefit of reviewing a proposed exhibit book several days before the hearing started. This book included the Agreed Statement of Facts containing admissions of guilt and substantial factual detail. It is evident that this statement was fashioned from the extensive involvement (including mediation) of informed and able counsel. Evidence tendered during the hearing and counsel's oral submissions fortified these advance materials and further justified their acceptance.

16. Accordingly, the Hearing Panel accepted the Agreed Statement of Facts as an admission of guilt. There is a deemed finding that the conduct admitted to in Exhibit 6 and, in particular, citations 2, 5, 6, 8 and 11 is deserving of sanction pursuant to section 60 of the *Legal Profession Act*.

17. The Panel also accepted a joint application to dismiss Citations 1 and 12. Citation 1 was dismissed for lack of evidence. Citation 12 was dismissed because it was subsumed by the detailed allegations in amended count 6.

VI. REASONS AND DECISION ON SANCTION

18. The fundamental objectives of sanctioning are to ensure the public is protected and that the public maintains a high degree of confidence in the legal profession. A purposeful approach should be taken during the sanctioning process to ensure these objectives are satisfied.

19. Paragraph 60 of the Hearing Guide outlines factors that may be considered in satisfying these principles. These factors, weighted according to case circumstances, include the need to maintain public confidence in the integrity of the profession, the ability of the profession to effectively govern its own members, specific and general deterrence, denunciation of the conduct, rehabilitation of the member and parity of dispositions.

20. Paragraph 61 of the Hearing Guide lists more specific factors to be considered in imposing sanctions. They include the nature of the conduct, the level of intent, the impact of or injury caused by the conduct, the number of incidents and length of time involved. Special circumstances may also work to either mitigate or aggravate sanction.

21. Multiple aggravating factors exist in this case. These factors include:

    a) The Member's threats to his clients raised concerns about maintaining public confidence in the legal profession. Rather than resolutely protecting client interests the Member protected his self-interest.

    b) The Member acted intentionally in issuing the threats;

    c) The Member deceived multiple parties, namely his clients, opposing counsel, and the Courts; and

    d) This program of deceit undertook various forms and occurred on numerous occasions.

22. Various mitigating factors also exist in this case. They include:

    a) The misconduct was confined, almost entirely, to a one month period;

b) Approximately 7 years have elapsed between the misconduct and present hearing date. This delay is almost entirely attributable to litigation arising from the Member successfully quashing the initial Hearing Committee decision ordering his disbarment. That decision was quashed because the presiding panel exhibited a reasonable apprehension of bias;

c) During the intervening period the Member was disbarred for approximately 3 months and practiced under restrictive conditions for an additional 22 months. Counsel agreed these restrictions confined him to conducting paralegal duties; and

d) The Member's guilty plea exhibits remorse. It also saved significant resources as an anticipated 10 day hearing was concluded in less than one day.

23. Counsel for the Law Society and the Member jointly submitted that a "package" of sanctions would satisfy fundamental sentencing objectives while recognizing the unique history of this case. The joint submission on sanction proposed that the Member be issued a reprimand and receive a $5,000 fine on each of the 5 counts for which guilt deserving of sanction was found. Other dispositions terms included i) the Member's undertaking to move to inactive status and not apply for reinstatement before January 1, 2013, ii) the Member's acknowledgment that, absent the unusual circumstances of this case, a 2 year suspension was appropriate. Finally, the Member accepted this sanction will be deemed a one year suspension in any future disciplinary proceeding.

24. A joint submission on sanction deserves deference. As an Appeal Panel of the Law Society of Upper Canada stated, a joint submission "promotes resolution, the saving of time and expense, and reasonable certainty for the parties". *Law Society of Upper Canada v. Cooper*, *supra*. A hearing committee should give serious consideration to a joint sentencing submission, should not lightly disregard it, and should accept it unless it is unfit or unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting it. (See ***Rault v. Law Society of Saskatchewan***, 2009 SKCA 81, [2010] 1 W.W.R. 678; ***R. v. L.R.T.***, 2010 ABCA 224.)

25. In this case the parties participated in a mediation session overseen by the Chair of the Conduct Committee. Their full engagement in this structured process provides a concrete rationale for respecting the resulting joint submission.

26. The proposed sanction, in its totality, is reasonable. It is proportional to the circumstances of both the misconduct and the Member. The misconduct was serious and involved the Member launching into the systematic, deliberate deception of clients, counsel and Courts. It occurred briefly but pervasively. The Member was 24 years old at that time. He had been practicing for about 7 months without incident. (A reprimand was ordered on April 8, 2008 for subsequent unrelated conduct). The Member's misconduct is reasonably characterized as an aberration. The Member's age, immaturity and professional inexperience undoubtedly influenced his behaviour. His evident remorse and acceptance of responsibility remedies these concerns. The joint submission also recognizes the Member has already experienced significant sanctions arising from this matter. Finally, the Member's undertakings and acknowledgments offer future protection to the public. Under all the circumstances, the Hearing Committee fully accepted the joint submission on sanction.

VII. RECORD OF DECISIONS

27. The Member was found guilty of citations 2, 5, 6 (as amended) 8 and 11. Citations 1 and 12 were dismissed.

28. The Hearing Committee imposed the following sanction on the Member:

a) A verbal reprimand was administered by the Chairperson (See Appendix "B");

b) A $5,000 fine on each of citations 2, 5, 6, 8, and 11 was ordered;

c) The Member undertook to move to inactive status and not apply for reinstatement before January 1, 2013;

d) The Member acknowledged that absent the unusual circumstances of this case, a 2 year suspension was appropriate; and

e) The Member accepted this sanction will be deemed a one year suspension in any future disciplinary hearing

29. A redaction order was issued to protect confidential and privileged information prior to publication or public access.

30. A Notice to the Profession will not issue.

31. There is no direction that any report be made to the Attorney General.

Dated July 4, 2012 at Edmonton, Alberta.

Larry Ackerl, Q.C. (Chairperson)

Cheryl Gottselig, Q.C.

Tudor Beattie, Q.C.

Appendix "A"

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF MATTHEW V.R. MERCHANT, A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

INTRODUCTION

1. The Member was admitted to the Alberta Bar on August 24, 2004, and practiced in Calgary, Alberta until his transfer to the inactive list on January 1, 2012.

2. This matter had first been heard by a Hearing Committee in hearing proceedings which concluded on January 30, 2007, pertaining to allegations in 12 citations. Mr. Merchant was found guilty on a portion of the original citations. Mr. Merchant appealed that decision and his appeal was granted by the Benchers on February 4, 2011.

CITATIONS

3. As a result of the appeal only the following citations or portion thereof originally referred to hearing by the Conduct Committee on December 14, 2005, are the subject of this re-hearing:

1. IT IS ALLEGED THAT you applied for *ex parte* garnishee orders when you knew the Complainant had been retained to act on behalf of B.F. and J.H., and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED THAT in applying for *ex parte* garnishee orders, you misled the Court and failed to disclose all of the material facts, and that such conduct is conduct deserving of sanction.

3. Not guilty.

4. Not guilty.

5. IT IS ALLEGED THAT you failed to respond to the Complainant on a timely basis, and that such conduct is conduct deserving of sanction.

6. IT IS ALLEGED THAT you threatened B.F. and J.H., and that such conduct is conduct deserving of sanction.

7. Not guilty.

8. IT IS ALLEGED THAT you failed to render your trust accounting to your clients B.F. and J.H. on a timely basis, and that such conduct is conduct deserving of sanction.

9. Not guilty.

10. Not guilty.

11. IT IS ALLEGED THAT you lied to B.F. and J.H. that the loan agency was threatening them with criminal charges, and that such conduct is conduct deserving of sanction.

12. IT IS ALLEGED THAT you threatened criminal proceedings to induce B.F. and J.H. to pay money that were paid to them by mistake, and that such conduct is conduct deserving of sanction.

FACTS

4. The citations arose from conduct of the Member following the settlement of claims advanced on behalf of B.F. and J.H. ("the Clients") arising from a motor vehicle accident that occurred in April 2003.

5. The Clients entered into a contingent fee agreement with what was then Yanko Merchant Law Group on April 7, 2003. The lawyer who originally represented the Clients was Joshua Merchant. The Member assumed conduct of the claims in October 2003 and he was successful in concluding a settlement in January 2005, pursuant to which Merchant Law Group received the sum of $76,100.00 on the Clients' behalf

6. Between January 2004 and January 2005 the Clients had obtained advances on the anticipated settlement proceeds by way of loans from C.F.B. (xxxx) Inc., also known as I., and A.X.C. Inc. On each occasion, one or the other of the Clients executed a promissory note and an irrevocable assignment of proceeds in favour of the lender. Receipt of the assignment for each loan was acknowledged by Merchant Law Group.

7. There was a dispute between the Clients on the one hand and the Member on the other about the extent of the involvement of Merchant Law Group in obtaining these loans and whether any advice was provided in connection with the reasonableness of the terms of the loans. It appears clear, however, that all parties understood that the loans were to be repaid from the proceeds of settlement.

8. There was also a dispute between the Clients on the one hand and the Member on the other about the amount of contact the Member had with them and the extent to which he effectively represented them in relation to their claims or kept them informed of the progress of his discussions with the insurer.

9. The trust ledger disclosed that Merchant Law Group received the sum of $76,100.00 into its trust account on February 7, 2005 and that $26,100.00 of this amount was allocated to the claim of B.F. and $50,000.00 was allocated to the claim of J.H.

10. Pursuant to the contingent fee agreement, Merchant Law Group was entitled to 25% of the settlement proceeds plus disbursements. In addition, pursuant to the irrevocable assignments it had acknowledged receiving from the lenders, Merchant Law Group was supposed to deduct the amounts owing on the loans and remit the funds directly to the lender.

11. M.K., the Member's relatively new assistant, believes that he expressly told the Clients that they would be responsible for paying the outstanding loans from the settlement proceeds remitted to them. Both B.F. and J.H. believe that they understood that Merchant Law Group would remit funds to the lenders and that the cheques they would be receiving would be net of the loan proceeds.

12. There was confusion between the Member and M.K. as to what would happen. The Member expected the loan proceeds to be deducted by Merchant Law Group and remitted directly to the lenders. The Member thought he had communicated this to M.K. when he instructed him to the effect that the loan proceeds were to be paid from the monies payable to the Clients. M.K. understood this instruction to mean that he was to include the amounts owing to the lenders in the amounts payable to the Clients and that they were to remit these amounts to the lenders.

13. The Clients were anxious to receive the settlement proceeds. Although they had signed releases on January 31, 2005, and the settlement proceeds were received by Merchant Law Group on February 7, 2005, more than a week went by and they still had not received their settlement cheques. They finally arranged to attend at the office of Merchant Law Group on February 18th and, according to B.F. and J.H., when they did so they were eventually provided with an envelope by a receptionist. The envelope only contained two settlement cheques: a cheque payable to B.F. in the amount of $17,254.35 and a cheque payable to J.H. in the amount of $36,515.90.

14. The Clients did not see either the Member or M.K. on this occasion nor did they receive an explanation from anyone about what deductions had been made to calculate the cheque amounts. Moreover, they were not provided with either a written reconciliation of settlement proceeds or statements of account with the result that there was nothing accompanying the cheques to explain to the Clients how the amounts of the cheques had been calculated.

15. It is not clear precisely when statements of account were sent to the clients. There are letters dated February 24, 2005 enclosing statements of account addressed to B.F. and J.H. The Member maintains the letters were sent, however, the Clients denied receiving them. James Lawson, the lawyer who later represented the clients in the action commenced against them by the Member, maintains that when he initially met with them on March 8, 2005 and requested copies of their documents they did not provide him with statements of account. He received statements of account from the Member with a letter dated March 29, 2005.

16. On Sunday, March 6, 2005, the Member read correspondence from one of the lenders relating to a number of loans to Merchant Law Group clients. The Member saw B.F.'s name on the list of outstanding loans and assumed it must be a mistake. On March 7th he contacted A.X.C. Inc. and received confirmation that the loans had not been repaid. He later contacted I. and was told that its loans to the Clients had also not been repaid.

17. After obtaining this information from the lenders, the Member contacted his father for advice. According to the Member, his father alerted him to the possibility that the Clients faced potential criminal liability.

18. The Member telephoned B.F. He believed that he spoke to her mid-morning on March 7th and, according to the Member, B.F. immediately acknowledged that there had been an overpayment and that she and J.H. would come in to repay the money but she wanted to speak with J.H. first. The Member claimed that B.F. told him that her husband was at work until midnight and that she would contact the Member after she had spoken with J.H.

19. The Member maintains that he heard from I. later on March 7th and that he "tried to get information" because, based on his father's advice, he was trying to protect his clients from what he perceived would be I.'s next step.

20. The Member believes he spoke with T.F., an I.'s employee who told the Member that there were two options; which were to either go after the Merchant Law Group or the borrowers. The Member claimed he asked what I. would do and, specifically, whether it would prosecute criminally. The Member claimed that T.F. responded that she did not know and that the owner would be calling the Member.

21. After speaking with T.F., the Member was more concerned about the prospect of criminal prosecution. He spoke with a couple of lawyers in his firm and then did some research and pulled some cases. He also called B.F. again. The Member recalled that either in this conversation or in the first conversation B.F. had agreed that she and J.H. would come in the next morning and meet with him at 9:00 a.m. He testified that she led him to believe that they were going to repay the money and, specifically, that she said, "Of course we have to repay it."

22. The Member also wrote to the lenders on March 7th and sent the letters by facsimile. The substance of the letters was to confirm that the settlement funds had been dispersed to the Clients directly without withholding the amount of the outstanding loans and relaying the Member's conversation with B.F. to the effect that the Clients desired to make good on their debt obligation.

23. The letter to the lenders also enclosed a letter from the Member to the Clients in which the Member reminded the Clients of their responsibility to pay the outstanding loans.

24. At about 5:00 or 6:00 p.m. on March 7th the Member phoned B.F. again and asked her to get J.H. on the phone by way of a conference call as he wanted to "confirm something". B.F. apparently told him that she could not reach J.H. and that she and J.H. would meet the Member at his office the following morning between 8:00 and 9:00 a.m.

25. The Member states that when he went home that evening he took with him some case law and the files and, after reviewing the case law early the following morning, he was "absolutely convinced" that there was a risk that I. would pursue criminal proceedings against the Clients. This led the Member to call the Clients' residence a number of times during the course of March 8. In fact, the Member left at least four separate messages. As it turned out, these messages were recorded by the Clients.

26. The messages left by the Member were as follows:

<u>First message</u>:

> *Hi. Matthew Merchant calling. We were to meet this morning or I wanted to talk to you about the loan. Please call me right away. 237-7777. I'm worried*

about what they will start to do. I didn't want to tell the loan people because I don't want them to get rabid about it and start, you know, doing whatever they do. Their collections people are relentless and that's all that they do. So I, you know, I want to be able to tell them something to help you, but at the same time I'm not by law able to sort of hide those things from them. So they are getting a letter because I'm not going to phone them. It might take them awhile to get the letter, but they are getting a letter telling them that these loans, that we paid the money to you and please call me. You should come in to the office this morning. I'm happy to meet with you. This could be a problem. There are cases, lots of cases, the law is that when you, you know, the cases come from the banks that overpay people, that bank machines spits out fifty thousand dollars when you asked to take out, you know, five thousand dollars. And people say well you know, I didn't know, I thought it was a mistake or something, prosecuted criminally and convicted criminally for not bringing the money back. You know, they will use those sorts of things. That's what I've seen in the past and I don't want that to happen, because I only found out yesterday when they wrote and said when are going to get the money, that Mark failed to take it out. Any way, please call and, or just come down. I'm here all morning and we've got to deal with this issue. Bye.

Second Message:

Hi. Matthew Merchant calling. I expected to hear from you by now. Please call and just have them interrupt me. I want to hear from you on these issues. 237-7777. Thanks. Bye.

Third Message:

This is a message for [B.F.] or [J.H.] I need either one of you guys to give me a call at my office ASAP before the end of the day. 780-414-5929. Thank you.

Fourth Message:

Matthew Merchant calling. You have to talk to me. These people, I. anyway, A.X.C. Inc., haven't said as much, but I know that that's what they do. I. is now after me to cooperate with them in having criminal charges laid and I, you really have to be in communication with me. 237-7777. They can charge you with theft by, it's theft by conversion. You can't convert money of someone else's into your own. It's the same as theft. And they're really pressing me to cooperate with them and I'm sort of, you know, I had to report it to them, but I'm not being very bloody cooperative with them. I'm sorry that this has happened, but you have to talk to me or they'll move against you.

27. Later on the afternoon of March 8, 2005, the Member received a letter from James Lawson, a lawyer retained by the Clients after they were contacted by the Member. Mr. Lawson's letter, which was marked *without prejudice*, informed the Member that Mr. Lawson had been retained by the Clients to deal with issues arising out of the settlement and requested that the Member direct any further communication to him.

28. As a result of receiving Mr. Lawson's letter, the Member made no further attempts to contact the Clients by phone.

29. The Member did not respond to Mr. Lawson's letter immediately. He spoke with Satnam Aujla, a senior lawyer in the Calgary office of the Merchant Law Group, and asked Mr. Aujla to contact Mr. Lawson. He believed that Mr. Aujla called Mr. Lawson on March 8th and left a message. Mr. Aujla and Mr. Lawson did not speak until March 15th.

30. The Member also decided that he would proceed with an *ex parte* application against the Clients to recover the amount he considered to have been overpaid. To that end, he drafted a Statement of Claim, which sought the recovery of a debt amount in the sum of $25,515.45; drafted and swore an affidavit in support of an Attachment Order; and arranged for M.K. to provide an affidavit in support of an Attachment Order.

31. The affidavits left the impression that the Clients' demands were the principal cause of the mistake that had occurred; that they had knowingly received more than they were entitled to; that they refused to repay; and that there was an urgent need to move quickly.

32. On March 9, 2005, the Member appeared before Justice Hart on an *ex parte* application to attach bank accounts of the Clients. After hearing the Member and expressing concerns about the content of the affidavit filed by the Member, Justice Hart gave the following direction:

> But I think in light of what we have got to do here, I am going to direct, sir, I am not going to entertain your application any further today. I am suggesting to you that you get your affidavit in order and apply tomorrow morning on an *ex parte* basis at the appropriate time. That is my direction.

33. The Member immediately made changes to the affidavit about which Justice Hart had raised concerns and appeared before Justice Rawlins in Chambers later that morning. He did not disclose to Justice Rawlins that he had previously been before Justice Hart on the same application that morning nor did he disclose Justice Hart's direction. He also did not disclose that the Clients were represented by Mr. Lawson. Justice Rawlins granted the Member's application although she denied costs.

34. On March 10, 2005, the Member appeared *ex parte* before Justice Bensler to apply to expand the scope of the Attachment Order. Once again, he did not disclose that the Clients were represented by Mr. Lawson. Madam Justice Bensler granted the Member's application.

35. The Member, again without notice to Mr. Lawson, appeared before Justice Bensler on the afternoon of March 10th to obtain a further Attachment Order in relation to an account of J.H.'s. Madam Justice Bensler granted the Order.

36. The Member attached a number of the Clients' bank accounts.

37. The Member states that he had not previously brought an *ex parte* application and that he was somewhat unsure about how to proceed. He understood from Justice Hart's direction that he should remove all references to Mr. Lawson's *without prejudice* correspondence, which he had initially disclosed in the affidavit, and that he was "excited", "flustered", "panicked", "really

out of my depth in terms of my experience". This was the Member's explanation for his conduct arising from and following Justice Hart's direction. His explanation for not providing notice of his application to Mr. Lawson was that he was concerned that if he provided notice the clients might remove the money from their accounts.

38. In addition, sometime between March 10th and March 15th, the Member contacted the Calgary Police Service with the intent of initiating criminal proceedings. His explanation for doing so was that he is a law-abiding person and he viewed the actions of the Clients as terribly dishonest.

39. On March 14, 2005, Mr. Lawson sent a letter to the Member by facsimile in which he informed the Member that he had been advised by his clients that the Member had obtained an *ex parte* Order. He demanded that copies of all pleadings be faxed to his office immediately. The Member did not respond to this letter immediately. He states that when he received it he dictated a response that he expected to be dealt with in the ordinary course.

40. On the afternoon of March 15, 2005, Mr. Lawson sent another letter to the Member by facsimile in which he noted that the Member had obtained at least three *ex parte* orders against his clients; not responded to his fax of March 14, 2005; and made a criminal complaint. Mr. Lawson informed the Member that he was preparing an affidavit for his clients and that he intended to bring an application returnable on March 17th to set aside the Orders and prevent the Member from obtaining further *ex parte* Orders or taking execution proceedings.

41. Mr. Aujla contacted Mr. Lawson by telephone at the request of the Member. They discussed their respective sides of the mistaken overpayment to the Clients but nothing was resolved.

42. Mr. Lawson's application on behalf of the Clients proceeded before Madam Justice Romaine on March 17, 2005. In support of the application, Mr. Lawson filed an affidavit of B.F. The Member appeared on behalf of Merchant Law Group and sought an adjournment. The Member also initially informed Justice Romaine that he had advised each of the judges before whom he had appeared that there was a lawyer representing the clients.

43. Mr. Lawson had transcripts of the Member's previous attendances on the *ex parte* applications and provided these to Justice Romaine. After reading the transcripts, Justice Romaine observed that the Member had not indicated to either Justice Bensler or Justice Rawlins that there was counsel on the other side and, after hearing further from Mr. Lawson, Justice Romaine set aside the *ex parte* Orders and ordered the Member to pay solicitor and client costs forthwith.

44. Justice Romaine also suggested to the Member that he should report himself to the Law Society insurers and get counsel on the matter. He did that.

45. Eventually, the Law Society insurer, ALIA, appointed counsel to assist the Member and ALIA counsel represented the Member in resolving matters with the Clients. As it turned out, the Member and ALIA paid a negotiated amount to the lenders, the Clients recovered costs from the Member, and the Member and the Clients exchanged releases.

46. Mr. Lawson filed a complaint with the Law Society against the Member on behalf of himself and the Clients on June 27, 2005. The Member responded to the complaint.

47. The Member acknowledges that he had made a number of mistakes. He acknowledges that he should have paid closer attention to the calculation of the cheques payable to the Clients and that they should have been provided with an accounting at the time of payment so that they clearly understood the basis upon which the cheque amounts had been calculated.

48. The Member also acknowledges that he should have disclosed to Justice Rawlins and Justice Bensler that the clients were represented by Mr. Lawson and that his response to the Law Society arising from Mr. Lawson's complaint should have been more forthcoming in acknowledging his errors and less an exercise in advocacy.

49. The Member states that his mistakes were due to inexperience, a very busy practice, and being somewhat overwhelmed upon learning that the loans remained outstanding. The events giving rise to the citations had all occurred in the heat of the moment and that the Member has learned from his mistakes and is not likely to repeat them. The Member's initial response to the Law Society was hind sighted rationalization. The Member's approach to the complaint was as an advocate rather than making a straightforward and direct reply to the point.

50. Inexperience partially contributed to the Member's conduct. The Member was also embarrassed when he discovered that the outstanding loans had not been paid and his subsequent actions were motivated by a desire to correct the mistake as quickly as possible.

51. There was a lack of candour reflected in the Member's conduct before the Court and in the evidence he filed in support of the applications. Apparent from the affidavits filed in support of the Attachment Orders is an attempt by the Member to present a state of urgency that did not exist. The affidavits lacked detail with respect to a timeline that, had it been included, would in all probability have led the Member being denied the relief he sought, in particular, if he had disclosed that the Clients were represented by counsel.

52. Concerning his appearances before Justice Rawlins and his first appearance before Justice Bensler, the Member also failed to disclose there was a dispute about whether the Clients were aware of the error at the time it occurred or any time before it was brought to their attention by the Member; and he failed to disclose the use to which the funds had been put.

53. The Member's response to Mr. Lawson's request was at best casual or, at worst, deliberately slow.

54. Putting the messages in context with the Member's actions, the telephone voice mail statements were made by the Member with the intention of intimidating the Clients with the threat of criminal proceedings to cause them to address the outstanding indebtedness. The first and last messages contained lies.

55. In the first message on March 8th, the Member represented to the Clients that he was not co-operating with the lenders and that, while a letter had been sent to the lenders, it might take them a while to get it. That was a lie. In fact, when this message was left on the morning of March 8th, a letter had already been sent on March 7th by facsimile as had a copy of a demand letter from the Member to the clients.

56. In the last message, the Member clearly represented that he was being pressed by at least one of the lenders to co-operate in having criminal charges laid. That was a lie. The very most that had occurred at that point in time was that the Member had raised the possibility of criminal proceedings with an I.'s employee; nothing more.

57. The Member sent statements of account to the Clients by letters dated February 24, 2005. The Member sent different statements of account to Mr. Lawson on March 29, 2005. At the same time, the Member provided Mr. Lawson with trust accountings.

58. As it relates to the timeliness of rendering trust accountings, there was no dispute that this did not occur until March 29, 2005, which was approximately six weeks after the settlement cheques had been given to the Clients. In the circumstances, the trust accountings were not rendered on a timely basis.

ADMISSION OF FACTS AND GUILT

59. The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings.

60. The Member proposes that Citations 6 and 12 be combined into one citation as follows:

> *IT IS ALLEGED THAT you threatened B.F. and J.H. with criminal proceedings to induce B.F. and J.H. to pay monies that were paid to them by mistake, and that such conduct is conduct deserving of sanction.*

61. For the purposes of Section 60 of the *Legal Profession Act* the Member admits his guilt to Citations 2, 5, 6 (as combined with 12), 8, and 11 as being conduct incompatible with the best interests of the public and conduct which tends to harm the standing of the legal profession generally.

62. The Member does not admit any guilt to Citation 1.

THIS STATEMENT IS SIGNED ON BEHALF OF MATTHEW V.R. MERCHANT THIS 14th DAY OF MARCH, 2012.

_____

James B. Rooney, Q.C.
Counsel for Matthew V.R. Merchant

Appendix "B"

Now is the time for that reprimand, and your counsel and the counsel of the Law Society agreed that there were unusual, perhaps exceptional circumstances that existed here that worked to mitigate penalty. But they didn't work to mitigate our concern about your conduct and the nature of the message you need to receive. And at the time when we were drafting the reprimand, we were unaware that you had had subsequent involvement with the Law Society. So I want you to listen attentively to our comments to ensure not just that you are listening, but that they are heard.

The practice of law is a true privilege. Lawyers must act and must be seen to act unequivocally, and always, with unimpeachable integrity. The Courts, your clients, your professional colleagues and the public rely upon your honour. You have failed them all.

Very early in your career and in brief capsule of time, you lied to your clients, you threatened your clients, and you deceived the Courts. Your reputation, barely being fashioned as a junior lawyer, is now permanently tarnished and has rippled to colour that of your professional colleagues. Your sole currency as a lawyer – your reputation, has been spent.

To end where it began and to emphasize that point, you must learn this lesson quickly and completely should you wish to practice law again.