THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

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

INTRODUCTION

1. On December 13, 2006, a Hearing Committee of the Law Society of Alberta ("LSA") convened at the Law Society offices in Calgary to inquire into the conduct of Matthew Merchant (the "Member"). The Committee was comprised of Jim Peacock, Q.C., Chair, Shirley Jackson, Q.C., and Yvonne Stanford, Lay Bencher. The LSA was represented by Garner Groome. The Member was present for the hearing and was represented by his counsel, Graham Price, Q.C.

2. The hearing began on December 13, 2006 and continued to December 15, 2006 when it was adjourned to January 16, 2007. The Committee reconvened on January 16, 2007 until January 19, 2007, when it heard argument on the citations. The Committee delivered its decision on the citations on January 24, 2007 and heard argument and gave its decision on sanction on January 30, 2007.

JURISDICTION, PRELIMINARY AND INTRA-HEARING MATTERS

3. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, established the jurisdiction of the Committee.

4. There was no objection by the Member's counsel or counsel for the LSA to the composition of the Hearing Committee.

5. The Certificate of Exercise of Discretion and an Affidavit of Service were entered as Exhibit 5.

6. No private hearing application was made and as such the hearing proceeded in public.

7. There was an application by counsel for the LSA to recall J.H., and for J.H., who had previously been sworn, to give his evidence by way of telephone. Counsel for the Member initially objected but ultimately withdrew the objection to J.H.

BACKGROUND AND CITATIONS

8. The Member faced a total of 33 citations, as set out in the Notice to Solicitor **[Exhibit 2]**. It was originally proposed that Citations 1 through 12 would be addressed on December 13 through 15, 2006 and that the balance of the Citations would be addressed on January 16 through 19, 2007. As matters progressed, there was a direction from the Chair of Conduct that the Hearing Committee only address the first 12 Citations as follows:

    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. It is alleged that in applying for *ex parte* garnishee orders, you lied in your affidavit, and that such conduct is conduct deserving of sanction.

    4. It is alleged that in applying for *ex parte* garnishee orders, you expressed a personal opinion or belief as to the facts in evidence, and that such conduct is conduct deserving of sanction.

    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. It is alleged that you failed to comply with the direction of the Court to file a transcript of the March 9, 2005 proceedings before it, and that such conduct is conduct deserving of sanction.

    8. It is alleged that you failed to render your Statement of Account and trust accounting to your clients B.F. and J.H. on a timely basis, and that such conduct is conduct deserving of sanction.

    9. It is alleged that you improperly charged J.H. for disbursements or other charges that were not for the benefit of J.H., and that such conduct is conduct deserving of sanction.

    10. It is alleged that you misled or attempted to mislead the Court when you swore in your affidavit that the fact of criminal wrongdoing had arisen

in your discussion with an employee of C… and which is denied by the said employee, and that such conduct is conduct deserving of sanction.

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.

9. At the commencement of the hearing, counsel for the LSA informed the Hearing Committee that the LSA proposed withdrawing Citations 4, 7, 10, 11 and 12. He submitted that the evidence did not support convictions on Citations 4 and 7 and that Citations 10, 11 and 12 should proceed as particulars of Citations 2, 3 and 6. Counsel for the LSA submitted that the Hearing Committee should decide the issue after hearing all the evidence. Counsel for the Member submitted that the Hearing Committee ought to decide immediately.

10. After considering the submissions of counsel, the Hearing Committee directed that Citations 2 and 3 would be amended to include Citation 10 as a particular, Citation 6 would be amended to include Citation 12 as a particular and that Citations 7, 10 and 12 could be withdrawn. The hearing proceeded on that basis.

11. Counsel for the LSA also informed the Hearing Committee that the Member had been given notice that the citations were such that the LSA might be seeking disbarment or a lengthy suspension and a referral to the Attorney General.

SUMMARY OF RESULT

12. In the result, after considering the evidence and the submissions of counsel, the Hearing Committee found that Citations 1, 2, 5, 6, 8 and 11 were proven and that the Member was guilty of conduct deserving of sanction in respect of each Citation.

13. After considering additional evidence and the submissions of counsel on sanction, the Hearing Committee directed that the Member be disbarred; that there be a referral to the Attorney General in relation to Citations 6 and 11 and, in particular, the content of Exhibits 27 and 28; and that the Member pay the actual costs of the hearing.

EVIDENCE ON CITATIONS

14. The evidence in this hearing consisted of 85 exhibits, 66 of which were marked during the fact-finding stage of the hearing and 19 of which were marked during the sanction phase of the hearing.

15. The Member testified. In addition, the Hearing Committee heard from the following witnesses:

James Lawson;
B.F.;
J.H.;
Greg Hopfauf;
Mark Kingsmith;
T.P.;
J.R.;
Douglas Stokes, Q.C.;
Satnam Aujla; and
Jane Anne Summers.

16. 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.

17. The Clients entered into a contingent fee agreement **[Exhibit 25]** 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.

18. Between January 2004 and January 2005 the Clients had obtained advances on the anticipated settlement proceeds by way of loans from C…Inc., also known as I…, and A…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.

19. 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.

20. 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.

21. The Clients maintained that they had little or no contact whatsoever with the Member and that the first time they ever saw him was at this hearing.

22. The Member testified that he spoke with one or both of them on more than one occasion and that he was certainly in attendance when they attended at the office of Merchant Law Group to sign final releases. The Clients specifically disputed this, however, the Member's signature does appear as a witness on the release documents signed by both B.F. and J.H. on January 31, 2005.

23. The trust ledger **[Exhibit 8]** 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.

24. 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.

25. Mark Kingsmith, the Member's relatively new assistant, testified 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. testified 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.

26. It is clear from the evidence of the Member and Mr. Kingsmith that there was confusion between the two of them 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 Mr. Kingsmith when he instructed him to the effect that the loan proceeds were to be paid from the monies payable to the Clients. Mr. Kingsmith 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.

27. 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.

28. The Clients did not see either the Member or Mark Kingsmith 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.

29. It is not clear precisely when statements of account were sent to the clients. Letters dated February 24, 2005 enclosing statements of account addressed to B.F. and J.H. were entered as exhibits. **[Exhibits 34 and 37]**. The Member testified 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, testified 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. **[Exhibit 17]**.

30. 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… 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.

31. 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.

32. 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.

33. The Member testified 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.

34. The Member believes he spoke with T.F., an I… 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 Ms. F. responded that she didn't know and that the owner would be calling the Member.

35. The Member testified that, based on this conversation, nothing Ms. F. told him displaced his fears that I... might take criminal action against the Clients.

36. T.F. did not testify but the Hearing Committee accepted into evidence a transcript of an interview of her conducted by Greg Hopfauf, a Law Society investigator **[Exhibit 39]**. During the course of this interview, Mr. Hopfauf asked Ms. F.

whether the subject of criminal wrongdoing by either the Member or Clients ever came up in her conversation with the Member. In response to this question Ms. F. asked Mr. Hopfauf to be more specific and, in doing so, he asked her whether she accused the Member or the Clients of any criminal wrongdoing or threatened the Member that he or the Clients had done something criminally wrong. She responded in the negative.

37. The Member testified that after speaking with Ms. F. he was more concerned. 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."

38. 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. **[Exhibit 66]**.

39. 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.

40. The Member initially testified that he was quite certain that he had mailed the letters to the lenders on March 7th, and that, although the letters on their face suggested they had been sent by facsimile, he had reviewed his file and not found any indication that the letters had been sent by facsimile.

41. Near the conclusion of the fact-finding stage of the Hearing, after reviewing a portion of the original file with the consent of counsel, the Chair of the Hearing Committee discovered a document which confirmed that the March 7th letter to at least one of the lenders had been sent via facsimile on that date. The Member was recalled and only then acknowledged that the letters to both lenders had been sent by facsimile on March 7, 2005.

42. The Member testified that at about 5:00 or 6:00 p.m. on March 7th he 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.

43. The Member testified 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.

44. A transcript of the messages **[Exhibit 27]** and the original tape **[Exhibit 28]** were entered as exhibits . The messages left by the Member were as follows:

First message:

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…, 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.*

45. 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* **[Exhibit B to B.F.'s affidavit (Exhibit 15)]**, 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.

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

47. The Member testified that he 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 believes that Mr. Aujla called Mr. Lawson on March 8th and left a message. Mr. Aujla and Mr. Lawson did not speak until March 15th.

48. 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 **[Exhibit 10]**; drafted and swore an affidavit in support of an Attachment Order **[Exhibit 10(1)]**; and arranged for Mark Kingsmith to provide an affidavit in support of an Attachment Order **[Exhibit 10(3)]**.

49. 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.

50. 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. **[Exhibit 11]**

51. Notwithstanding this direction, 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 **[Exhibit 12]**.

52. 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 **[Exhibit 13]**.

53. 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 **[Exhibit 14]**.

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

55. The Member testified 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 remove the money from their accounts.

56. In addition, some time 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.

57. 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 **[Exhibit C to the Affidavit of B.F. (Exhibit 15)]**. The Member did not respond to this letter immediately. He testified that when he received it he dictated a response that he expected to be dealt with in the ordinary course.

58. 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 **[Exhibit 50]**.

59. Mr. Aujla testified that he contacted Mr. Lawson at the request of the Member. The Member made a note of Mr. Aujla's side of the conversation and this note and a transcription of it were entered in evidence. **[Exhibit 49]**.

60. 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 the affidavit of B.F. **[Exhibit 15]**. 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. [Page 5, lines 12 to 15 of the transcript of the proceedings before Justice Romaine **(Exhibit 16)**].

61. 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 **[Exhibit 16]**.

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

63. Eventually, the Law Society insurer, ALIA, appointed counsel to assist the Member and ALIA counsel, Douglas Stokes, Q.C. 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.

64. Mr. Lawson filed a complaint against the Member **[Exhibits 18 and 27]** and the Member responded to the complaint by letter dated August 5, 2005 **[Exhibit 24]**.

65. In due course, the LSA proceeded against the Member by way of these Citations.

DECISION ON CITATIONS

66. During the course of the Hearing, the Member acknowledged that he had made a number of mistakes. He acknowledged 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.

67. The Member also acknowledged 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 **[Exhibit 24]** should have been more forthcoming in acknowledging his errors and less an exercise in advocacy.

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

69. The Hearing Committee accepted that inexperience partially contributed to the Member's conduct. Clearly, the Member was embarrassed when he discovered that the outstanding loans had not been paid and there is little doubt that his subsequent actions were motivated by a desire to correct the mistake as quickly as possible.

70. What was troubling to the Hearing Committee was the lack of candour reflected in the Member's conduct before the Court and in the evidence he filed in support of the applications. It was apparent from a review of the affidavits filed in support of the Attachment Orders that the Member attempted 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.

71. The Member's response to the Law Society in August 2005 also lacked candour and so did the Member's conduct before the Hearing Committee. The most obvious example of the Member's lack of candour or, putting it in its most charitable light, lack of reliability, related to whether or not the March 7th correspondence to the lenders was sent by facsimile. This was an important point in relation to at least a couple of citations because it had to be considered in the context of statements that were made to the Clients in telephone messages.

72. Initially, the Member was quite steadfast that he had not sent this correspondence by facsimile and that it was only when, fortuitously, a fax transmission was found that the Member was forced to admit that the correspondence had been sent in this manner.

73. It is fair to say that the manner in which the Member was brought to this admission raised concerns with the Hearing Committee about the Member's credibility and reliability and this conduct by the Member left the Hearing Committee with doubt that the Member was being truthful to the Hearing Committee about his mindset and his actions at the relevant time.

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.

74. Counsel for the LSA submitted that this citation was made out on the basis that the Member applied for Attachment Orders when he knew that the Clients had retained Mr. Lawson to act on their behalf.

75. Counsel for the Member submitted that the citation was deficient and that it should really be subsumed within Citation 2. The basis for his submission was that it was really for a judge to decide whether or not the Member had proper grounds to obtain an *ex parte* order and the real issue related to the adequacy of information disclosed by the Member on the *ex parte* applications, which was the issue at the heart of Citation 2.

76. Rule 7 of Chapter 10 of the *Alberta Code of Professional Conduct* provides as follows:

> A lawyer must not communicate with the court respecting a matter unless the other parties to the matter (or, if represented, their counsel) are present or have had reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the Court.

77. The commentary notes that submissions to the Court by one party without the knowledge of the other undermines the fundamental even-handedness of the adversary process with a result that such conduct is only justified in exceptional circumstances. By way of example, it refers to a matter that may be sufficiently urgent that the time taken to afford notice will place the remedy in jeopardy or the giving of notice may permit an opposing party to defeat the remedy altogether.

78. The Member sought to justify his *ex parte* applications on the basis that if he disclosed what he was doing to the Clients they would simply remove the money from their bank accounts. However, the March 8th correspondence from Mr. Lawson not only told the Member that Mr. Lawson was representing the Clients, it also told him that most of the money was gone. Moreover, the Member knew that the Clients had received the money almost three weeks earlier such that there was no reasonable basis upon which to submit there was urgency to his application. Of concern, the affidavits filed in support of the *ex parte* orders did not disclose a timeline. Had they done so it would have undermined the sense of urgency the Member later represented to the court.

79. The Hearing Committee found that, in light of the Member's knowledge of the actual circumstances and in light of his knowledge that the Clients were represented by Mr. Lawson, it was unethical for the Member to have proceeded by way of an *ex parte* application. and this 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.

80. Citation 2 includes as a particular the substance of Citation 10 which was that the Member misled or attempted to mislead the court when he swore his affidavit that the fact of criminal wrongdoing had arisen in his discussion with an employee of one of the lenders.

81. Counsel for the LSA submitted that the Member misrepresented or failed to disclose a number of material facts during the course of his appearances before Justice Hart, Justice Rawlins and Justice Bensler. By way of example, counsel referred to the transcript of the proceedings before Justice Hart and specifically to the Member's submissions at page 2, lines 5 through 8; page 3, lines 10 and 11; page 7, lines 1 through 3; page 10, lines 1 through 4 and lines 12 through 15 **[Exhibit 11]**.

82. Counsel for the LSA submitted that, in substance, what the Member was attempting to do was to suggest to the Court that the Clients knew full well at the time they had been overpaid and that they had, in effect, taken advantage of the situation. In light of what the Member actually knew, this was misleading.

83. In relation to the attendances before Justice Rawlins and Justice Bensler, counsel for the LSA referred not only to the Member's failure to disclose that the Clients were represented by counsel, he also referred to the Member's misrepresentation of the sense of urgency and his characterization of the Clients as having wrongfully taken certain funds when he knew that the overpayment had occurred as a result of an error in the Member's office.

84. Counsel for the LSA also referred to the Member's statement to Justice Romaine that he had disclosed to Justice Rawlins and Justice Bensler that the Clients were represented by counsel. Clearly, this was not the case.

85. Counsel for the Member did not dispute that there was a failure to disclose material facts, however, he submitted that this had occurred not because the Member intended to mislead the court but because he was "flustered, excited" and lacked focus. He submitted that, in effect, the Member's "judgment had deserted him".

86. The Hearing Committee found that Citation 2 was made out: that the Member had attempted to mislead the court on each of the three appearances when he sought Attachment Orders by the manner in which he characterized the actions of his former clients, as reflected both in his affidavits and in his representations to the Court, and in his failure to disclose material facts, including relevant dates and material events, to all three judges.

87. Specifically, concerning his appearances before Justice Rawlins and his first appearance before Justice Bensler, the Hearing Committee found that the Member 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; he failed to disclose the use to which the funds had been put; and, most importantly, that he failed to disclose the fact that his former clients were represented by counsel.

88. On the basis of the totality of the evidence, the Hearing Committee did not accept the Member's explanation or the submissions of his counsel that the Member's mis-characterization of the evidence to the court was inadvertent. They found that , on a balance of probabilities, the conduct was deliberate and is conduct deserving of sanction.

CITATION 3

It is alleged that in applying for *ex parte* garnishee orders, you lied in your affidavit, and that such conduct is conduct deserving of sanction.

89. Citation 3 also includes Citation 10 as a particular.

90. Counsel for the LSA submitted this citation related specifically to paragraph 15 of the Member's Affidavit in Support of an Attachment Order **[Exhibit 2]**, which provided as follows:

> In discussions with the company, C…, the fact of criminal wrongdoing arose. I drew this to my former clients' attention….

91. Counsel for the LSA submitted that if we accepted Ms. F.'s recollection of her conversation with the Member, as admitted during the course of the testimony of Mr. Hopfauf, and Mr. Lawson's evidence, there was no discussion of criminal wrongdoing. He acknowledged, however, that if we accepted the evidence of the Member that he brought the subject up during the course of his conversation with Ms. F., the citation was not made out.

92. The Hearing Committee dismissed this citation.

93. In reaching a decision, the Hearing Committee gave little weight to either the hearsay evidence of Mr. Hopfauf or the evidence of Mr. Lawson concerning their respective conversations with T.F. about whether or not criminal proceedings were discussed during her telephone conversation with the Member. This was not

because it considered their evidence unreliable or lacking in credibility. It did so primarily because the Committee was not confident that the issue had been fully canvassed by them with Ms. F. such that it could not rule out the possibility that the Member, himself, had raised the topic of criminal proceedings with her. The Hearing Committee accepted that it was quite probable that the Member had raised the topic, in light of the Member's subsequent conduct.

CITATION 4

It is alleged that in applying for *ex parte* garnishee orders, you expressed a personal opinion or belief as to the facts in evidence, and that such conduct is conduct deserving of sanction.

94. Citation 4 was dismissed. The Hearing Committee accepted the submissions of both counsel for the LSA and for the Member that even if there were unfounded expressions of personal opinion or belief as to facts in the Member's affidavit, his representations to the Court in this regard were due to inexperience and, as such, were not 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.

95. Counsel for the LSA submitted that this citation related to the correspondence from Mr. Lawson to the Member dated March 14, 2005 in which he requested the Member to immediately provide him with copies of all pleadings. The substance of the Member's evidence was that he either actually did or intended to respond to Mr. Lawson's letter but that the request was dealt with in the ordinary course of his dictation.

96. Counsel for the LSA submitted that, in the circumstances, the Member should have recognized the urgency of the request and should have dealt with it promptly and his failure to do so was conduct deserving of sanction.

97. Counsel for the Member characterized the Member's conduct as highly discourteous and conceded that, in the circumstances, it was reasonable for Mr. Lawson to have asked for an immediate response and to have expected one. He also conceded that the Member did not provide an immediate response.

98. Counsel for the Member attempted to justify the Member's conduct by pointing out that Mr. Lawson had actually obtained the documents for himself within 24 hours with the result that a response was not really necessary. However, he acknowledged that this result did not excuse the Member.

99. Based on the evidence of the Member, the Hearing Committee was left with the impression that the Member's response to Mr. Lawson's request was at best casual and, at worst, deliberately slow.

100. The Hearing Committee found that Citation 5 was made out and that the Member's conduct is conduct deserving of sanction. .

CITATION 6

It is alleged that you threatened B.F. and J.H., and that such conduct is conduct deserving of sanction.

101. This citation relates to the messages left by the Member on the telephone answering machine of the Clients, which were transcribed. Both the tape and the transcription were entered as exhibits **[Exhibits 27 and 28]**.

102. Citation 6 includes Citation 12 as a particular. The substance of Citation 12 is that the Member threatened criminal proceedings to induce the Clients to pay money that was paid to them by mistake.

103. The impugned statements are contained in the first and last messages. Both of these messages were left on March 8th. In the first message, the Member said the following:

> *"…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…."*

104. The Member said the following in the last message:

> *"Matthew Merchant calling. You really have to talk to me. These people, I… anyway, A…, 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."*

105. The Member's explanation for these messages was, in substance, that they were based upon his review of case law and his telephone conversation with T.F. He

testified that he was concerned that the Clients could be criminally prosecuted by the lenders and that he left these messages because he was worried about their exposure.

106. The Hearing Committee did not accept the Member's explanation. Putting the messages in context with the Member's actions, the Committee found, on a balance of probabilities, that these statements were made by the Member with the express intention of intimidating the Clients with the threat of criminal proceedings to cause them to address the outstanding indebtedness. This was the only reasonable finding in light of the fact that both messages contained what were clearly lies.

107. 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.

108. 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. Based on the evidence, 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… employee; nothing more.

109. Counsel for the LSA submitted that the Member's conduct was a breach of Chapter 10, Rule 4, the material part of which provides as follows:

> A lawyer shall not personally, and shall not advise a client to:
>
> (a) lay or threaten to lay a criminal or quasi criminal charge for the collateral purpose of enforcing the payment of a civil claim or securing any other civil advantage for a client of the lawyer.

110. The commentary notes that lawyers are in a position to influence the course of criminal proceedings and that it is improper to threaten another person with criminal, quasi criminal charges or Law Society complaints or promise that charges or complaints will be withdrawn in an attempt to gain a financial or other benefit for the client. It also notes that the fact that the client has a legitimate entitlement to the benefit sought is immaterial.

111. Counsel for the LSA submitted that in making these threats, the Member was, in substance, acting on behalf of Merchant Law Group because he knew well that Merchant Law Group was directly responsible to the lenders for the outstanding loans.

112. Counsel for the LSA submitted that the Member's conduct also fell within Section 346 of the *Criminal Code of Canada*. He referred the Hearing Committee to case law in the 2006 edition of Martin's Annual Criminal Code in support of the

LSA's position. He acknowledged, however, that it was not necessary to prove extortion for Citation 6 to be made out but that the Hearing Committee had to consider Section 346 in light of its statutory duty to refer the matter to the Attorney General if there were reasonable and probable grounds to believe that a criminal offence has been committed.

113. Section 346 of the *Criminal Code of Canada* provides as follows:

> 346.(1) Everyone commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

114. Counsel for the Member submitted that the statements by the Member did not amount to extortion because nowhere in Exhibit 27 did the Member expressly say "return the money or you'll be criminally charged." He argued that there was no overt connection between criminal proceedings and advancing any sort of civil claim or other civil advantage.

115. Counsel for the Member submitted that the Hearing Committee ought to consider the Member's explanation that at the time these telephone messages were left he was acting out of concern for his clients. However, Counsel for the Member was asked whether he could reconcile the Member's explanation with the two lies that had been noted by the Hearing Committee and he could not.

116. The Hearing Committee concluded that the Member's explanation for these telephone messages was not credible. Moreover, when the Member's statements were placed in context, there was clear and cogent evidence that these statements by the Member clearly tied the threat of criminal proceedings with the failure of the Clients to contact the Member to make arrangements to address the outstanding loans.

117. On that basis, the Hearing Committee found, on balance of probabilities that the facts in support of Citation 6 had been made out and that the conduct is conduct deserving of sanction.

CITATION 7

118. This Citation was withdrawn.

CITATION 8

It is alleged that you failed to render your Statement of Account and trust accounting to your clients B.F. and J.H. on a timely basis, and that such conduct is conduct deserving of sanction.

119. The evidence before the Hearing Committee was that the Member sent statements of account to the Clients by letters dated February 24, 2005. The Clients denied receiving the letters and the enclosed statements of account. 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.

120. Counsel for the LSA submitted that, if we accepted the evidence of the Member, Citation 8 was not made out in relation to his failure to render a statement of account. However, the Member still failed to render a trust accounting on a timely basis. If we accepted the evidence of the Clients, the Citation was made out both with respect to the statement of account and trust accounting.

121. Counsel for the Member submitted that the Hearing Committee had to decide whether it accepted the Member's evidence that the letter of February 24, 2005 with the attached statement of account was sent. He pointed out that B.F. had testified that the Clients had had difficulty with their mail, although he acknowledged that this had occurred approximately a year after the events in question.

122. The Hearing Committee was left with some uncertainty about exactly what documents the Clients received from the Member and whether they had kept all the documents they had received. In the result, the Hearing Committee accepted the possibility that the Member had sent the February 24, 2005 letters to the Clients with the enclosed statements of account. If the statements of account were sent at that time they were rendered on a timely basis. Therefore, as it relates to the statements of account, Citation 8 was not made out.

123. 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 and the conduct is conduct deserving of sanction.

CITATION 9

It is alleged that you improperly charged J.H. for disbursements or other charges that were not for the benefit of J.H., and that such conduct is conduct deserving of sanction.

124. Counsel for the LSA submitted that the breach of the accounting rules was very technical and that, in the circumstances, the conduct was not conduct deserving of sanction. Counsel for the Member concurred and the Hearing Committee accepted this submission.

125. The breach related to transfers made from trust to pay certain disbursements. It was clear from the evidence that these disbursements were appropriate and that, had they been paid from the general account, as they should have been, there would have been no issue.

126. The Hearing Committee dismissed Citation 9.

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.

127. Citation 11 related to the statements by the Member to the Clients in the telephone messages **[Exhibits 27 and 28]**. For the reasons articulated by the Hearing Committee in relation to Citation 6, the Hearing Committee did not accept the Member's explanation for these messages.

128. The Hearing Committee found that, even accepting the Member's explanation about his telephone conversation with T.F., the Member's statements about being asked by the lenders to co-operate in bringing criminal proceedings were lies. As such, the Hearing Committee found that, on a balance of probabilities, the facts in support of Citation 11 were made out and that the Member's is conduct deserving of sanction.

EVIDENCE ON SANCTION

129. The evidence consisted of Exhibits 67 to 85. In addition, the Member was cross-examined by counsel for the LSA.

130. Counsel for the Member entered a letter from the Member to the Hearing Committee dated January 29, 2007 as an exhibit **[Exhibit 73]**. In this letter, the Member acknowledged that he was "neglectful, and worse in [his] supervision of this matter in terms of the cheques being released and [his] subsequent actions." He also admitted that he was "embarrassed and remorseful for the poor performance put forth in terms of [his] submissions to the Court."

131. In relation to his dealings with his clients, the Member accepted that "the messages left on [his] clients' voicemail were inappropriate and that they brought inappropriate pressure to bear" and that he was humiliated by his indiscretion and assured the Hearing Committee that he would "not ever again exercise such poor judgment in terms of language used which was totally inappropriate"; and that he now saw that "the statements were not an accurate reflection of facts and were inappropriate".

132. The Member went on to tell the Hearing Committee how he had learned from his mistakes and taken steps to ensure that these mistakes do not occur again.

133. The Hearing Committee was also provided with evidence that Douglas Stokes, Q.C. was prepared to function as the Member's mentor within the parameters of the Law Society's Mentorship Program, as well as letters of good character from both current and former members of Merchant Law Group as well as other counsel.

134. In addition, the Hearing Committee was provided with letters of apology sent by the Member to Justice Hart, Justice Rawlins, Justice Bensler, Justice Romaine, James Lawson and, through Mr. Lawson, the clients. The letters of apology were all dated January 22, 2007.

135. On cross-examination by counsel for the LSA, the member was asked about his representations to the Hearing Committee in Exhibit 73, particularly those relating to how he had changed his practises when dealing with the Court. He was then referred to the Reasons for Decision of Justice McMahon in *Calf Robe v. Canada*, 2006, ABQB, 652 arising from an application by the Merchant Law Group for a charging order or, alternatively, a solicitor's lien to secure fees, disbursements and taxes against its former client, Marie Calf Robe and against one of the Defendants.

136. The Member was counsel for Merchant Law Group on the application. In his Reasons, Justice McMahon commented negatively on the careless drafting of the motion, the fact that a legal secretary was used to depose to facts that should have been deposed to by a lawyer of the Merchant Law Group and the nature of the relief sought in the application.

137. In addressing costs, Justice McMahon wrote:

> [33] As to the scale of costs, I do not find conduct, or misconduct, which would warrant solicitor/client costs. However, the relief sought against the Third Parties was so clearly baseless that increased costs are proper.
>
> [34] Calf Robe is equally entitled to her costs on the same scale. She has been wholly successful. The motion was brought against her notwithstanding the contradictions in the Retainer Agreement and the Merchant letter, and despite a lawyer's special obligation to inform a client of her liability for legal fees.

138. The application in question was heard on July 12, 2006. This was approximately 16 months after the events that gave rise to the Citations before the Hearing Committee.

139. The Member attempted to distance himself from some of Justice McMahon's comments on the basis that he was proceeding on instructions from other lawyers and that this was an event that occurred in July 2006 whereas his letter to the Hearing Committee was written in January 2007.

140. Counsel for the LSA also asked the Member about a comment he made during the course of his evidence to the effect that Merchant Law Group got its "clock cleaned" and whether he was referring to the fact that there was an increased costs award against the Merchant Law Group. The Member's response was that he didn't think there were increased costs and it was only when counsel for the LSA referred him to the paragraphs quoted above that he acknowledged that there were increased costs.

141. On another issue in *Calf Robe* case, the Member was asked about Justice McMahon's comments concerning the contradictions in the Retainer Agreement and whether the Member was aware of the Retainer Agreement that Justice McMahon was referring to. He responded that he was not aware of it and that he did not think it was included in the affidavit that the assistant had sworn. Later, after it was established that the Retainer Agreement was exhibited in the affidavit relied upon by the Member, the following exchange occurred between the Chair of the Hearing Committee and the Member:

> Q And then just a couple of minutes ago, Mr. Groome asked you in connection with the Calf Robe matter whether you had seen the Retainer Agreement and the Merchant letter, and your initial response was: No, I don't think so; yet it's clear from Justice McMahon's judgment that they were in the affidavit that you used in support of your application.
>
> A And I only have the decision to look at. I don't have a recollection of it. I don't know.
>
> Q Why did you say: No? If you don't know, answer the question honestly: I don't know. That's what I'm trying to understand, sir, you tell me that you have learned and you tell us you have learned from the lesson, and your actions don't seem to support that. How am I supposed to reconcile that?
>
> A Well, saying I don't think so is saying: I'm not sure, but I don't know that. I should have said: I don't know.

142. The Member acknowledged that whatever lessons he had learned from the events giving rise to the Citations before the Hearing Committee he had not learned them by the time he responded to the Law Society complaint in August 2005.

143. He was also asked about his testimony before the Hearing Committee concerning the March 7th correspondence and how it had been sent. The Member's

explanation for his initial response was that, because he could not find the fax confirmation on the file, he was sure that he had not faxed the correspondence

ARGUMENT ON SANCTION

144. Counsel for the LSA submitted that the primary purpose of sanctioning is to protect the public and that, secondly, it is to maintain the reputation of the legal profession.

145. He submitted that the Citations for which the Member was found guilty fell into two principal areas of misconduct. The first group involved Citation 8, which was failing to provide a proper trust accounting and he submitted that if that was the only matter before the Hearing Committee a reprimand would be sufficient. However, the second group of Citations, making up the balance of the Citations for which the Member was found guilty, involved deceit and reflected an intention on the part of the Member to obtain a personal gain. This conduct was sufficiently serious that the appropriate sanction was either disbarment or a lengthy suspension.

146. Counsel for the LSA submitted that the question the Hearing Committee had to consider was whether the Member's expression of regret arose because the Member truly felt remorseful over his misconduct and the harm it had brought to the reputation of the profession or whether it arose only because the Member had been caught and was faced with the inescapable conclusion that he was going to be sanctioned.

147. He submitted that based upon what the Member had done as opposed to what he said he would do, his expression of remorse was only consistent with concern about the jeopardy he was facing.

148. Counsel for the LSA submitted that there were a number of general factors that the Hearing Committee should take into account in determining the appropriate sanction. He referred to specific deterrence to prevent the Member from engaging in further misconduct as well as general deterrence and the need to send a message to the profession that the misconduct engaged in by the Member will attract the most serious sanctions from the Law Society. He also referred to the need to remove the risk the Member's conduct poses to the public.

149. Counsel for the LSA also referred to the following specific factors in this case:

(i) The extremely serious nature of the misconduct;

(ii) The fact that the Member's conduct was deliberate;

(iii) The nature of the Member's arrogant response to the Law Society **[Exhibit 24]**;

(iv) The Member's attempt to take advantage of the vulnerability of unsophisticated clients; and

(v) The conduct of the Member throughout the Hearing, including the piece meal production of documents.

150. Counsel for the LSA submitted that the conduct for which the Member was found guilty raised serious questions about his integrity and honesty and should cause the Hearing Committee to conclude that the Member's conduct was a product of a flawed character such that disbarment was the appropriate sanction.

151. Counsel for the LSA also submitted that the Member's conduct following the complaint raised serious governability issues. He referred to the Member's response to the Law Society complaint in August 2005 **[Exhibit 24]** and argued that it was a more accurate reflection of the Member's attitude than his letter to the Hearing Committee **[Exhibit 73]** in that it reflected his state of mind at a time when he was not facing the immediate threat of sanction. On more than one occasion in this response to the Law Society, the Member suggested that his conduct did not raise issues involving discipline.

152. Counsel for the LSA referred to passages in the Hearing Guide and previous decisions of Hearing Committees in support of his submission that, because the Citations for which the Member had been found guilty raised serious issues about the Member's integrity and governability, disbarment was the appropriate sanction.

153. On the issue of a referral to the Attorney General, counsel for the LSA submitted that even if the Hearing Committee concluded that there were not reasonable and probable grounds to believe that an offence had been committed under Section 346 of the *Criminal Code of Canada*, the evidence supported a referral in relation to Section 372 of the *Criminal Code of Canada* which provides as follows:

> Everyone who, with intent to alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence…

154. In the submission of counsel for the LSA, the Hearing Committee should make a referral to the Attorney General on the basis that there were reasonable and probable grounds that offences under one or both of these sections had been committed.

155. Counsel for the Member submitted that there were two important points that the Hearing Committee should take from the Member's letter to the Hearing Committee **[Exhibit 73]** and his evidence on cross-examination. They were:

(i) that the Member accepted responsibility for his actions; and

(ii) that he had learned to say "no" when an action is inappropriate.

156. Counsel for the Member agreed with counsel for the LSA that the central issue before the Hearing Committee was protection of the public and maintenance of the reputation of the profession. He argued that the evidence showed that the Member and Merchant Law Group had put in place controls, which made it unlikely that what had occurred in this case would occur again.

157. Counsel for the Member submitted that much of the conduct giving rise to the Citations occurred “in the heat of the moment” and was due primarily to the Member’s inexperience. He submitted that much of what occurred during that period was coloured by a number of factors, including embarrassment, chagrin, excitement and trying to remedy a problem.

158. As to the Member’s response to the Law Society, he characterized it as the Member being an advocate rather than just providing a factual response and as a misconception on his part about what he should do when responding to the Law Society.

159. Counsel for the Member did not have an explanation for the Member’s conduct before the Hearing Committee. He submitted, however, that having regard to the Member’s actions an appropriate disposition would be a significant fine rather than disbarment.

160. With respect to the factors that the Hearing Committee ought to consider, counsel for the Member referred to factors applicable to the Member, including the severe stress of the hearing process. He also referred to the Member’s motive for his actions, which, although irrelevant to the finding of guilt, was relevant to the sanction. He argued that we ought to consider the Member’s mental state, including the fact that his actions were motivated by his desire to recover the money. It was unclear whether this was offered as a mitigating or aggravating factor.

161. Counsel for the Member argued that the letters of reference indicated that there are members within his firm and the profession who show genuine concern and support for the Member and that the Hearing Committee ought to attach significance to that, particularly to the comments of Mr. Stokes.

162. Counsel for the Member submitted that the Member had clearly acknowledged that his conduct before the Court as it related to Mr. Lawson was inappropriate. In relation to the voice messages he left on the Client’s answering machine, counsel referred to the Member’s explanation that he thought, based on his conversation with Ms. F., that the Clients faced the risk of criminal proceedings.

163. The Hearing Committee asked counsel for the Member whether the Member’s testimony concerning the telephone messages **[Exhibit 27]** was an aggravating factor in that it demonstrated a lack of remorse, a lack of insight, and a lack of awareness or responsibility. He submitted that the hearing process itself and the

enormous stress and pressure it had put on the Member had to make an impression on the Member such that he would never want to go through such a process again.

164. Counsel for the Member was asked about the Member's response concerning Justice McMahon's comments about the Retainer Agreement in the *Calf Robe* decision and the fact that his answers to the Hearing Committee also, raised questions about his reliability. Counsel's response was that the Hearing Committee had to give the Member the message that the practice of law requires trust and confidence exist between lawyers.

DECISION ON SANCTION

165. In the result, based on all the evidence, including the conduct of the Member during the course of the hearing, the Hearing Committee found that the appropriate sanction for the Citations was disbarment.

166. The primary purpose of disciplinary proceedings is:

> (1) the protection of the best interests of the public (including the members of the Society); and
>
> (2) protecting the standing of the legal profession generally.

167. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

168. As pointed out by Gavin McKenzie in *Lawyers & Ethics: Professional Responsibility and Discipline* (at page 26-1):

> "The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession."
>
> "In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes…."
>
> "The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practice will be terminated regardless of extenuating circumstances and the probability of recurrence…."

169. Paragraphs 60 and 75 of the Hearing Guide address the situation where integrity is in issue. Paragraph 68 is instructive in this case. It provides as follows:

68. Marvin J. Huberman in his article "Integrity Testing for Lawyers: Is it Time?" (1997), 76 *Canadian Bar Review* 47 at pp.53-54:

> "The costs of lack of integrity, and the perception of absent [sic] of integrity, are significant. When lawyers act without integrity, people are injured, whether financially or emotionally. The individual lawyer suffers a loss of reputation, the profession's reputation suffers damage, and the justice system is diminished. Mr. Justice La Forest has explicitly stated that lawyers must possess the qualities of honesty and integrity for the justice system to function properly. Lawyers are individuals' representatives within the legal system. People rely on them to serve their interests, to carry out the task required of them, and to do so in a principled fashion. Lawyers 'may be entrusted with the liberty, confidences, property, well-being and livelihood of a client'. Likewise, judges rely upon the integrity of the lawyers who appear before them. Judges expect to be able to rely upon lawyers' statements, research and undertakings. If judges cannot assume that the representations made by lawyers are true and accurate, the system cannot function."
>
> "Integrity on the part of lawyers is therefore essential to the effective operation of our legal system…"
>
> "…Even further, the integrity of the legal profession is necessary in order to maintain a free and democratic society. In essence, then, a lawyer's integrity is important for reasons going far beyond the interests of his or her clients; it has implications for our overall legal and social order. Lawyers thus have an obligation to their clients, to the judiciary, to other lawyers and to the public to act, at all times, with integrity."

170. The Hearing Committee's decision that disbarment was the appropriate sanction was based on its conclusion from the evidence that the Member lacked integrity.

171. The conduct giving rise to most of the Citations involved conduct relating directly to the Member's integrity and the Hearing Committee found that the Member's conduct in his dealings with the Court, with his clients, and with other counsel all demonstrated a lack of integrity.

172. The Member's response to the Law Society in August 2005 **[Exhibit 24]** and his conduct before the Hearing Committee were aggravating factors, which contributed to the Hearing Committee's decision that disbarment was the only appropriate sanction because, notwithstanding the Member's evidence to the contrary, the Hearing Committee found, based on his conduct in the hearing, that the Member still did not appreciate the importance of honesty and candour.

173. The Hearing Committee was unanimously of the view that nothing short of disbarment would adequately impress on the Member, the profession, and members of the public the importance of being able to rely on a lawyer's honesty and integrity.

174. The Hearing Committee also directed that the Member should pay the actual costs of the hearing.

CONCLUDING MATTERS

175. During the course and at the conclusion of the hearing there were applications by counsel for the LSA that certain exhibits remain private. They were the affidavits of service in Exhibit 5, Exhibits 6, 7, 8, 9, 25, 26, 29, 33, 43 and 61, as well as the statements of account attached to Exhibits 34 and 37 and any evidence given by Mr. Stokes concerning Exhibit 61. Counsel for the Member did not object and the Committee directed that these exhibits and the evidence of Mr. Stokes concerning Exhibit 61 remain private.

176. There was also an application by Suzanne Porteous, counsel for T…, to have a portion of the hearing involving the evidence of T.P. held as a private hearing. Counsel for the LSA and Member did not object. The Hearing Committee directed that the branch number and account number on Exhibit 58 be redacted and to the extent that either were referred to in the course of the hearing the information remain private. Otherwise, Ms. P.'s evidence will be public.

177. The Hearing Committee directed that a Notice to Profession be circulated.

178. The Hearing Committee directed that a referral to the Attorney General be made in relation to the statements of the Member that were the subject matter of Citations 6 and 11.

DATED this 14th day of November, 2008.

_____

JIM PEACOCK, Q.C., Chair and Bencher

_____

SHIRLEY JACKSON, Q.C., Bencher

_____

YVONNE STANFORD, Lay Bencher