



The Law Society of Saskatchewan

DAVID WAYNE CLEMENTS

November 20, 2013

Law Society of Saskatchewan v. Clements, 2013 SKLSS 10

**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF DAVID WAYNE CLEMENTS,
A LAWYER OF LLOYDMINISTER, SASKATCHEWAN**

PRELIMINARY APPLICATION AND HEARING COMMITTEE DECISIONS

PRELIMINARY APPLICATION FOR FURTHER AND BETTER PARTICULARS

Application Date: June 28, 2013

Hearing Committee: Robert Heinrichs (Chair), Thomas Campbell and Laura Lacoursiere

Counsel for Member: Bruce Wirth

Counsel for Law Society of Saskatchewan: Drew S. Plaxton

1. The Applicant applies pursuant to Rule 432 of The Rules of The Law Society of Saskatchewan for further and better particulars of the charges against the Applicant, as set out in the Formal Complaint dated September 26, 2012. The application proceeded by telephone conference on June 28, 2013 in the presence of the full Hearing Committee.

2. The Applicant requested better particulars in connection with each of the four counts in the Formal Complaint as follows:

- Who are the alleged clients of the Applicant?
- Are the alleged clients actual or deemed clients of the Applicant?
- With respect to each alleged client, when and in what circumstances did the lawyer- client relationship commence?

3. Additional particulars are also sought with respect to each particular charge as follows:

Charge 1 – What was the nature of the conflict of interest?
When did the conflict of interest rise?

Charge 2 – In what respect was there a significant risk that the Applicant or his associate's interests and the client's interest would differ?

Charge 3 – How and when did the Applicant act in a manner contrary to the interests of some or all of his said clients favoring his or his associate’s interests over that of the clients?

Charge 4 – When and for what reason should the clients have been referred to independent counsel?

When and under what circumstances should the clients have been given a reasonable opportunity to seek independent legal advice?

4. During the course of the Application the Applicant’s counsel advised that the additional particulars in relation to Charge 4 regarding independent legal advice had been provided by counsel for the Conduct Investigation Committee and the Applicant’s request for further particulars in that regard had been satisfied.

5. With respect to the first two sets of particulars requested in regard to each of the four charges, what the Applicant is in essence requesting is that the Investigation Committee elect a mode of transgression being alleged against the Applicant in the charges. With respect, the Investigation Committee is entitled to charge in the alternative and, ultimately, it is the function of the Hearing Committee, as the trier of fact, to ultimately determine those issues.

6. The remaining particulars sought pursuant to the Application are also issues to be determined by the Hearing Committee based on the evidence that will be placed before it and argument thereafter. In the Preliminary Ruling regarding Member Abrametz dated December 6, 2011, the Hearing Committee stated:

“The purpose of particulars is to define the issues to be decided if the wording of the complaint is too vague or general, and to ensure the Member will not be taken by surprise at the hearing.”

7. It is noted that the issues forming the subject matter of the charges in the present case have been well litigated between the relevant parties, both in a Queen’s Bench civil action and in a Business Corporations Act application. As well, disclosure of documents in possession of the Investigation Committee has been provided to the Applicant. Given the above, the circumstances of the alleged misconduct are known to the Applicant and the wording of the allegations contained in the Formal Complaint contain sufficient detail of the circumstances of the alleged conduct unbecoming to give the Member reasonable information with respect to the conduct charged and to identify the relevant transactions.

8. Accordingly, the Applicant’s motion is dismissed.

Dated at the City of Swift Current, in the Province of Saskatchewan, this 2nd day of July, 2013.

“Robert R. Heinrichs”
Hearing Committee Chair

Dated at the City of Yorkton, in the Province of Saskatchewan, this 2nd day of July, 2013.

“Thomas Campbell”
Hearing Committee Member

Dated at the City of Swift Current, in the Province of Saskatchewan, this 2nd day of July, 2013.

“Laura Lacoursiere”
Hearing Committee Member
By her authorized agent, Robert R. Heinrichs

DECISION OF THE HEARING COMMITTEE

Hearing Date: July 22, 23, 24, 2013

Location: Saskatoon, SK

Hearing Committee: Robert Heinrichs (Chair), Thomas Campbell and Laura Lacoursiere

Counsel for Member: Bruce Wirth

Counsel for Law Society of Saskatchewan: Drew S. Plaxton

Introduction

9. David Wayne Clements (the Member) is the subject of a Formal Complaint (Exhibit P-1) dated September 26, 2012 alleging four (4) counts of conduct unbecoming a lawyer (the Complaint). Exhibit P-1 was amended at the Hearing with respect to counts number two (2) and three (3) by changing the wording at the beginning of each count from “did directly through his associate” to “did directly or through his associate”.

10. The Discipline Hearing Committee (the Committee) in this matter was comprised of Robert Heinrichs, Chair, Thomas Campbell and Laura Lacoursiere. Counsel for the Law Society of Saskatchewan Investigation Committee (LSS) was Drew S. Plaxton. Counsel for the Member was Bruce W. Wirth.

11. The evidential hearing on the merits of the Complaint was held July 22, 23 and 24, 2013. Written briefs were filed and oral arguments were presented and heard on August 12, 2013. The Committee reserved its decision on all counts.

12. The Committee rendered an earlier ruling on July 2, 2013 on a preliminary motion for further and better particulars of the charges against the Member as set out in the Formal Complaint. The Committee dismissed that preliminary motion.

13. The original complaint in this matter was filed with the Law Society of Saskatchewan prior to July, 2010. As the initial complaint in this matter was received by the Law Society of Saskatchewan prior to the *Legal Profession Amendment Act, 2010* being brought into effect on July 1, 2010, the applicable transitional rules required that this hearing proceed under the *Legal Profession Act, 1990*, the Rules of the Law Society of Saskatchewan and the Law Society's Code of Professional Conduct as they existed prior to July 1, 2010.

A. Preliminary Matters of the Hearing

14. At the beginning of the hearing, it was agreed by both Counsel that the Hearing Committee was properly constituted and that there were no jurisdictional complaints. Counsel for the Member requested that the Complainant Mr. X be excluded during the testimony of the Complainant Mr. X. and the Committee agreed to that exclusion. Some discussion occurred regarding the disclosure of a letter from Mr. X. to solicitor Mr. Y dated June 3, 2010 with Counsel for the Investigation Committee initially claiming the letter was the subject of solicitor-client privilege. Counsel for the Member took issue with that claim and took the position that the said privilege had been waived. Counsel for the Law Society of Saskatchewan agreed to provide the letter to Counsel for the Member. Nothing further turned on that document and this Committee does not rely on that document as part of the hearing on the merits.

B. Counts in the Complaint

15. The Formal Complaint alleges that the Member is guilty of conduct unbecoming a lawyer in that he:

- a. did act and/or continue to act in a matter where there was or was likely to be a conflicting interest, more particularly:
 - i. He acted or continued to act in a matter where there was or likely to be a conflicting interest between his client (actual or deemed) F. Ltd. and his clients (actual or deemed), Mr. X, Ms. X and/or Numbered Saskatchewan Ltd.

Reference *Code of Professional Conduct*, Chapter V

- b. did directly or through his associate, Clements Property Management Ltd., enter into or continue a business transaction with his clients (actual or deemed), F. Ltd. and his clients (actual or deemed), Mr. X, Ms. X and/or Numbered Saskatchewan Ltd. where the clients expected or might reasonably be assumed to expect that he was protecting their interests and there was a significant risk that his or his associate's interests and the clients' interests would differ.

Reference *Code of Professional Conduct*, Chapters VI and VII

- c. did directly or through his associate, Clements Property Management Ltd., enter into or continue a business transaction with his clients (actual or deemed), F. Ltd.

and his clients (actual or deemed), Mr. X, Ms. X and/or Numbered Saskatchewan Ltd. where the clients expected or might reasonably be assumed to expect that he was protecting their interests and acted in a manner contrary to the interests of some or all of his said clients favouring his or his associate's interests over that of the clients.

Reference *Code of Professional Conduct*, Chapters VI and VII

- d. did directly or through his associate, Clements Property Management Ltd., enter into or continue a business transaction with his clients (actual or deemed), F. Ltd. and his clients (actual or deemed), Mr. X, Ms. X and/or Numbered Saskatchewan Ltd. where the clients were not referred to independent counsel or given a reasonable opportunity to seek independent legal advice concerning the said transaction.

Reference *Code of Professional Conduct*, Chapters VI and VII

C. Onus and Standard of Proof

16. The burden of proof lies on the Conduct Investigation Committee to prove its case on a balance of probabilities with evidence that is sufficiently clear, convincing and cogent. The Committee must determine, based on the evidence before it, whether it is more likely than not that the alleged misconduct occurred. Counsel for the Conduct Investigation Committee referred the Committee to the following cases:

Regina v. the Discipline Committee of the College of Physicians and Surgeons of the Province of Saskatchewan, Ex parte Sen, 1969] S.J. No. 281 (C.A.), para. 12.
Ringrose v. College of Physicians and Surgeons of the Province of Alberta, [1978] A.J. No. 961, para. 13.

and as applied in Law Society proceedings:

Law Society of Alberta v. Ming. [2007] L.S.D.D. No. 177, para. 63.

D. Facts and Findings

17. All four counts in Exhibit P-1 arise out of a commercial transaction that occurred in the summer of 2009 and continued into early 2010. Mr. X and his spouse Ms. X wanted to purchase along with the Member and the Member's spouse certain real estate holdings located at a resort property known as The Property. From the evidence of Mr. X, Ms. X and the Member, it is clear that Mr. X was the primary player along with the Member in the proposed transaction. Mr. X had a peripheral involvement only and the Member's spouse did not appear to be involved at all. The Member testified that the basic structure of the proposed transaction was that the Member and the Complainants through their respective holding companies, Clements Property Management Ltd. and the Numbered Company would form a new company, namely The Company and the purchase would be made through the newly formed company. Some discrepancy exists between Exhibit D-2 corporate documents and the Exhibit P-1 Profile Report

for The Company regarding the ownership of that company. Exhibit D-2 indicates that shares were issued to the respective holding companies and that the Member and Mr. X were to be officers and directors of the corporation only. Exhibit P-1 indicates the Shareholders to be the Member and Mr. X individually as well as showing them to be Directors. The Member testified that the intended structure was to be as reflected in Exhibit D-2 and that the Member inadvertently failed to update the Saskatchewan Corporation branch records. At the time the proposed transaction began Mr. X testified that he was unaware of the existence of The Company and the Member's intention to purchase the Property through that corporate entity, comprised of the Member's and Mr. X's respective holding companies.

18. The following documents were filed and accepted as Exhibits by the Committee:
- a. Exhibit P-1 - the formal complaint (as amended at the hearing);
 - b. Exhibit P-2 - Appointment of Hearing Committee – complaints of Mr. X;
 - c. Exhibit P-3 – Notice of Hearing;
 - d. Exhibit P-4 – Acknowledgement and Undertakings dated January 5, 2011 given on behalf of the Member;
 - e. Exhibit P-5 – Exhibit book on behalf of the Conduct Investigation Committee;
 - f. Exhibit P-6 – Certified copy of Saskatchewan Corporate Registry Profile Report for Clements Property Management Ltd.;
-Certified copy of Saskatchewan Corporate Registry Profile Report for the Numbered Company; and,
-Certified copy of Saskatchewan Corporate Registry Profile Report for the Company.
 - g. Exhibit P-7 – E-mail for identification only.
 - h. Exhibit P-8 – January 5, 2011 Offer of Settlement letter addressed to Mr. Y and signed by Bruce W. Wirth together with January 6, 2011 letter of acceptance of settlement offer presented to Mr. Bruce W. Wirth and offered by Mr. S;
 - i. Exhibit P-9 – Discontinuance of Action in Court of Queen's Bench for Saskatchewan Judicial Centre of Saskatoon;
 - j. Exhibit P-10 – E-mail for identification only.
 - k. Exhibit D-1 – Exhibit book on behalf of the Member;
 - l. Exhibit D-2 – The Company corporate documents.

19. Inherent in each of the counts of conduct unbecoming contained in Exhibit P-1 is the requirement that The Company, The Numbered Company and/or the Complainant Mr. X and Ms. X were actual or deemed clients of the Member. It was conceded by the Member at the hearing that The Company was a client of the Member's during the course of the business transaction. It follows, therefore, that the first issue this committee must determine and the one upon which the other allegations contained in the charges depend, is whether Mr. and Ms. X and/or The Numbered Company were clients of the Member at any time during the impugned transaction.

20. Mr. X. and the Member had a longstanding relationship. Mr. X had a Bachelor of Commerce and Bachelor of Law Degree, had articulated for a law firm in the City and subsequently practised law in the City for approximately 8 years. Mr. X. also articulated for a law firm in Alberta. Mr. X. had at one time worked in the same firm as the Member. During his time as an

active lawyer, the Complainant's practice focused on real estate, wills, small corporate transactions and some administrative law – what Mr. X called a small solicitors practice.

21. When Mr. X left his practice he re-located to Ottawa and worked as an assistant to the Deputy Prime Minister and later as an advisor to the Minister of Finance. Following his departure from the political forum, Mr. X operated and up to the time of the hearing continued to operate a successful floral business in Saskatoon.

22. In cross examination Mr. X advised that he incorporated companies during his legal practice, advised clients regarding their corporations, that he understood corporate entities and that he represented clients in the sale/purchase of businesses from time to time.

23. There was some history of the Member acting for the Complainants in a few real estate transactions in which the Complainants were purchasing investment properties. The Member prepared mortgages for the Complainants in earlier matters and represented the son and daughter-in-law of the Complainants with a resort property purchase. Mr. X testified the Member provided some estate planning advice to them and provided some general advice.

24. The last time the Member provided legal services to the Complainant prior to the The Property transaction was September, 2008. In cross examination the Complainant Mr. X stated that he and the Member referred to each other as partners, including their respective spouses, in reference to The Property transaction.

25. No retainer contract was signed between the Member and the Complainants or their holding company and no invoice was rendered by the Member to the aforesaid parties for legal services with respect to The Property transaction. In fact, Mr. X testified there was no discussion between himself and the Member regarding legal fees as the Complainant thought it was understood that there would not be any legal fees because they had divided various aspects of the proposed transaction between them, with the Member taking primary responsibility for negotiating with the realtor which included preparing a Letter of Intent and Agreement for Sale contained at Tab 2/2A in Exhibit P-5.

26. Mr. X, being more familiar with the area and people involved, assumed responsibility for dealing with the Rural Municipality in order to obtain the necessary re-zoning that had been built into the Sale Agreement as one of the conditions precedent. Mr. X testified that they considered the Member to be their lawyer and the Complainants did not initially retain a lawyer of their own, testifying that Mr. X considered the Member to be working towards their combined interests and any suggestion of obtaining other legal advice would have been alarming to the Complainants.

27. With respect to the numbered company, Mr. X testified that he could not recall thinking about it or having ever articulated that the Member was the lawyer for that holding company. The Complainants thought of the Member as their lawyer but not necessarily their holding company's lawyer. The Member did not incorporate the numbered company or file Annual Returns at Corporations Branch for that company. In fact, Mr. X indicated that the Member was not the corporate lawyer for The Numbered Company.

28. Although, as indicated earlier, the Complainants did not initially seek advice from a third party lawyer, when Mr. X encountered significant problems with respect to the required re-zoning and opposition thereto from the Rural Municipality, the Member started to look for a specialist lawyer to provide advice to deal with the Rural Municipality.

29. Mr. X testified that at that time the Member was going to speak to a lawyer in Alberta who had that particular expertise. The Member did not follow up on that plan and so, with the knowledge of the Member, Mr. X contacted a Saskatoon lawyer with respect to dealing with the limited issue of the Rural Municipality's mounting opposition to the desired re-zoning. Ultimately that Saskatoon law firm did not invoice any of the parties for their services.

30. In her testimony Ms. X stated that she did not make any distinction between their numbered company, The Numbered Company, and herself nor did she make any distinction between the holding company and the shareholders of The Company. In her mind, the Member's role was to act as their lawyer and she relied on the Member to provide the legal background for the transaction.

31. Ms. X confirmed there were no discussions regarding legal fees to be rendered by the Member to the Complainants for his role in the transaction, there were no documents outlining the Members role as their lawyer and there were no discussions regarding who would represent who in the event of a dispute between the Complainants and the Member. The testimony of Mr. X in large part corroborated that of her spouse. She also indicated that they did not sign any documents pertaining to the issue of entering a business transaction with another party who is a lawyer.

32. The Member's recollection of his relationship with the Complainants, in particular, Mr. X prior to The Property transaction is similar to that of the Complainants. He indicated that when Mr. X left the employ of the Member's law firm the parting was amicable and that subsequently he and Mr. X had a common interest in property development. The Property transaction, which had been initially discussed between them in 2007 was revived in 2009 by Mr. X because the asking price for the property had decreased. The Member thought that setting up the new company, The Company was the appropriate vehicle with which to purchase The Property. He incorporated the company and had his secretary prepare opening by-laws, minutes and resolutions. The Member admitted he probably ignored the ancillary corporate documents once The Company was incorporated as it was required for the purchase and that his lack of attention in that regard was the cause for the discrepancy between the corporate recording of shareholders in Exhibit P-6 and D-2. The Member considered the company necessary to open the bank account; eventually register title; get a G.S.T number; and to file tax returns, etc.

33. The Member considered The Company to be his client. When cross examined on whether the Member considered himself to be the lawyer to The Property business venture, the Member answered affirmatively and stated that the venture in his view was comprised of The Company and the business contained within that company. In his mind the venture was not comprised of himself, Mr. X or their respective holding companies and spouses.

34. The Member was aware of the code of conduct rule discouraging lawyers doing business with non-lawyers without independent advice but stated he viewed the case at bar as different since Mr. X was educated in business and law and had work experience in both fields.

35. The Member's evidence was that he thought it was a given that Mr. X. knew that Mr. X could not rely on the Member for legal advice. Any advice the Member gave during the course of the transaction was to advance the project for his admitted client, The Company

36. The Member's testimony was the same as the Complainants with respect to the fact that there were no discussions regarding providing legal advice to Mr. and Ms. X or their holding company; there was no retainer; and, there was no invoice rendered for legal services.

37. The Member testified there was no real discussion on the roles the parties would assume, and that those roles morphed as time went on with Mr. X taking the major role and being involved with the Rural Municipality, surveying and environmental issues arising out of the transaction. This division of labour seemed natural to the Member as Mr. X. lived in the area and knew the personalities involved.

38. In cross examination, the Member did state that he never told the Complainants that he was not their lawyer, that he was not the lawyer for the holding company and that he had no discussion with the Complainants on what would happen if a conflict occurred between them.

39. When asked under cross examination who the Member considered the lawyer for the Complainant's holding company to be, the Member replied that he considered Mr. X to be the lawyer for that company.

40. Similar to the Complainant's comments, the Member stated that the first discussions between himself and Mr. X concerning third party legal advice was in relation to the Rural Municipality's opposition to re-zoning. The Member stated he saw the issue as a non-starter and admitted he did undertake to get someone from Calgary to look at it but ultimately he did not follow through with that suggestion. Further discussions regarding third party lawyers did not occur until the Member's e-mail to Mr. X contained at Tab 71 in Exhibit D-1 in which message the Member wondered if it would be useful for the two of them to retain a senior lawyer with corporate/commercial experience to attempt to arbitrate their dispute. The Member advised that Mr. X did not respond to that suggestion.

Analysis of Existence of Solicitor Client Relationship

41. Counsel for the Member and the Law Society of Saskatchewan acknowledged in argument that the Member was in a solicitor client relationship with The Company and was not in a solicitor client relationship with the Complainant's numbered company. The issue then becomes whether the Member was in a solicitor-client relationship with the Complainants Mr. and Mrs. X. Counsel for the Law Society of Saskatchewan acknowledged in argument that the Member's relationship with the Complainants did not contain many of the ear marks of the classic solicitor-client relationship such as a retainer agreement, correspondence identifying the nature of the relationship, solicitor-client meetings (in the formal sense) or a bill for services rendered. The Committee was referred to *Piccolo v. DiBenedetto*, [2002] O.J.No.4151 as

authority for what factors traditionally define a solicitor-client relationship. However, counsel for the Law Society of Saskatchewan argued that in this case one must look beyond those traditional ear marks; at the long standing relationship between the Member and the Complainants and the fact that the Member acted on behalf of the Complainants and/or family or friends in a number of matters and offered general advice, often in an informal manner, without charging fees in every instance.

42. As well, Counsel for the Law Society of Saskatchewan pointed out the deemed client test as contained in Commentary 6, Chapter VI Conflict of Interest between lawyer and client in the Code of Professional Conduct. That commentary is set out below:

When Person to be Considered a Client

The question of whether a person is to be considered a client of the lawyer when such a person is lending money to the lawyer, or buying, selling, making a loan or investment in or assuming an obligation in respect of a business, security or property in which the lawyer or an associate of the lawyer has an interest, or in respect of any other transaction, is to be determined having regard to all the circumstances. A person who is not otherwise a client may be deemed to be a client for purposes of this Rule if such person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer must consider such person to be client and will be bound by the same fiduciary obligations that attach to a lawyer in dealings with a client.

43. As stated by Counsel for the Law Society of Saskatchewan in written argument, the deemed client test is basically whether the person in question might reasonably feel entitled to look to the lawyer for guidance and advice in respect to the transaction. The Law Society of Saskatchewan counsel argued the Member was in fact acting for the business transaction, being the joint venture. The informality of the relationship with respect to the business transaction was not significantly different from the informality of the relationship when the Member had acted for the Complainants in prior legal matters.

44. Counsel for the Member also noted the absence of the usual indicators of a solicitor and client relationship, those being meetings between solicitor and client, a retainer agreement, correspondence between solicitor and client and the bill for services. The Committee was referred to *Filipovic v. Upshall*, 2000 CanLII 26971 (ONT. C.A.) in this regard.

45. Counsel for the Member referred to certain facts as present in the case at bar to confirm the absence of an actual solicitor-client relationship, and that none of the Complainants were reasonably entitled to assume that the Member was providing legal services or legal advice to them or protecting their legal interests. Those facts as put forth to the Committee in written argument by Counsel for the Member are as follows:

- a. there was no specific request by any of the complainants that the Member provide legal services or advice to them, and the Member never agreed to do so;

- b. The Member had virtually no communications whatsoever with Mr. X regarding the transaction;
- c. Mr. X has a Bachelor of Commerce and Bachelor of Law degree. He articulated with the Firm in 1980 and 1981 and subsequently practiced law in The City from 1981 to 1989. While practicing law Mr. X did a considerable amount of work in the areas of real estate, corporate and commercial law. He also, from time to time, acted as a chairperson to hear complaints under the *Canadian Human Rights Act*. Between 1989 and 1992 Mr. X was a special assistant to Mr. M, the Deputy Prime Minister, and then an adviser to Mr. M when he became Minister of Finance. Since 1992 Mr. X has been a sophisticated and successful businessman;
- d. Mr. X undertook sole responsibility for dealing with the Rural Municipality regarding the rezoning of Parcels A and B from commercial to residential, and for obtaining subdivision approval. He also undertook personal responsibility for dealing with the surveyor in connection with preparing the plan of proposed subdivision. Dealing with the Rural Municipality for rezoning and subdivision approval is a role that would usually be fulfilled by the lawyer if there was a solicitor-client relationship in existence;
- e. on October 9, 2009 Mr. X prepared a Restrictive Covenant, Building Specification and Development Agreement, which is a document that would normally be prepared by the lawyer if a solicitor-client relationship was in existence;
- f. in December of 2009 Mr. X performed legal research relating to the issue of municipality acting in bad faith;
- h. in December, and January, 2010, when Mr. X felt that the Rural Municipality was acting in bad faith, he sought legal advice from The Law Firm not the Member, and retained The Law Firm to provide him with a legal opinion;
- i. on February 15 and 16, 2010 Mr. X obtained extensions of the date for removing conditions from the vendor. He did this without consulting with the Member as would be usual if a solicitor-client relationship existed;
- j. The Member did not incorporate The Numbered Company and his firm did not act as the registered office for the company.
- k. The Member did not open a file with respect to any of the complainants;
- l. on February 19, 2010 Mr. X sent the Member an email that stated: “Ms. X and I have just been to see our own lawyer on this matter”. The reference to “our own lawyer” suggests that Mr. X did not consider the Member to be the lawyer for him and his wife.

46. The Committee was referred to *Hidden Rock Drilling Ltd. v. Klassen* 2010 BCSC 963, appeal dismissed 2011 BCCA 216. That case involved Mr. Klassen as lawyer who had previously performed legal services to Mr. Buchan, a prospector. Mr. Klassen and Mr. Buchan entered into a joint venture, to jointly own and develop certain gravel deposits. Mr. Klassen acted as the corporate solicitor for the joint venture. Mr. Buchan and Mr. Klassen decided, as part of their joint venture to use Hidden Rock Drilling Ltd. as agent for the companies formed to hold the assets of the joint venture. Hidden Rock Drilling Ltd. was a company that Mr. Klassen had incorporated a few years earlier at the request of Mr. Buchan. Subsequently, when the

relationship between the two parties deteriorated, Mr. Buchan argued that a solicitor-client relationship existed between himself and Mr. Klassen. In rejecting that argument, the trial judge stated at paragraphs 203-205:

“[203] However, Mr. Klassen acted as corporate solicitor to the joint venture, which was a role distinct from acting as legal counsel for Mr. Buchan personally. The distinction is an important one. Any fiduciary duty owed by Mr. Klassen was owed to the joint venture, not to Mr. Buchan.

[204] A similar circumstance was considered by the court in *Cavallin v. King* (1984), 51 B.C.L.R 149 (S.C.) The plaintiff advanced claims of negligence and breach of fiduciary duty against the defendant solicitor with whom he had entered a joint venture to develop real estate. The court considered whether the solicitor owed a fiduciary duty to the plaintiff, concluding as follows at 153:

47. It is clear that the relationship between the plaintiffs and Mr. King [the solicitor] concerning the acquisition and development of the Washington State properties was one of joint venture partners pursuant to an agreement that each contribute particular services, share the profits and be equally responsible for the losses. They embarked upon a joint business venture giving rise to quite different duties from those which would arise from the usual solicitor/client relationship.

...
Mr. King owed a duty to the joint venture, of which he was a part, to perform his services with care to avoid causing the joint venture loss. I find, with respect to the legal services he performed, that his duty, as solicitor, was owed to the joint venture and not to the plaintiffs as the plaintiffs' solicitor.

[205] Similar circumstances arose in *Buchan v. Moss Management Inc.*, 2008 BCSC 285, aff'd 2009 BCCA 25. There, as in *Cavallin*, the plaintiffs alleged that a solicitor, Mr. Richards, had breached his fiduciary duty to them by taking certain steps pursuant to a joint venture agreement. Mr. Justice Bauman (as he then was), citing *Cavallin* with approval, concluded that if Mr. Richards owed any duty as a solicitor, he owed it to the joint venture and not to the plaintiffs”.

G. DECISION

48. The Committee notes the similarity between the *Hidden Rock Drilling Ltd.* case and the case at bar where there was a joint venture to purchase The Property through The Company. There was an admitted solicitor-client relationship between the Member and The Company but having regard to the facts of this case the Committee finds no actual solicitor-client relationship between the Member and the Complainants.

50. As regards the deemed client test, the Committee is of the view that in the circumstances of this case, it is not reasonable for the Complainants to feel entitled to look to the Member for guidance and advice with respect to the transaction. The primary Complainant is educated and experienced in business and law. The role he assumed full responsibility for, with respect to The Property transaction, involved work that one would expect would normally be done by a

lawyer if a solicitor-client relationship existed. The reaction of Mr. X in wanting to seek advice from a Saskatoon law firm upon encountering a major problem with the transaction, mitigates against the conclusion that he considered the Member to be his lawyer.

51. In light of the above, the Committee finds there was no solicitor-client relationship, actual or deemed, between the Member and the Complainants. As such, an essential element of each count contained in the formal complaint is missing and the Committee finds that the counts contained in the formal complaint to be not well founded.

Dated at the City of Swift Current, in the Province of Saskatchewan, this 19th day of November, 2013.

“Robert R. Heinrichs”
Hearing Committee Chair

Dated at the City of Yorkton, in the Province of Saskatchewan, this 19th day of November, 2013.

“Thomas Campbell”
Hearing Committee Member

Dated at the City of Swift Current, in the Province of Saskatchewan, this 19th day of November, 2013.

“Laura Lacoursiere”
Hearing Committee Member