



THE LAW SOCIETY OF ALBERTA
SUPPLEMENTARY HEARING COMMITTEE REPORT

IN THE MATTER OF THE *Legal Profession Act*,
and in the matter of a Hearing regarding the conduct
of MARK HOFFINGER, a Member of
The Law Society of Alberta

INTRODUCTION

1. On September 23, 2008, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society office in Calgary to inquire into the conduct of Mark Hoffinger (the Lawyer). The Committee was comprised of Rodney Jerke, Q.C., Chair, Vivian Stevenson, Q.C., and Hugh Sommerville, Q.C.
2. The Hearing Committee delivered written reasons for its decision in January 2009, and found that the Lawyer was guilty of conduct deserving of sanction in respect of the Citation which he faced. On July 30, 2009, the Hearing Committee re-convened at the Law Society of Alberta office in Calgary for the sanction phase of the Hearing. The LSA was represented by Michael Penny. The Lawyer was present for the Hearing and was represented by Dennis McDermott, Q.C.

SUMMARY OF RESULT AS TO SANCTION

3. In the result, on the basis of the evidence entered at the Hearing, the Hearing Committee made the following orders concerning sanction:
 - a) That the Lawyer be reprimanded;
 - b) That the Lawyer pay the actual costs of the Hearing.

EVIDENCE

4. Additional Exhibits were entered at the sanction phase of the Hearing as follows:
 - a) Exhibit 18 - Letter confirming the Lawyer has no discipline record with the LSA.
 - b) Exhibit 19 - Estimated Statement of Costs.

- c) Exhibit 20 – Written policy of the Lawyer's firm.
5. The Lawyer testified at the sanction phase of the Hearing.

SUMMARY OF FACTS AND EVIDENCE AS TO SANCTION

6. The Lawyer's firm has instituted a policy where funds are provided to the firm for deposit by way of a cheque from a third party. The intention of the firm in initiating the policy is to protect the public and the firm.
7. The Lawyer has no discipline record with the LSA.

SUBMISSIONS RE: SANCTION

8. Counsel for the LSA accepted that the Lawyer understood the risk to himself and his firm, and to the public, as a result of his conduct in this case. Counsel agreed there is no issue with respect to the integrity of the Lawyer, and that the Lawyer had nothing personally to gain from the conduct sanctioned. LSA Counsel suggested the interests of protection of the public and maintenance of the reputation of the Legal Profession are sufficiently addressed by a reprimand and an Order to pay the costs of the Hearing.
9. Counsel for the Lawyer argued that the Lawyer should not be made to pay the costs of the Hearing. He urged that the duty of Lawyers receiving funds derived from a third party (i.e. someone other than their client) is not well understood in the Profession, and the circumstances in which the Lawyer found himself here have not previously been considered by a LSA Hearing Committee. No complaint was made against the Lawyer by his own client, and the Lawyer and his firm have taken steps to initiate a policy addressing receipt by the firm of third party cheques. The financial resources, sophistication, and ability of the complainants to access professional advice should be taken into account. The Lawyer has found the LSA discipline process distressing, and the Lawyer has incurred legal fees in connection with the discipline process and an assurance fund claim.
10. Counsel for the LSA argued in rebuttal that the principles relevant to imposition of an order for payment of costs are that Citations were directed, a Hearing was conducted, and a finding of guilt made. It was not appropriate to look behind the fact of the conviction to determine whether payment of costs should be ordered.

DECISION ON SANCTION

11. The sanctioning process involves a purposeful approach. Paragraph 51 of the Hearing Guide provides:

“The primary purpose of disciplinary proceedings is found in section 49(1) of the Legal Profession Act: (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. 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.”

12. Paragraph 60 and 61 of the Hearing Guide articulate general and specific factors which are to be taken into account when imposing sanction.

13. The Hearing Committee found that the circumstances and mitigating factors, particularly:

- a) the Lawyer’s actions in taking pro-active steps to institute a firm policy addressing receipt by the firm of cheques derived from third parties;
- b) the Lawyer’s unblemished record; and
- c) the fact that no questions were raised about the Lawyer’s integrity in the circumstances of the transaction,

were sufficient to address any concerns about the public’s confidence in the integrity and reputation of the Profession. The conviction and a reprimand were sufficient to act as a general deterrence for other members of the LSA. The conviction and the Lawyer’s pro-active steps to institute a firm policy were sufficient to denounce the conduct and to address questions with respect to specific deterrence of the Lawyer. Issues of rehabilitation, therefore, were not raised.

14. The purpose of sanctioning proceedings was therefore satisfied by a reprimand of the Lawyer.

15. In the normal course, a Lawyer found guilty of conduct deserving of sanction after a contested hearing ought to pay the actual costs of the hearing. *Cartledge v. Alberta Veterinary Medical Association*, [1999] A.J. No. 458 (C.A.) supports the proposition that hearing expenses incurred in the exercise of a statutory duty by the LSA are appropriately charged to the Lawyer whose conduct is under scrutiny, rather than expecting all of the Members of the LSA to absorb the costs in the long run. The Hearing Committee was of the view that while the facts raised in argument may be relevant to a determination of the appropriate sanction, they were not sufficient to justify departure from the usual rule concerning payment of costs.

SANCTION AND ORDERS

16. In the circumstances, the Committee ordered the following sanctions:
 - a) That the Lawyer be reprimanded; and
 - b) That the Lawyer pay the actual costs of the Hearing.
17. The Lawyer was given time to pay the costs of 120 days following delivery of the actual Statement of Costs to the Lawyer's Solicitor.
18. The Chair delivered the reprimand stressing the expectation that Lawyers must be absolutely diligent with respect to monies provided to them in trust. The Lawyer's professional duties in serving the public interest included the interests of his own client and the wider duties to third parties as articulated in the *Code of Professional Conduct*.
19. The Lawyer's failure was a failure to notice red flags on matters which could potentially put the public at risk.

CONCLUDING MATTERS

20. The existing proceedings will be available for public inspection which includes copies of Exhibits for a reasonable copy fee. The Exhibits and proceedings shall be redacted and initials substituted for the Lawyer's client.
21. No Notice to the Profession is ordered or required.
22. No referral to the Attorney General is required.

23. At the conclusion of the Hearing, the Chair delivered the Reprimand.

Dated this 2nd day of October, 2009

Rodney A. Jerke, Q.C., Bencher
Chair

Vivian Stevenson, Q.C., Bencher

Hugh Sommerville, Q.C., Bencher