

IN THE MATTER OF THE *LEGAL PROFESSIONS ACT*
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
MARK FEEHAN, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

I. INTRODUCTION

1. On November 4, 2009, a Hearing Committee comprised of Rose M. Carter, Q.C. (Chair), Neena Ahluwalia, Q.C. and Wayne Jacques (the Hearing Committee) convened at the Law Society of Alberta (LSA) office in Edmonton, Alberta to inquire into the conduct of Mark Feehan (Mr. Feehan).
2. Mr. Feehan was represented by Stewart G. Baker (Mr. Baker) and the LSA was represented by Mr. Lindsay MacDonald, Q.C. (Mr. MacDonald).
3. This matter came to the attention of the LSA in the Autumn of 2005 during a routine Rule 130 audit.
4. In short, during its audit, the LSA became aware that:
 - (a) Mr. Feehan entered into a "side deal" fee arrangement with his clients contrary to his agreement with WCB and without full disclosure to the clients; and
 - (b) Mr. Feehan did not send the WCB client letter to two WCB covered Worker clients whom he represented in civil actions.

II. JURISDICTION AND PRELIMINARY MATTERS

5. The Jurisdiction of the Hearing Committee was established through Exhibits 1 through 5 consisting of the following:

Exhibit 1: Letter of Appointment

Exhibit 2: Notice to Solicitor with Acknowledgment of Service

Exhibit 3: Notice to Attend with Acknowledgment of Service

Exhibit 4: Certificate of Status

Exhibit 5: Letter of Exercise of Discretion Re: Private Hearing Application Notices

III. COMPOSITION OF THE HEARING COMMITTEE

6. Neither counsel for the LSA nor counsel for Mr. Feehan objected to the composition of the Hearing Committee.

IV. PRIVATE HEARING

7. There was no application made that the Hearing, nor any part of it, be heard in private and therefore, the Hearing proceeded in public.

V. CITATIONS

8. *Exhibit 2*, being the Notice to Solicitor, listed four allegations:
 - (1) IT IS ALLEGED that you breached the terms and conditions of the Workers' Compensation Board Consent and Retainer Agreement, and that such conduct is deserving of sanction.
 - (2) IT IS ALLEGED that you failed to be candid with the Workers' Compensation Board, and that such conduct is conduct deserving of sanction.
 - (3) IT IS ALLEGED that you failed to be candid with or failed to provide informed, independent and competent advice to your clients, and that such conduct is conduct deserving of sanction.
 - (4) IT IS ALLEGED that you failed to be candid with the Law Society, and that such conduct is conduct deserving of sanction.
9. At the commencement of the Hearing, counsel for the LSA and counsel for Mr. Feehan advised the Hearing Committee that they had proposed amended Citations. After the Hearing Committee heard the proposed amended Citations and representations from counsel, it ruled that the proposed amended Citations would be the Citations for the purpose of the Hearing (*Exhibit 20*). Those Citations are as follows:
 - (a) IT IS ALLEGED that you breached the terms and conditions of the *Workers' Compensation Act* and Regulations and that such conduct is deserving of sanction.
 - (b) IT IS ALLEGED that you failed to advise the Workers' Compensation Board (WCB) of the nature of the agreements that you had entered into with your clients.
 - (c) IT IS ALLEGED that you entered into side agreements with your clients which were in breach of the *Workers' Compensation Act* and Regulations, without advising your clients as to the full nature and effect of the said agreements, without advising your clients as you had agreed to do in your agreements with the WCB that they would not be responsible to pay for any fees or disbursements and without telling them that you knew your side agreements with your clients were unenforceable and that such conduct is deserving of sanction.

VI. FACTS

10. During a routine Rule 130 Audit by the LSA in the Autumn of 2005, it came to the attention of the LSA that Mr. Feehan had charged extra fees to clients who were covered by WCB contrary to WCB's agreement with him.
11. The circumstances of this matter commenced in 1998.
12. Two WCB covered workers were clients of Mr. Feehan:
 - (a) A. M.; and
 - (b) D. F.

For the purposes of the allegations, the relevant facts are the same for both Mr. M. and Mr. F.. In relation to the M. matter, WCB wrote to Mr. Feehan on October 29, 1998. In relation to the F. matter, WCB wrote to Mr. Feehan on June 12, 1997. For the purposes of the facts before this Hearing, the WCB communications are identical (the WCB Letter).

13. The WCB Letter states that any settlement or payment made without the consent of WCB is void and Mr. Feehan is to obtain the written authorization of WCB before any settlement is accepted. Part of the agreement was that all monies recovered in a lawsuit after the deduction of WCB's legal fees and disbursements must be paid to WCB for distribution in accordance with the *Workers' Compensation Act* (the *Act*). The WCB Letter further stated that the WCB required Mr. Feehan's agreement that he be bound by the terms and conditions set out therein. As such, the WCB Letter asked Mr. Feehan to sign, detach and return page 6 of the WCB Letters to him, so doing constituted the agreement between WCB and Mr. Feehan (the Agreement). In the M. matter, Mr. Feehan signed the Agreement on November 20, 1998 and returned it to WCB. In the F. matter, Mr. Feehan signed the Agreement on July 8, 1997. In both the M. and F. matters, the Agreement was the same stating whereby Mr. Feehan agreed to comply with the conditions outlined in the WCB Letters.

WCB Letter for Provision to Workers

14. In accepting the conditions set out in the WCB Letter, Mr. Feehan was also to provide to Mr. M. and Mr. F. the letter entitled, "Covering Letter to Your Client" which accompanied the WCB Letter (the Client Letter). At the Hearing, the Client Letter in the M. matter was entered as *Exhibit 6, Tab 2* and in the F. matter, the Client Letter was entered as *Exhibit 14, Tab 5*. Mr. Feehan acknowledged, through his counsel at the Hearing, that he had not provided the Client Letter to either Mr. M. or Mr. F..
15. In his letter of February 21, 2006 to the LSA, Mr. Feehan stated that "you have to sign the retainer, or WCB would not give you the file. He stated the client wants you to work on the file and has agreed to pay your rates. This is a clear conflict between the WCB and the client." Mr. Feehan went on to say that he "reconciled this by making a 'side deal' with the client that s/he will pay [him] more upon settlement, but [he] didn't do this secretly". He states he cleared it with WCB. He further advised the LSA that he explained to the client how the matter works. He indicated he advised the client that he would be sending the settlement monies to WCB, WCB would take off their portion and

pay the client the balance. Following that, the client would have to come down to his office and pay him the difference.

16. The Client Letter Mr. Feehan was to send to his clients states, in part, that "because the Workers' Compensation Board is the client, you will not be responsible for payment of any fees or disbursements related to this action except as they relate to claims other than personal injury claims. All fees and disbursements are to be paid from money recovered in the lawsuit".
17. By letter dated May 25, 2006, Mr. Dumont, Q.C. of LSA wrote to Mr. Feehan advising him that there are concerns about the additional fees he had been charging on some of his WCB files. Mr. Dumont stated that, as LSA understood it, Mr. Feehan had on some files charged the worker an amount in excess of that permitted by the WCB retainer agreement. Mr. Dumont further stated in his letter that the form of retainer agreement states that counsel is limited to a certain schedule of legal fees. Therefore, when counsel obtains WCB's consent to act, as occurred in this case, counsel is in effect undertaking to charge no more than that specified in the retainer agreement. This raises the issue of the propriety of counsel making "side deals" with the worker and billing the worker directly for fees in excess of that provided in the retainer agreement.
18. In the F. case, Mr. Feehan's fees in the "side deal" with Mr. F. totaled \$4,866.41. At the time of this Hearing, the amount of money paid to Mr. Feehan from Mr. M. on the "side deal" was in the process of being calculated by the parties. Mr. Feehan gave an Undertaking that once the calculations in the M. case were performed he would not only reimburse Mr. F. with the \$4,866.41, but would also reimburse Mr. M. for the calculated amount which is to be determined (*Exhibit 21*).
19. Mr. Feehan, through his counsel, readily admitted at the Hearing that the "side deals" he had with Mr. F. and Mr. M., were in breach of the Agreement and the clients were unaware that the "side deals" made with Mr. Feehan were unenforceable.
20. Mr. Feehan's difficulties arose with the LSA for two reasons:
 - (i) Mr. Feehan did not refuse to sign the consent letters for WCB. Rather, he signed the consent letters and returned them to WCB thus, entering into the Agreement with WCB. He did not advise WCB that he did not agree with the contents of the letters regarding fees.
 - (iii) Mr. Feehan did not send either client the Client Letter which clearly states "because the Workers' Compensation Board is the client, you will not be responsible for payment of any fees or disbursements related to this action except as they relate to claims other than personal injury claims. All fees and disbursements are to be paid from money recovered in the lawsuit".
21. Prior to commencement of the Hearing, Mr. Feehan agreed that he would repay Mr. F. and Mr. M. the monies received by him in contravention of the Agreement. Mr. Feehan also gave an Undertaking that he would repay Mr. F. within 30 days of November 4, 2009 and within 30 days of the arithmetic being calculated he would repay Mr. M. the monies received by him in contravention of the Agreement.

VII. EVIDENCE AND SUBMISSIONS OF COUNSEL

22. No *viva voce* evidence was heard by the Hearing Committee. All Exhibits were entered with the consent of counsel for Mr. Feehan.
23. Lengthy submissions were heard from both counsel.

VIII. DECISION AS TO CITATIONS

24. The Hearing Committee found that there was a *prima facie* case that Mr. Feehan had breached the Agreement in that having consented to the Agreement, Mr. Feehan did not send the Client Letters to either Mr. M. or Mr. F. and engaged in a "side deals" with Mr. M. and Mr. F..

IX. DECISION REGARDING SANCTION

25. *Exhibit 21* entered in these proceedings sets out the Undertakings of Mr. Feehan which are as follows:
 1. [Mr. Feehan] will pay to Mr. F. the sum of \$4,866.41 (*sic*) within 30 days.
 2. [Mr. Feehan] will pay to Mr. M. and the WCB any monies received by [Mr. Feehan] over that allowed by the *Workers' Compensation Act* and Regulations within 30 days of calculating amounts. [Mr. Feehan] will use [his] best efforts to calculate those amounts within a reasonable time.
 3. Immediately after making the payments set out in paragraph 1 and 2, [Mr. Feehan] will advise the Law Society that [Mr. Feehan] has done so.
 2. [Mr. Feehan] will always advise clients in the future that they will not be responsible for payment of any fees or disbursements on Workers' Compensation cases.
26. In arriving and delivering the sanction and penalty at the conclusion of the Hearing, the Hearing Committee was mindful of Mr. Feehan's cooperation which resulted in no evidence being called. Mr. Feehan's agreement that he breached the agreement with the WCB in not providing the Client Letter to Mr. M. and Mr. F. and engaging in "side deals" with them, carried weight with the Hearing Committee. In addition, Mr. Feehan's agreement that he would reimburse Mr. M. and Mr. F. the monies paid to him in the "side deals" also carried weight with the Hearing Committee.
27. In arriving at its decision, the Hearing Committee is mindful of the professional responsibility of members of the LSA and our duty to the public as stated in the *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie (at pages 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.

28. McKee v. College of Psychologists, etc., [1994] 9 W.W.R. 374 at 376 (B.C.C.A.):

In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession.

29. Given Mr. Feehan's cooperation in this matter, and as advised at the sentencing portion of the Hearing, the Hearing Committee, having found that the allegations were proven and deserving of sanction, fined Mr. Feehan \$1,000.00 which is payable within 30 days of November 4, 2009.

X. COSTS

30. At the close of the Hearing, counsel for the LSA produced the Estimated Statement of Costs for \$7,200.38, entered as *Exhibit 19*. Mr. Feehan made no submissions concerning the costs or the amounts. The Hearing Committee found the items reasonable and ordered Mr. Feehan to pay the Costs within 30 days of November 4, 2009.
31. At the conclusion of the Hearing, the Hearing Committee, through the Chair, reminded Mr. Feehan of his obligation as a member of the LSA to be beyond reproach in dealing with others. The Hearing Committee indicated its concern and dismay that after Mr. Feehan signed the consent in both the M. and F. matters and returned those documents to WCB that he failed in his obligation to:
- (a) honour the Agreement including failing to provide the Cover Letter to each of Mr. M. and F..
 - (b) advise Mr. M. and Mr. F. that based on the Agreement any contingency agreement ("side deal") with either Mr. M. or Mr. F. were unenforceable.

32. ANCILLARY ORDERS

33. The Hearing Committee directs that any documents entered as Exhibits during the Hearing are not a matter of public record and, thus, are unavailable to the public. The Profession shall not be notified of the fine.

DATED this 13th day of May, 2010.

ROSE M. CARTER, Q.C.
Chair

NEENA AHLUWALIA, Q.C.
Member

WAYNE JACQUES
Member