THE LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING

THE CONDUCT OF ALLAN G. M. BOTAN,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Darlene W. Scott, Chair (Bencher)
Julie Lloyd, Committee Member (Bencher)
Robert Dunster, Committee Member (Lay Bencher)

Appearances:

Counsel for the Law Society – Nancy Bains
Allan Botan - self-represented.

Hearing Date:
October 15, 2015

Hearing Location:
Law Society of Alberta, 800 Bell Tower, 10104 – 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

Jurisdiction, Preliminary Matters and Exhibits

1. The Hearing Committee described above was appointed by The Chair, Conduct Committee by letter dated August 17, 2015.

2. The Hearing Committee met on October 15, 2015 in Edmonton, Alberta to hear this matter.

3. The Chair introduced the panel and asked whether there were any objections to the constitution of the panel. There were no objections.

4. The Chair inquired of Mr. Botan whether he wished to retain independent counsel and he confirmed he did not wish to do so.

5. The Chair inquired as to whether there were any requests for any part of hearing to be held in private. There were no such requests and accordingly the hearing was held in Public.

6. The Exhibit Book (Tabs 1-39) was entered as Exhibit 1 with consent of the Parties.

7. Counsel for the LSA introduced the jurisdictional documents being Tabs 1-5 inclusive of Exhibit 1 and the Committee accepted those documents as establishing the jurisdiction of the Committee.

8. The Statement of Admitted Facts and Admission of Guilt was amended with the consent of both Parties. The Amended Statement is appended to this decision as Appendix 1. The Hearing Committee found the Amended Statement of Admitted Facts and Admission of Guilt to be in a form acceptable to it.

9. The Chair questioned Mr. Botan about whether he was making the admissions freely and voluntarily, whether he was unequivocally admitting guilt to the citations and understood the nature and consequences of the admissions. Mr. Botan confirmed he did.

10. The Committee therefore accepted the Admissions of Guilt on all 3 Citations.

11. LSA counsel asked that Citation #3 be amended by deleting the phrase, "…knowingly attempted to deceive the tribunal or influence the course of justice", which would make Citation #3 conform to Mr. Botan's amended admission of guilt in respect of Citation #3. In addition, LSA counsel asked that Citation #4 be dismissed. The Committee agreed to amend Citation #3 as proposed and dismiss Citation #4.

Background

12. Therefore, the citations facing Mr. Botan are as described below.

#1. It is alleged that Mr. Botan failed to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity and such conduct is deserving of sanction.

#2. It is alleged that Mr. Botan, in advocating on his own behalf, failed to represent himself within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect and such conduct is deserving of sanction.

#3. It is alleged that Mr. Botan, when advocating on his own behalf in the course of advancing the litigation against his former client, misstat[ed] facts or law or suppress[ed] what ought to have been disclosed and such conduct is deserving of sanction.

13. The Statement of Admitted Facts and Admission of Guilt, as amended, being in a form acceptable to the Committee pursuant to section 60 of the Legal Profession Act, constitutes a finding of the Hearing Committee that the conduct of the member is deserving of sanction in respect of each of the above citations.

Facts

14. The Facts are as disclosed in the Statement of Admitted Facts and Admission of Guilt, as amended, which is attached to this Decision.

15. The misconduct in this matter arose from Mr. Botan obtaining an order requiring his former client Mr. S. (the "Client") to pay the amount of a disputed fee claim into Court. The order was granted on September 26, 2012 on a without prejudice basis by Germain, J. The Client was in attendance but was unrepresented. The matter was set for determination on its merits to a subsequent date (February 4, 2011). Germain, J. was very clear that the order was being made on a "without prejudice" basis and Mr. Botan acknowledged that he understood the order was being made on that basis. The Client paid the funds into court pursuant to the Court Order.

16. Subsequently, on December 14, 2010, and notwithstanding the Clients' prior attendance in Court on the matter, Mr. Botan noted the Client in default for failure to file a defence and then appeared on an ex parte basis before Eidsvik, J. seeking an order for the payment of the funds out of Court to Mr. Botan. Mr. Botan failed to describe the without prejudice nature of the order to Eidsvik, J. and did not identify the provisions of Rule 10.22 of the Alberta Rules of Court, which states:

> "If an action is brought for payment of a lawyer's charges,
>
> (a) despite Rule 3.36 [judgment in default of defence and noting in default] no judgment may be entered in default of defence without the Court's permission…."

Eidsvik, J. granted the order and Mr. Botan received payment of the funds.

17. Mr. Botan denied being aware of the above Rule but acknowledged that he failed to "say anything about the without prejudice nature of the November 26, 2010 order and failed to disclose that the Order was subject to a further hearing on February 4, 2011." (Statement of Agreed Facts, paragraph 17).

18. The Client then retained counsel and the parties appeared before Justice Germain on February 4, 2011. Justice Germain was highly critical of Mr. Botan's conduct in obtaining judgment against the client and then appearing before Justice Eidsvik on December 14, 2010. He referenced the "high fiduciary duty to the Court" which accompanies ex parte applications and noted the high standard of professional and ethical conduct required of lawyers. (Statement of Agreed Facts, paragraph 20).

Decision

19. As noted above, the Hearing Committee determined that the Statement of Agreed Facts and Admission of Guilt, as amended, was in a form acceptable to the Committee. This therefore constitutes a finding of conduct deserving of sanction by Mr. Botan on each of the three citations.

20. LSA counsel produced Mr. Botan's record which revealed one prior matter in respect of which Mr. Botan had been sanctioned by way of reprimand for breaching a trust condition. The Member's record was admitted by consent as Exhibit #2.

Sanction

21. LSA counsel sought a one day suspension, effective November 2, 2015 and payment of the actual costs of the Hearing.

22. Mr. Botan argued that he had been punished sufficiently through the significant cost award which he had to pay in the civil action, the fees he had to repay to the Client and the very substantial damage to his reputation among the Bench and the Bar. He submitted that he is finding it very difficult to attract new clients as a result of the very specific and pointed criticism of his behavior in judicial decisions. He pointed out the high degree of cooperation that he has offered the LSA in the investigation and hearing and the amount of time that has elapsed since the events.

23. LSA counsel submitted, in support of the suspension, that the conduct is question is egregious, that the conduct involved a professional taking advantage of an unrepresented party in an ex parte application with the result that the entire legal profession was brought into disrepute. She pointed out Justice Germain's highly critical comments as to Mr. Botan's conduct, which Germain, J. noted had "embarrassed the Court and the legal profession." (Statement of Facts, paragraph 22).

24. LSA counsel asked the Committee to consider that, in light of the previous sanction by way of reprimand, an additional reprimand would not be sufficient sanction for this behavior.

25. LSA counsel made submissions regarding the goals of sanctioning in the regulatory process, including protecting the public, protecting the reputation of the legal profession, specific and general deterrence of the behavior, public denunciation of the behavior and the need to maintain confidence in the legal profession. She did point out the mitigating factor that Mr. Botan had been cooperative throughout the investigation and the hearing and that this cooperation had the result of saving the LSA and the profession significant time and expense. She also pointed out that the prior finding of conduct of deserving of sanction was in respect of an unrelated matter.

26. The Hearing Committee has considered the extent of cooperation by Mr. Botan in agreeing to certain facts and his admission of guilt to the 3 citations, which resulted in saving time and expense for the Law Society and benefitted all parties. However, the Committee also notes Mr. Botan's previous disciplinary record, the need for deterrence of this type of conduct and the need to maintain the reputation of the legal profession.

27. The Committee considered Mr. Botan's submissions as to the extent of the damages awarded against him in the civil action and whether that should be considered in establishing sanction in the Law Society regulatory process. It is the view of this Committee that the damages which Mr. Botan paid in the civil proceedings are intended to compensate the Client for the costs and inconvenience which resulted from Mr. Botan's conduct. This Committee, as the regulatory body considering the appropriate sanction for the breach of the Code of Conduct, must consider a number of factors in determining sanction. Those factors include; specific and general deterrence, denunciation of the conduct, protection of the reputation of the legal profession, protection of the public, and the need to maintain confidence in the legal profession. None of these factors are materially impacted by the existence of a damage award in another civil proceeding and this should not serve to decrease the appropriate sanction in the professional regulatory proceedings.

28. The Panel finds instructive the following words of ethicist Gavin McKenzie:

> "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…. The seriousness of the misconduct is the prime determinant of the penalty imposed." (*Lawyers & Ethics: Professional Responsibility and Discipline,* page 26-1)

29. The conduct to which Mr. Botan has admitted is serious conduct. The judicial system relies heavily on the integrity of members of the legal profession which appear in our courts. To be anything less than fully and completely forthright, particularly in an ex parte matter, constitutes a fundamental and significant breach of a lawyers' professional responsibility to the Court. Although there have admittedly been significant

repercussions to Mr. Botan as a result of this behavior and Mr. Botan has publicly expressed his regret over the incident, and although there is no evidence of or admission of any intent to mislead the Court, it is the responsibility of the Law Society of Alberta to treat this misconduct seriously and to publicly denounce the behavior, both as a message to the Member who is guilty of the misconduct, but also to the public and the profession which we serve.

30. The membership we all enjoy in this profession carries with it significant responsibilities and Mr. Botan's conduct in this matter falls far short of that which is expected of a member.

31. The Hearing Committee imposes a sanction of a one day suspension, effective November 2, 2015, and payment of the actual costs of the hearing.

32. LSA counsel submitted a statement of anticipated costs of the Hearing, which was entered by consent as Exhibit 3.

Concluding Matters

34. There shall be a Notice to the Profession.

35. There shall be no referral to the Attorney General.

36. Exhibits shall be available, but the Exhibits and transcript shall be redacted in accordance with Law Society policy.

37. The Costs which shall be payable shall be the actual costs of the hearing and shall be payable within 6 months of the delivery of the Actual Statement of Costs to the Member.

Dated at the City of Edmonton, in the Province of Alberta, this 25th day of February, 2016

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Darlene Scott, Chair

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Julie Lloyd

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Robert Dunster

APPENDIX 1.

IN THE MATTER OF *THE LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF ALLAN G. M. BOTAN,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I was admitted to the Law Society of Alberta on July 18, 2002.
2. My present status with the Law Society of Alberta is Active/Practicing.
3. I was also admitted to the Law Society of Manitoba in June 1984 and practiced there until 2009.
4. I have practiced in Edmonton, Alberta from July 18, 2002 to present. I have clients all over Alberta.
5. My practice comprises of HCV compensation claims (90%) and Civil Claims (10%).

CITATIONS

6. On May 27, 2015 the Conduct Committee Panel referred the following conduct to hearing:
    1. It is alleged that Mr. Botan failed to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity and such conduct is deserving of sanction.

    2. It is alleged that Mr. Botan, in advocating on his own behalf, failed to represent himself within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect and such conduct is deserving of sanction.

    3. It is alleged that Mr. Botan, when advocating on his own behalf in the course of advancing the litigation against his former client, knowingly attempted to deceive the tribunal or influence the course of justice by misstating facts or law or suppressing what ought to have been disclosed and such conduct is deserving of sanction.

    4. It is alleged that Mr. Botan, when advocating on his own behalf in the course of advancing the litigation against his former client, abused the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, were clearly motivated by malice and were brought solely for the purpose of injuring the other party and such conduct is deserving of sanction.

FACTS

7. I was retained by Brian St. Amand (the "Client") in 2008 with regard to an HCV tainted blood claim. I was to assist in filing a claim and determining if he qualified for compensation under the government Hepatitis C compensation and pursuing a prescribed damage award on his behalf.
8. The retainer for the Client was structured so that I would be paid an hourly rate if my retainer was terminated before the claim was filed or, on a contingency basis if my retainer was terminated after the claim was filed.
9. Eventually, a dispute arose between me and the Client as to when my retainer was terminated. The Client alleged that my services were terminated on May 19, 2010 before his claim was filed, while I maintained that my services were not terminated until after I filed the Client's claim on June 1, 2010.

10. The Client filed and proceeded with his own claim and was awarded 234,533.00. However, he failed to file his medical records or an original doctor's form confirming his HCV status. I filed those documents on June 1, 2010 and the claim could not have been successful without those documents.

11. I subsequently learned of the award and demanded the contingent payment of 25% or approximately $58,633. The Client indicated that he was willing to pay me for the time spent on the matter prior to my termination and offered $10,000 to settle the matter. I did not settle the matter.
12. Instead, I commenced an action against the Client on November 22, 2012. I sued the client for $56,250 (roughly 25% of the Client's anticipated award) plus $25,000 in punitive damages, a further $25,000 in aggravated damages and solicitor-client costs.
13. On November 26, 2012, I brought an application before Justice Germain for security for costs against the Client. The Client appeared unrepresented and initially opposed the application. However, relying on the assurances of Justice Germain, the Client indicated that he would pay the funds into Court. The Order was granted and the Client paid $56,000 into Court but did continue to deny liability. Justice Germain advised the client to obtain a lawyer.
14. Justice Germain's Order was characterized as an "emergency termporary order" made "without prejudice" pending a further application to be heard on February 4, 2011, to determine whether the funds were to stay in Court pending the substantive outcome of my claim.
15. It is on the record that I confirmed that I understood the payment into Court was without prejudice and that there would be a further application. However, I understood the reference to "without prejudice" to mean litigation would continue and the Client was not admitting liability by paying funds into Court.
16. Thus, on December 14, 2010, I admittedly attended at Court and took the following steps:
    i. I noted the client in default, for failure to file a defence, notwithstanding that the Client entered an appearance when he opposed the security for costs application;
    ii. I obtained Default Judgment against the client in the sum of $61,314.73 contrary to Rule 10.22. I was not aware of this rule though I admit as a practicing lawyer in Alberta I should have been. I originally practiced in Manitoba and we did not have a similar rule there;

iii. I appeared before Justice Eidsvik in morning chambers on an *ex parte* basis seeking the payment out of the funds that were paid into Court by the Client as a result of the filed *praecipe* noting the Client in default.

17. I admit that I made the December 14, 2010 application for payment out of court without advising the Court about the November 26, 2010 Order of Justice Germain. I failed to say anything about the without prejudice nature of the November 26, 2010 order and failed to disclose that the Order was subject to a further hearing on February 4, 2011, to revisit my entitlement to the funds as security. I also failed to apprise Justice Eidsvik of Rule 10.22 which states:

> 10.22 If an action is brought for payment of a lawyer's charges,
>
> (a) despite rule 3.36 [Judgement in default of defence and noting in default], no judgment may be entered in default of defence without the Court's permission…

18. However, it was my understanding, <u>which I admit was flawed</u>, that the "without prejudice" nature of the Order meant the lawsuit could continue, and when the client never obtained a lawyer within the time for filing a defence, I thought I was free to continue as in normal litigation which next step would be the noting in default and consequently payment out.

19. Justice Eidsvik ordered that the $56,000 which had been paid into Court be paid to me.

20. In the meantime, the Client retained a lawyer and the parties appeared before Justice Germain on February 4, 2011. Justice Germain was highly critical of my conduct in obtaining judgment against the Client and then appearing before Justice Eidsvik on December 14, 2010. Justice Germain referred to the "high fiduciary duty to the Court" that accompanies *ex parte* applications and noted the high standard of professional and ethical conduct required of lawyers. Justice Germain found that I had violated the spirit and intent of the November 26, 2010 Order by obtaining Default Judgment and the order permitting payment out of court. I was ordered to repay the sum into Court pending the outcome of litigation and costs of the application were awarded to the Client.

21. However, I advised Justice Germain that my income was mostly from my HCV claims and that I had no control over when a claim would be deemed completed by the HCV Plan Administrator. I further advised him that I have often gone months with no income and never know when a claim is successful until the last week of the month when the payments are made.

22. I was ordered by Justice Germain to repay the sum within 75 days but failed to do so. I requested that the Client's lawyer consent to an Order extending time for payment in. He refused. We appeared before Justice Germain and I explained I had had no income coming in. I was then given a 30 day extension, but again no income came in that month. I again requested the Client's counsel to consent to a further extension. He refused. The parties appeared before Justice Germain a third time on June 9, 2011 and I was again ordered to pay the amount into court and was warned that failure to do so would result in a daily penalty. Justice Germain was critical of my many delays and stated that my conduct "embarrassed the Court and the legal profession". At this time, Justice Germain also awarded the Client costs of the application on a solicitor client basis.

23. I finally repaid the $56,000 into Court on July 11, 2011 approximately seven months after I was first ordered to do so. In the last appearance before Justice Germain prior to trial, on July 15, 2011, Justice Germain thanked me for my effort in repaying the sum back into court by stating:

> Mr. Botan…I want to thank you very, very much for the effort you made as a member of the Bar in getting that dough in as quickly as possible. It is a great credit to you…

24. There were several Motions before trial, but I felt that all were necessary. I made two Motions to compel the Client to produce his records and attend for discovery as he refused to do either. I made a further Motion to obtain the HCV Plan Administrator's file as the Client refused to provide me with an authorization for its release to me or to request it himself.

25. In every appearance before Justice Germain, the Client's counsel sought an Order for a taxation. However, a taxation cannot take place once pleadings are filed and in this case there was a contract dispute which a taxation officer cannot determine. In spite of the Client's counsel being so advised, he took out a request for taxation. We appeared before the taxing officer who advised the Client's counsel that he could not hear the matter due to pleadings being filed and furthermore he had no jurisdiction to determine the contract issue.

26. Subsequently, a trial of the main action was held in September 2011. At the trial Justice Michalyshyn concluded that the contingency agreement was valid but found that I had been terminated by the Client prior to the submission of the compensation claim. Justice Michalyshyn accepted the Client's evidence over mine on a number of critical points, particularly regarding the May 2010 events. Justice Michalyshyn found that my notes were "inexplicably incomplete" and on numerous occasions "simply mistaken".

27. In reaching this conclusion Justice Michalyshyn expressed "real doubts" about my July 8, 2010 diary entry and felt that the Client would have better reason to remember the events of May 18 and 19, 2010. Therefore, he determined that I was only entitled to compensation for my services up to the point of termination at a cost of $250 per hour. I did not keep time records nor did I provide an estimate of time spent on the file. The Client estimated that I spent 7 hours on the claim. Justice Michalyshyn tripled this estimate and awarded me $5,250.00.

28. Following the trial, the Client brought an application seeking costs on a solicitor-client basis against me, arguing that I was barely successful at trial and had made several unfounded allegations of malfeasance against the Client. I responded that I was entitled to costs because I "won" the case. However, I did not seek costs during the application and instead proposed that each party should bear its own costs.

29. Justice Michalyshyn noted that I had recovered "less than 5% of [my]claim", that I failed on the central issue of when the agreement was terminated, and that I failed because I was disbelieved. Further, Justice Michalyshyn stated that I had made misleading representations to a judge hearing an *ex parte* interlocutory application during the course of the litigation. These representations caused the Client to incur significant unnecessary legal costs which were attributable to my actions. For these reasons, Justice Michalyshyn awarded costs against me on a solicitor client basis for the trial and trial preparation in the amount of $37,358.60

30. I appealed both the decisions on the merits and the costs award. The Court of Appeal dismissed the appeals and upheld Justice Michalyshyn's decisions.

ADMISSION OF FACTS AND GUILT

31. I admit as facts the statements in this Agreed Statement of Facts for the purposes of these proceedings
32. I admit that I failed to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity and such conduct is deserving of sanction.
33. I admit that I, in advocating on my own behalf, failed to represent myself within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect and such conduct is deserving of sanction.
34. I admit that I, when advocating on my own behalf, in the course of advancing the litigation against my former client, misstated facts or law or suppressed what ought to have been disclosed and such conduct is deserving of sanction.
35. For the purposes of section 60 of the *Legal Profession Act,* I admit my guilt to Citations 1, 2 and parts of Citation 3 , that were directed on May 27, 2015.
36. I acknowledge that I have had the opportunity to consult legal counsel and provide this Statement of Facts and Admission of Guilt on a voluntary basis.

THIS STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT IS MADE THIS 9 DAY OF OCTOBER, 2015.

"Allan Botan"

ALLAN BOTAN