THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF THE *LEGAL PROFESSION ACT*, R.S.A. 2000 C. L-8,

AND IN THE MATTER OF A HEARING REGARDING

THE CONDUCT OF JAMES LUTZ

Hearing Committee:

Perry R. Mack Q.C., Chairperson
Stephen G. Raby, Q.C.
Douglas R. Mah, Q.C.

Appearances:

Anthony Jordan, Q.C. for Mr. James Lutz
Rocky Kravetsky for the Law Society of Alberta

Summary and Disposition

A Hearing Committee of the Law Society of Alberta conducted a hearing into the conduct of James Lutz on January 12, 13 and 14, 2015. The Hearing Committee was comprised of Perry R. Mack, Q.C. (Chair), Stephen G. Raby, Q.C., and Douglas R. Mah, Q.C. The Law Society was represented by R. Kravetsky. Mr. Lutz was represented by A.J. Jordan, Q.C.

1. This matter involves two citations issued by the Law Society against Mr. Lutz:

   (a) It is alleged that you misappropriated funds and that such conduct is conduct deserving of sanction;[1]
   (b) It is alleged that you misled or attempted to mislead your client M.D., and that such conduct is conduct deserving of sanction.

2. The matter proceeded to hearing January 12, 13 and 14, 2015. The Hearing Committee reserved its decision until February 23, 2015. The parties were informed by correspondence that the charges against Mr. Lutz were dismissed with reasons to follow.

[1] This citation originally stated: "It is alleged that you misappropriated funds belonging to your client, M.D., and that such conduct is conduct deserving of sanctions." The citation was amended by deleting the underlined portion upon application of the Law Society at the commencement of this Hearing.

Facts

3. The citations arise from a field audit by the Law Society staff of the accounting records of the firm Dartnell Lutz of which Mr. Lutz is a partner. The audit was conducted in the spring of 2011. The events under scrutiny occurred in 2009. There is no complaint by the client or by opposing counsel in the matter at hand.

4. Mr. Lutz has been a member of the Law Society since 1992. He is an experienced criminal defence counsel. A significant portion of his practice involves the defence of persons charged with drug offences under the *Controlled Drugs and Substances Act* and the *Criminal Code*.

5. On May 22, 2009, information was sworn charging M.D. with 14 offences. M.D. was arrested. At the time of his arrest police seized a number of items including a quantity of cocaine, a handgun and ammunition, personal documents and other items including a Rolex watch, and cash in the sum of $19,935.00. This hearing concerns the ultimate disposition of the cash.

6. M.D. was known to both the police and Mr. Lutz. Mr. Lutz had previously represented M.D. respecting matters in 2007 and in 2008. The latter matter had been concluded in early 2009.

7. M.D. retained Mr. Lutz in relation to the May 2009 charges. On May 25, 2009, a retainer of $2,000.00 was paid and deposited into the trust account of Darnell Lutz. $1,000.00 of that sum was disbursed on June 17, 2009 to pay invoices issued by Darnell Lutz. On August 13, 2009 a further retainer of $4,000.00 was paid into the trust account of Darnell Lutz. M.D. was scheduled to be tried on all charges in Provincial Court on September 29, 2009. Mr. Lutz was fully secured for his trial fees.

8. This controversy arises from an agreement made the date of the trial to resolve the charges against M.D. The agreement included the disposition of the property seized by the police on May 22, 2009. As will be seen, there is little if any disagreement on the express discussions between Mr. Lutz and Crown Counsel. There is a brief transcript of what was said in Court concerning the agreement and its adoption by the judge. The Law Society's position is however, founded upon what is said to be understood or implied in the agreement and the state of mind of Mr. Lutz.

9. The common evidence is that prior to the commencement of the trial on September 29, 2009, Mr. Lutz met with Crown Counsel Lori Ibrus in a meeting room outside Court Room 1105 at the Calgary Courts Centre. The discussions were toward an agreement and Provincial Court Judge Skene stood matters down to give the parties time to continue negotiations. Some of those discussions took place in the presence of the investigating police officer, Sergeant H. As the discussions progressed, Mr. Lutz left the meeting room on a number of occasions to consult with M.D. who was being held nearby. The negotiations took place over a time period of approximately 1 ½ hours.

10. Ms. Ibrus was an experienced Crown prosecutor who, at the time of these events, had recently moved to Alberta from the Province of Quebec where she had also been a Provincial Crown. As matters turned out, the M.D. matter was to be her first trial in Alberta. She had been assigned the case approximately a week before the scheduled trial.

11. Sergeant H. had had prior dealings with Mr. Lutz and knew him to be an experienced defence counsel. He recalled that on September 29, 2009 his focus was on the particular charge that M.D. had threatened to cause him death or bodily harm, contrary to section 264.1(1)(a) of the *Criminal Code*. He had no recollection of the discussions concerning the disposition of the seized cash. Sergeant H. had no notes of any of the discussions in this case. Sergeant H. did speak to his experience as a police officer in drug related matters. He said that drug dealers took it as a given that any funds seized by the police in connection with drug charges would be considered proceeds of crime and would not be returned. Sergeant H. said it was generally understood as a "cost of doing business".

12. As to her experience, Ms. Ibrus said that in Quebec the general rule was the seized funds were never returned to the accused following a guilty plea. She understood the practice in Alberta to be somewhat different in that such funds could be disbursed to defence counsel, presumably to defray defence costs.

13. Ms. Ibrus' supervisor and team leader in drugs and proceeds of crime prosecution in Calgary was Joe Mercier. Mr. Mercier gave evidence that his practice respecting seized cash varied with the amount. For a small amount of cash he might deal with it in a submission to the court. For large amounts he might formalize any agreement in a court order. He confirmed that the Crown can and does agree to disburse seized funds to the defence counsel as part of a negotiation. Mr. Mercier said that he had never heard of a case where alleged proceeds of crime were returned to the accused after he had pleaded guilty. Mr. Mercier had no recollection of discussions or notes of his involvement in the case of M.D.

14. Ms. Ibrus testified that the focus of her discussions with Mr. Lutz was toward the counts, i.e. what M.D. was prepared to plead guilty to and what sentence he was prepared to accept. After those items had been agreed to (subject to Court approval), the discussions turned to the seized property including the cash. The cocaine, the handgun and the ammunition were agreed to be forfeited to the crown. Ms. Ibrus stated that she was content to have the personal items including the Rolex watch returned to M.D., however she was not prepared to have the cash returned. She stated that she was agreeable to having the funds returned to Mr. Lutz provided they did not flow through him to M.D. She stated that Mr. Lutz said words to the effect:

> "Don't worry, my client will never see any of it."

15. She testified that she assumed that meant it would be absorbed in legal fees, although there was no specific discussion of fees and no mention of any terms or conditions other than that the funds would not go to M.D.

16. Ms. Ibrus said that Sergeant H. approved of the arrangements and she telephoned her supervisor Mr. Mercier for his approval which was obtained.

17. Mr. Lutz testified that during his discussions with Ms. Ibrus and Sergeant H. on September 29, 2009, Sergeant H. insisted that the drugs, handgun and ammunition be forfeited. They had no issue with M.D.'s personal items being returned. Mr. Lutz said that Ms. Ibrus was insistent that the seized funds could not be returned to M.D. so he said on a whim, "What if the money goes to me?". He said that Sergeant H. said words to the effect, "As long as the money does not go to M.D. I don't care." He said that Ms. Ibrus said words to the effect "You have to promise it will not return to M.D." Mr. Lutz said he gave that promise. He said that M.D. was primarily interested in the amount of time he was to serve in jail. With regard to the forfeiture of the funds, Mr. Lutz said that M.D.'s reaction to the discussions was that he would rather Mr. Lutz had the money than the Crown.

18. The parties appeared before Provincial Court Judge Skene and the terms of the agreement including the required guilty pleas and admissions were read into the record. The joint submission of counsel with respect to sentence was accepted. With respect to the seized cash, the transcript of the proceedings contains the following:

Page 12 line 1 to page 13 line 22

MS. IBRUS: There is – was $19,935 in Canadian currency that was seized and we are – I am not sure, because I come from Quebec, how you term it here, but that would be forfeited to Mr. --

THE COURT: Lutz?

MS. IBRUS: -- (INDISCERNIBLE) Lutz – sorry --

MR. LUTZ: That's okay.

MS. IBRUS: -- is that the way you do it?

MR. LUTZ: That's it.

THE COURT: And the Crown is content with that?

MS. IBRUS: Yes.

THE COURT: Okay.

MS. IBRUS: And all the rest will be forfeited to the Crown.

MR. LUTZ It's agreed.

THE COURT: Okay. Tell me the exact – I always – when you're saying those numbers, I – put down 19,000 plus, plus – 19,000 and?

MS. IBRUS: 835.

THE COURT: 35?

MS. IBRUS: Yeah.

THE COURT: Okay. Anything else?

Do you want to tell me something about your client?

MR. LUTZ: Yes.

Page 18 line 37 to page 19 line 3

THE COURT: Then, we'll add that.

The forfeiture orders, all items shall be forfeited to the Crown for destruction except – and I have a -- we'll call it unit – or, number BC26, the 8 gigabyte iPod; a Sony camera with enclosed tape; all identification documents, including: SIN -- SIN number -- or, SIN document, immigration papers, notice of assessment from Revenue Canada, the Rolex watch; and then, there'll be another clause saying the Canadian currency of $19,935 shall be returned to the offender's lawyer, Mr. Jim Lutz.

19. The transcript was prepared in connection with the Law Society proceedings. There was no written record of the agreement at the time of the events other than the Clerk of the Court's notes on the endorsement which stated:

> "All items forfeited to the crown except Sony Camera with tape, identification documents including SIN card, immigration papers and Revenue Canada Notice of Assessment, 8G iPod, Rolex watch.
>
> Canadian Currency in the amount of $19,935 to be returned to the offender's lawyer, Jim Lutz."

20. There was no further communication between counsel or with the Court concerning the funds prior to the Law Society investigation.

21. On November 12, 2009, the Seized Property Management Directorate in Gatineau, Quebec, issued a letter to "Mr. James Lutz In Trust". The letter was captioned "Return of seized monies – M.D. (DOB XXXX/XX/XX)" and stated:

> "Further to court order dated September 29, 2009, enclosed in (sic) cheque number XXXXXXXXXXX in the amount of $19,935.00 payable to your law firm.
>
> If you require further information do not hesitate to contact G.N. at XXX-XXX-XXXX."

22. The cheque stub in evidence stated:

> "As per Court Order dated September 29th, 2009, $19,935.00 to be returned to Mr. James Lutz in trust for M.D."

23. Upon receipt, the funds were deposited into the trust account of Dartnell Lutz. Mr. Dartnell who was the partner in charge of the trust account testified that there was confusion about how to characterize the funds. Mr. Dartnell understood from Mr. Lutz that the money was not to go to the client as per the agreement approved by the Court on September 29, 2009. He sought advice from the firm's chartered accountant. There was no account to render or against which the funds could be applied.[2] Ultimately Mr. Dartnell and Mr. Lutz determined that the funds would be disbursed and shared as law partners.

24. Subsequently M.D. was charged with further matters and he retained Mr. Lutz as counsel. He continued to pay retainers and have his legal counsel paid from those retainers without mention or credit of the $19,935.00. There is no evidence that M.D. ever asserted any claim on the now disputed funds.

25. M.D. did not appear and testify at this Hearing despite having been served with a Notice to Attend by Law Society counsel.

26. The Law Society field audit of 2011 raised questions concerning the disposition of the subject funds. There was correspondence between the Law Society and Mr. Lutz concerning the characterization of the funds in Mr. Lutz's hands including debate about whether or not the money came from the Crown or from M.D. Ms. Ibrus was interviewed about the events in the course of the Law Society investigation in 2012. At that time she apparently told the Law Society that Judge Skene had made it explicitly clear that the money was to be sent to Mr. Lutz in trust. At this Hearing and having had the chance to review the transcript of September 29, 2009 Court proceeding, she fairly acknowledged that she had been incorrect. She acknowledged that there was no discussion about Mr. Lutz's fees, although she had made some assumptions.

[2] Mr. Lutz had refunded a portion of his trial retainer to M.D. after September 29, 2009.

27. After the Law Society investigation was commenced, Mr. Lutz wrote to Provincial Court Judge Skene requesting advise and directions concerning the matter at issue. Judge Skene declined to respond advising that she was *functus*.

28. The Law Society tendered Kelly Dawson, a senior criminal lawyer in Alberta and he was qualified as an expert witness to give general evidence on the matter of the criminal law. He tendered a letter dated January 7, 2015 which included commentary on the law respecting proceeds of crime as well as his opinion on whether Mr. Lutz could have lawfully accepted these funds or deposited them to his trust account absent a properly justifiable statement of account.

29. While the Hearing Committee found Mr. Dawson's general explanation of the law useful, we found his commentary did not apply to the facts of this case. Fundamentally, Mr. Dawson's opinion was based upon an assumption that the cash had become proceeds of crime and therefore was coming from the Crown to Mr. Lutz as a result of a guilty plea. There was no such agreement or admission made by M.D. concerning the cash. Absent an agreement for the cash to have become proceeds of crime there would have had to have been an application for that declaration made by the Crown under section 462.37(1) of the Criminal Code and that did not occur.

30. In his cross-examination of Mr. Lutz, Law Society counsel was critical of him for not seeking clarification respecting disposition of the funds from the Crown at the time of the events, in Court or on receipt of the funds from the Seized Property Management Directorate. It was suggested to Mr. Lutz that he would have understood that had any effort been made along those lines, it would have made it clear that the funds could not be simply taken by Mr. Lutz for his own use. Mr. Lutz denied having any such understanding at the time.

Submissions of the Parties

31. Law Society counsel submitted that on the charge of misappropriation, the question is whether Mr. Lutz "was entitled to appropriate the money" in the manner that it occurred in this case. He underlined the fact that none of the experienced counsel who testified in this matter had ever encountered such a situation as the one described by Mr. Lutz. Law Society counsel submits the funds would ordinarily had been taken as property of the Crown as proceeds of crime. He submitted that Mr. Lutz's explanations were not credible.

32. Law Society counsel referred to the following provision from paragraph 277 of *L.M.* v. *T.M.*, 2012 NBQB 376 (N.B.Q.B.):

> "The real test of the truth of a story of a witness in such a case most be its harmony with the preponderance of the probabilities which a practical and informed person could readily recognize as reasonable in that place and under those conditions."

33. Law Society counsel submits that, at best, Mr. Lutz was willfully blind to the obvious, that the funds were being returned to pay his client's legal fees. Law Society counsel argued that Mr. Lutz had at least three opportunities to make the matter clear: in his conversations with Ms. Ibrus, before the Judge, or after the funds were received by his office but before they were released.

34. Law Society counsel acknowledges there would be a question as to from whom the funds were misappropriated. He said it is likely they were not misappropriated from M.D. as the funds were under the control of the Crown as likely proceeds of crime.

35. As to the second citation, the Law Society counsel conceded there was little evidence in support of that charge.

36. Counsel for Mr. Lutz argued that there was no misappropriation. When the money was seized it was in possession of M.D. and there was no evidence that it belonged to anyone else. The seizure by the police does not deprive M.D. of his property in the money and it stays as his money unless and until a Court adjudicates otherwise. There is no automatic forfeiture to the Crown and the *Criminal Code* requires an application be made for a declaration. Section 462.37(1) of the *Criminal Code* provides:

> 462.37 (1) **Order of forfeiture of property on conviction** – Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

37. In the result, until the money was ordered to go to Mr. Lutz it remained M.D.'s money subject to the constraint that he could not demand the payment from the government.

38. Counsel argued that there was no trust impressed on the funds. No trust was expressed by Ms. Ibrus, Mr. Lutz or the Provincial Court Judge on September 29, 2009. The letter from the Directorate purported to describe a trust but the staff member who wrote that letter had no authority to impose any such condition.[3] Counsel argued that if there is a form of trust for the benefit of M.D., there is no evidence that he intended the money to go to anyone other than Mr. Lutz.

39. In essence, Mr. Jordan argues that it cannot be a misappropriation when the person with property to the funds (M.D.), the person who is the custodian of the funds (the Crown), agreed the funds should not go to the other and designated Mr. Lutz as the recipient.

[3] It should be noted that the Law Society chose to proceed upon a charge based on misappropriation and not to any alleged failure to inquire upon or clarify trust conditions on the part of Mr. Lutz.

Analysis

40. The first citation carries the serious charge of misappropriation. As it is often the case in such matters, Law Society counsel reminded the Hearing Committee that there is but one standard approved in civil matters, namely a balance of probabilities.

41. In considering the matter, it is instructive to consider what is meant by the term "misappropriated". Black's Law Dictionary, 10th ed. defines "misappropriation" as:

> "The application of another's property or money dishonestly to one's own use."

42. The Oxford Dictionary of English, 2nd Ed., defines "misappropriate" as to:

> "Dishonestly or unfairly take (something, especially money belonging to another) for one's own use."

43. In *Monroe (Re)*, 2014 ABQB 636, Madam Justice J.B. Veit stated (at para. 269 to 270):

> "In my opinion the concept of "misappropriate" and the act of "misappropriation" inherently suggest conduct that is wrongful and morally blameworthy.
>
> While one might expect that misappropriation will most often occur where money is wrongly or dishonestly applied by the fiduciary for a different purpose than intended… the concept has equal application when property other than money is wrongfully or dishonestly appropriated by the fiduciary for purposes other than intended."

44. The Hearing Committee was also referred to authorities which have held that a member cannot shelter behind an "honest belief" defence to misappropriation where the alleged honest belief is founded on reckless and careless behaviour.[4]

45. The Hearing Committee was satisfied that the money went where the players wanted it to go. The money went to the person both the Crown and the client chose to the exclusion of the other. No conditions were expressed by the Crown other than that the funds should not go to M.D. The only evidence we have concerning M.D.'s intentions are Mr. Lutz' testimony about his instructions and his evidence concerning M.D.'s subsequent retainers, both of which are in favour of Mr. Lutz's position.

46. The Hearing Committee found that there had been no dishonest intent or conduct by Mr. Lutz. There was no reckless conduct. An agreement was reached and ratified by the Court. These are unique circumstances. There may well have been imperfect

[4] See, for example, Law Society of Alberta v. McGechie, 2007 LSA 21 (CanLII)

communication in hindsight. Imperfect communications however are not tantamount to a misappropriation to the account of Mr. Lutz.

47. Better practice may have been followed in documenting the agreement. Upon receipt of the letter from the Directorate, Mr. Lutz (who did not see it at that time) might have made an inquiry of Ms. Ibrus to confirm there were no trust conditions on the money. The manner in which the funds were deposited into the firm trust account and then disbursed did appear to the panel to be a breach of the Law Society Rules concerning use of a trust account but none of these issues can be viewed as being included within the citations.

48. In the result, the Crown got guilty pleas and an acceptable sentence on the charges it was most interested in. The Crown got the property it wanted forfeited to it, namely the drugs, the gun and the ammunition and it got the only thing that it wanted in respect of the cash, namely that it did not go to M.D. M.D. got an acceptable result on sentencing and the seized cash was disbursed to his lawyer and not to the Crown.

49. For these reasons the citations are dismissed.

All of Which is Respectfully Submitted this 11th day of August, 2015.

Perry R. Mack, Q.C., Chair

Stephen G. Raby, Q.C.

Douglas R. Mah, Q.C.