

**THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT**

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

INTRODUCTION

1. On March 12, 2013, a Hearing Committee of the Benchers convened at the Law Society of Alberta office in Calgary to inquire into the conduct of John Boulton (the “Member”). The Panel comprised Nancy Dilts QC, Bencher (Chair), Frederica Schutz QC, Bencher, and Miriam Carey PhD, Lay Bencher. The Law Society of Alberta (“LSA”) was represented by Brian Gifford. The Member was present for the Hearing and was not represented by counsel.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits J-1 to J-5 established the jurisdiction of the Hearing Committee. The Parties had no objections to the composition of the Panel.

3. The Hearing was held in public.

CITATIONS

4. The Member was responding to the following Citations:

1. IT IS ALLEGED THAT you breached a trust condition and that such conduct is conduct deserving of sanction.
2. IT IS ALLEED THAT you misled or attempted to mislead another lawyer, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

5. At the Hearing, the following Agreed Statement of Facts (the “Agreed Facts”) was tendered:

“Introduction

1. Mr. Boulton was admitted to the Alberta Bar on June 13, 1972. He practices in Sundre, Alberta.
2. Mr. Boulton’s primary area of practice is as a solicitor.

Citations

3. On May 31, 2012, the Conduct Committee referred the following conduct to hearing:

1. IT IS ALLEGED THAT you breached a trust condition and that such conduct is conduct deserving of sanction.
2. IT IS ALLEGED THAT you misled or attempted to mislead another lawyer, and that such conduct is conduct deserving of sanction.

Fact Summary

4. The Law Society received a letter dated April 16, 2010 (Exhibit 1) from Member, Brian Clark ("Complainant") regarding a disputed real estate transaction involving John Boulton.

5. Based on the information provided to the Law Society, the background of the complaint may be summarized as follows:

5.1 Mr. Boulton represented [Ws] in their real estate purchase from [Ns]. Ns were initially represented by Al Pearce ("Pearce"), who had since passed away and were now being represented by the Complainant;

5.2 While the Ws took possession of the property in December 2004, title was not actually transferred and the purchase price not tendered until July 2005. The Complainant explained that a portion of the lands being sold by the Ns were being acquired from a third party who had died prior to closing and therefore the transaction could not be completed until a grant of probate was issued and the parcel transferred into the Ns' name and so, in addition to the cash to close there was also an additional interest charge that had been agreed upon;

5.3 The Ws were initially represented by Andrew Geisterfer ("Geisterfer"), and on May 14, 2005, Pearce forwarded his trust letter (Exhibit 1, Tab 1) to Geisterfer enclosing the Transfer of Land. Pearce imposed a trust condition that "Prior to submitting the Transfer of Land for registration you will deliver to us that portion of the cash to close not reasonably expected to come from the new mortgage proceeds and an amount for late payment interest which has become payable in accordance with the terms of this letter".

5.4 A short time later, the Ws changed representation to Mr. Boulton (Exhibit 1, Tab 2) and as he had allegedly received the Transfer of Land to hold pending closing, the Complainant believed he would have also assumed liability for the trust conditions previously imposed;

5.5 By his calculations, Mr. Boulton, at closing and in order to submit the transfer for registration, would have been required to have \$201,829.12 in his trust account to be provided to Pearce. He said that this amount included the cash to close of \$194,534.09 in accordance with the statement of adjustments, interest on the cash to close of \$7,295.03 and minus an additional payment previously made;

5.6 Prior to completing the transaction, the Ws made allegations of defects to the property and were holding the Ns responsible. The Ws filed a civil claim against both the Ns and the realtor shortly after the completion date and it was allegedly agreed by Pearce that Mr. Boulton would holdback \$20,000 from the cash to close in trust pending resolution (Exhibit 1, Tab 3).

5.7 The Complainant also provided a copy of Mr. Boulton's letter to ALIA (Exhibit 1, Tab 4) dated May 17, 2006 and referred to the last paragraph on page 1 which he believed acknowledged Mr. Boulton's agreement with Pearce to holdback [sic] the funds.

5.8 The Complainant felt it was clear that Pearce believed Mr. Boulton was holding the funds and further provided:

ii) a copy of a letter from Pearce to the Ns indicating that Mr. Boulton would be holding the funds pending resolution of the claim (Exhibit 1, Tab 5); and

iii) ii) [sic] a copy of Pearce's Recapitulation Statement (Exhibit 1, Tab 6) noting the holdback;

5.9 A judgment was issued which dismissed the Ws' claim and the Ns requested that the Complainant contact the Ws' solicitor to obtain the holdback. After reviewing Pearce's file, he determined that Mr. Boulton was holding back the funds and so he contacted him.

5.10 Upon initial contact, Mr. Boulton advised that he did not hold nor had he ever held the monies in trust. Mr. Boulton further advised that at one time he held funds of approximately \$12,936.23 in trust but they had since been forwarded to the Ws' current counsel, Daniel Harder ("Harder"). The Complainant contacted Harder who confirmed he had received the funds from Mr. Boulton and those funds were thereafter released to the Complainant;

5.11 The shortfall owing to the Ns was \$7,063.77 of the purchase price and although Mr. Boulton had been required to obtain and hold such funds in trust and had also indicated to Pearce he had done so, the fact was he had only held \$12,936.23 and despite that shortfall in funds, Mr. Boulton proceeded with registration of the transfer.

5.12 The Complainant believed this was a clear breach of the trust conditions and also evidenced Mr. Boulton's misrepresentation to Pearce regarding the amount of money held in trust. He made a demand for a copy of Mr. Boulton's accounting of the transaction and was provided with a copy of Mr. Boulton's trust ledger (Exhibit 1, Tab 7) as well as a copy of his earlier letter to ALIA (Exhibit 1, Tab 4). He said review of the ledger clearly showed that Mr. Boulton had never held the agreed upon \$20,000 and further that paragraph 2, page 2 of Mr. Boulton's letter to ALIA noted that Mr. Boulton proceeded with registration of the transfer based on his assumption that the Ws would provide him with the shortfall amount. The Complainant noted this was improper and quoted a portion of Mr. Boulton's letter where he stated "I would have not gone to registration without those assurances and in retrospect I should not have done so without a certified cheque from the Ws";

6. By letter dated April 22, 2010, a Complaints Resolution Officer requested Mr. Boulton provide a written response to address the complaint material. The Law Society received Mr. Boulton's response dated May 11, 2010 (Exhibit 2), which included the following information:

6.1 Mr. Boulton provided a copy of his letter to the Complainant of May 7, 2010 (Exhibit 2, Tab 1) advising the Complainant that as he has reported the matter to the Law Society, there was no longer a threat between them. The letter also advised that he was prepared to pay the shortfall amount to the Ns but wanted to impose a trust condition that should the Ns receive any monies either from the Ws or on behalf of them, those monies would be accounted to him and that he wished to have the Ns' cooperation, at no cost to them, to assist him in collecting the monies owing;

6.2 The documents and facts as outlined by the Complainant were essentially correct and the problem on the file was the interest payable by the Ws to the Ns. When he released the funds and paid the interest owing, the Ws were to have brought him the amount of \$7,063.77. Mr. Boulton provided a copy of his client ledger (Exhibit 2, Tab 2) and review of the ledger indicates that Mr. Boulton had at no time retained a holdback amount of \$20,000 in trust not did it indicate receipt of the shortfall payment from the Ws;

6.3 Mr. Boulton stated that he would not have released funds without having been advised that the Ws would be immediately bringing in those monies. He said that Ms. W had attended at his office for what he thought was to deliver the funds however she requested to see her file, which she then proceeded to remove from his office despite his objections. He was later sued by the Ws for releasing the interest however the action was settled;

6.4 Mr. Boulton acknowledged he was a [sic] fault for releasing funds prior to receiving the shortfall from the Ws but the Ws had never paid it to him. He had also been advised by the Complainant that the Ws had since paid the shortfall to the Ns;

6.5 His position with the Complainant's December 23, 2009 letter was that it was improper to submit a complaint to the Law Society in order to obtain monies whether legally owing or not and further that it was improper to pay monies based on threats made.

7. The matter was referred to the Manager, Complaints and on May 17, 2010, a letter was sent to Mr. Boulton requesting his formal written response to the complaint, pursuant to section 53 of the Legal Profession Act. In his response dated May 26, 2010 (Exhibit 3), Mr. Boulton gave a more complete reply from his earlier May 11th correspondence as follows:

7.1 The issues on this file that were being dealt with were the alleged defects of the property and interest, if any, that was payable and he wished to point out that this matter had taken place 5 years prior so his memory of the events was not clear particularly regarding telephone conversations he may have had with other counsel involved. He also wished to correct one item from his letter and said that his file had not been taken by Ms. W until sometime later than he had previously advised;

7.2 The file had been first handled by Geisterfer and it was he who held initially held [sic] the shortfall of cash that was eventually transferred to him with the file. He provided copies of correspondence between Geisterfer and Pearce in December 2004 and May 2005 (Exhibit 3, Tabs 1-5). There was discussion between Geisterfer and Pearce regarding payment of the cash difference and registration of title and it was agreed by both Geisterfer and Pearce that interest would be payable at the Ws'

new mortgage interest rate on the full cash payable regarding the interest payable as set out in Pearce's trust letter of May 14, 2005. The file was then transferred from Geisterfer to Mr. Boulton on May 24, 2005;

7.3 Mr. Boulton said the issue with the interest was due to the length of time it took to obtain title by the Ns as well as the agreement between Geisterfer and Pearce. The Ws had initially agreed to deliver the interest but then later refused and then again agreed up to the point that they took the file from his office. He noted that he continued to deal with the interest and defect issues and enclosed his correspondence of August 30, 2005 to Pearce in which he inquired about the interest payment (Exhibit 3, Tab 7);

7.4 Mr. Boulton explained that his accounting to Pearce was not done to deceive but rather to explain how the amount of the cheque issued to Pearce had been calculated and he had been relying on the Ws' promise to deliver the interest to him. He had never and would never deceive a lawyer intentionally;

7.5 Mr. Boulton could not explain why things occurred as they had and any reasons he gave would simply be speculation as he was unable to recall conversations he had however, he again acknowledged that he believed he was liable for any shortfall on the matter.

8. Mr. Boulton's response was forwarded to the Complainant on May 27, 2010. The Complainant provided no further response.

Admission of Fact and Guilt

9. John Boulton admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. Mr. Boulton admits that all correspondence sent to him was received by him on or about the dates indicated, unless stated otherwise.

10. For the purposes of Section 60 of the Legal Profession Act, Mr. Boulton admits his guilt to the Citations as particulars of conduct incompatible with the best interests of the public and conduct which tends to harm the standing of the legal profession generally.

11. This Agreed Statement of Facts is not exhaustive and Mr. Boulton may lead additional evidence not inconsistent with the stated facts herein. Mr. Boulton acknowledges that the Law Society is not bound by this statement of facts and that it may cross-examine Mr. Boulton, adduce additional evidence, or otherwise challenge any point of fact it may dispute in this statement."

6. Mr. Boulton did not lead further evidence, nor did he give evidence under oath. Counsel for the LSA also did not lead any evidence.

7. The Panel conferred and concluded that the Agreed Statement of Facts was acceptable to the Committee and amounted to an admission of guilt of conduct deserving of sanction in accordance with Section 60 of the *Legal Profession Act*.

DECISION REGARDING SANCTION

8. In determining an appropriate sanction where there is a finding of conduct deserving of sanction, the Hearing Committee is guided by a purposeful approach to sanction where the overarching purpose of the proceedings is to protect the public, preserve high professional standards, and preserve public confidence in the legal profession: *Law Society of Alberta v. Mackie*, 2010 ABLs 10.

9. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie (at page 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. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of client's money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

10. The *Legal Profession Act*, Section 72(1) requires a Hearing Committee, on finding a member guilty of conduct deserving of sanction, to disbar, suspend or reprimand the member. Unlike a disbarment or a suspension, a reprimand does not limit a member's right to practice. It is, however, a public expression of the profession's denunciation of the lawyer's conduct and is to deter future misconduct by the member and within the profession: *Law Society of Alberta v. Westra*, 2011 CanLii 90716.

11. When deciding how the public interest should be protected through the sanction process, the Hearing Panel is invited to take into account various factors, including the nature and gravity of the misconduct, whether the misconduct was deliberate and whether the misconduct raises concerns about the lawyer's honesty or integrity. In addition, the Hearing Panel considers mitigating circumstances that may temper the sanctions that may be imposed including the lawyer's conduct since the misconduct, the lawyer's prior disciplinary record, the age and experience of the lawyer and whether the lawyer entered an admission of guilt, thereby showing an acceptance of responsibility: *Law Society of Alberta v. Elgert*, 2012 ABLs 9 (CanLII).

12. Counsel for the LSA tendered Mr. Boulton's discipline record, showing guilt on four citations dating from 1981 and 1986. Mr. Boulton's discipline record was entered into evidence as Exhibit 5. Counsel for the LSA submitted that Mr. Boulton's discipline record was not relevant, being both unrelated and dated. The Hearing Panel agrees that given both the age and nature of the previous disciplinary matters, Mr. Boulton's disciplinary record has no bearing on the appropriate sanction to be issued in this instance.

13. The Hearing Panel accepts that Mr. Boulton had no intention to mislead counsel or the public by his actions. The Hearing Panel further gives regard to Mr. Boulton's admission of responsibility and guilt, Mr. Boulton's seniority at the bar and the information he provided regarding the safeguards he had in place within his office and as direction to his staff to avoid matters like this one from arising.

14. Having regard to the nature of the misconduct and the response of Mr. Boulton, the Hearing Panel ordered that Mr. Boulton be reprimanded. A reprimand was delivered by the Chair at the conclusion of the hearing and is set out below. In addition to ordering a reprimand, the Hearing Panel ordered that Mr. Boulton pay costs of the hearing of \$3,000.00 payable not later than July 5, 2013.

CONCLUDING MATTERS

15. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of proceedings shall be redacted to protect the identity of the Member's former clients, and any information subject to proper claims of privilege.

16. No referral to the Attorney General is directed.

17. There shall be no Notice to the Profession issued.

REPRIMAND

18. Mr. Boulton, thank you for your attendance today and your submissions to the Panel. We recognize and acknowledge your long service to the profession and to the public. We also acknowledge your cooperation with the Law Society leading up to today in resolving these complaints. We do recognize that these matters are long outstanding and unfortunate, and that as a member of the Law Society, it is a burden and an unpleasant burden to have to carry the baggage of a mistake for now nearly eight years.

19. You are here today on two citations: one with respect to the breach of a trust condition; and the other, that you misled another lawyer. Having carefully considered the Agreed Statement of Facts (Exhibit 4) and the submissions of both Law Society counsel and yourself, the Panel accepts the admissions with respect to guilt on both citations.

20. In accepting that admission of guilt with respect to both citations, the Panel also accepts your advice that you established clear policies with your staff and within your office in an effort to ensure that errors like the one that occurred in this instance did not recur. We also accept that unfortunately your directions were not followed based upon some assurances from your client at the time that the money would be immediately delivered. The Panel also accepts your submission and that of Law Society counsel that you had no intention to mislead the vendors' counsel with respect to this deficiency and the handling of the funds in trust, and that in doing so in this instance was inadvertence or an oversight.

21. In making our observations and in expressing this reprimand today, the Panel considers it important to note that you have no relevant complaint history that raises concern to the Panel or to the public and that in your years since this transaction occurred, you are no longer a sole practitioner and now practice with others as an additional check and balance to prevent a recurrence of the problems that arose in this instance.

22. However, as members of the Law Society of Alberta, our obligation is to discharge our professional duties with great diligence, recognizing that the public relies on us and places their trust in us that we will act to protect and serve their interests. It is our responsibility to keep that in our forethought at all times.

23. We again thank you for your candor and your cooperation today. We encourage you to continue your practice as a valued and respected member of the rural bar, acting always in the diligent service of the public.

Dated at Calgary, Alberta this 16th day of May, 2013.

Nancy Dilts, QC, Chair

Frederica Schutz, QC

Miriam Carey, PhD