

THE LAW SOCIETY APPEAL PANEL

BETWEEN:

Hermo Toribio Pagtakhan, a Member of the Law Society of Alberta, Appellant

v.

The Law Society of Alberta, Respondent

Before: Fred R. Fenwick, Q.C. (Chair)
Derek Van Tassell
Dennis Edney, Q.C.
Brett Code, Q.C.
Nancy Dilts, Q.C.
Robert Harvie, Q.C.
Kathleen Ryan, Q.C.
Anthony G. Young, Q.C.

Heard: March 5, 2013

Counsel: Kenneth J. Alyluia, for the Appellant
Tamara Friesen, for the Respondent

DECISION

INTRODUCTION:

1. After a series of Rule 130 audits, Mr. Pagtakhan was charged with ten citations involving various breaches of Law Society trust fund general account, trust reconciliation, and other Rules.
2. A Hearing Committee of the Law Society of Alberta comprised of Ronald J. Everard, Q.C. (Chair), Vivian R. Stevenson, Q.C. and Dr. Larry Ohlhauser convened at the Law Society offices in Edmonton, Alberta on June 24, 2008, evidence was adduced and the Hearing Committee found that nine of the ten citations had been proven. After hearing submissions concerning sanction, the Hearing Committee disbarred the member on the day of the Hearing.
3. The Hearing Committee produced a written report dated June 23, 2008.
4. Mr. Pagtakhan appeals his conviction on four of the nine citations and also appeals the sanction of disbarment. The Appeal was heard March 5, 2013. The Appeal Committee delivered its decision after hearing submissions on that date, dismissing the Appeal, upholding the finding of the Hearing Committee with regards both findings of guilt and the sanction of disbarment.

JURISDICTION:

5. Jurisdiction was established pursuant to the Procedure Guidelines in the Member Conduct Appeal Guideline:
 - a. Quorum – a full quorum of eight Benchers were present.
 - b. Hearing record – the Benchers confirmed that they had received the Hearing Report and the Hearing Record. Mr. Pagtakhan and his counsel confirmed that they as well had received a copy of the Hearing Report and the Hearing Record.

DOCUMENTS:

6. By consent, three volumes of materials were circulated to the Appeal Committee prior to the Appeal and referred to at the Appeal Hearing:

Volume 1 Hearing Record

Tab A Hearing Committee Report

Tab B Transcript of Hearing

AP J-1 Letter of Appointment

AP J-2 Notice of Appeal

Volume 2, Factums and Authorities

Tab A Factum of Mr. Pagtakhan

Tab B Factum of the Law Society of Alberta

Volume 3 Hearing Exhibits of the June 24, 2008 Hearing

OPEN HEARING

7. Counsel for the Member and counsel for the Law Society confirmed that the matter would be an open hearing.

PRELIMINARY ISSUE (FRESH EVIDENCE):

8. Mr. Pagtakhan, included, as an attachment to his Factum “Exhibit A to the Appellant’s Factum – Affidavit of P.C.”. P.C. was an expected witness at the original Hearing but had not testified. There was no formal application to treat the Affidavit of P.C. as fresh evidence but as neither P.C.’s evidence nor this Affidavit was part of the original Hearing Record, submissions were made concerning adducing the Affidavit as fresh evidence pursuant to Section 76(6) of the *Legal Profession Act*.

9. The Affidavit of P.C. contained evidence regarding the flow of funds relevant to citation 4 (failure to deposit funds from a client to a trust account), but the factual matters set out in the Affidavit had been testified to by Mr. Pagtakhan at the Hearing and accepted as factual evidence by the Hearing Committee without the necessity of hearing from P.C.
10. The test for receipt of fresh evidence is stated in *Palmer and Palmer v. The Queen* [1980] 1 SCR 759 at 775 :
 1. The evidence should generally not be admitted if by due diligence, it could have been adduced at trial provided that this general principle would not be applied as strictly in a criminal case as it is in civil cases.
 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 3. The evidence must be credible in the sense that it is reasonably capable of belief for it must be such that if believed, it could reasonably, if taken with other evidence adduced at the trial, be expected to have affected the result.
11. The Appeal Committee ruled that P.C.'s Affidavit, as fresh evidence, did not satisfy the requirements of due diligence, relevance or decisiveness. P.C. was available at the hearing but was not called, thus the test of due diligence is not made out. More importantly though, the evidence which P.C. purported to depose to in his Affidavit was already testified to at the Hearing by Mr. Pagtakhan and accepted by the Hearing Committee. As such the evidence was not decisive as it added nothing to the factual matrix for this Appeal.
12. P.C.'s Affidavit was therefore not accepted as fresh evidence and the Affidavit was disregarded by the Appeal Committee.

CITATIONS:

13. Mr. Pagtakhan was convicted at the Hearing of 9 out of the 10 charged citations:
 2. IT IS ALLEGED that you failed to maintain a general account and thereby breached the Rules of the Law Society of Alberta and that such conduct is deserving of sanction.
 3. IT IS ALLEGED that you failed to complete monthly trust reconciliations and thereby breached the Rules of the Law Society of Alberta and that such conduct is deserving of sanction.
 4. IT IS ALLEGED that you failed to deposit funds from a client to your trust account and thereby breached the Rules of the Law Society of Alberta and that such conduct is deserving of sanction.
 5. IT IS ALLEGED that you misled or attempted to mislead the Law Society with forms S you filed in 2002, 2003, 2004, and 2005 and thereby breached the rules of the

Law of Society of Alberta and the Code of Professional Conduct and that such conduct is conduct deserving of sanction.

6. IT IS ALLEGED that you failed to file your forms T for the years 2001, 2002, 2003, and 2004 and thereby breached the Rules of the Law Society of Alberta and that such conduct is deserving of sanction.

7. IT IS ALLEGED that from 1998 to 2005, you failed to submit your GST returns and remit the net funds owing from GST are collected and breach the statutory trust obligation imposed upon you by the *Goods and Excise Tax Act* and thereby breached the Code of Professional Conduct and that such conduct is deserving of sanction.

8. IT IS ALLEGED that you misled or attempted to mislead the Law Society of Alberta in confirming that your books and records were in compliance with the rules, and failed to honor the undertakings you gave to the Law Society that you would comply with the accounting rules of the Law Society and thereby breached the Code of Professional Conduct and that such conduct is deserving of sanction.

9. IT IS ALLEGED that you failed to serve some of your clients in failing to pay out trust funds in a timely fashion and thereby breached the Code of Professional Conduct and that such conduct is deserving of sanction.

10. IT IS ALLEGED that you failed to serve some of your clients in failing to provide proper statements of account and thereby breached the Code of Professional Conduct and that such conduct is conduct deserving of sanction.

11. Upon conviction on the above nine citations, Mr. Pagtakhan was disbarred by the Hearing Committee.

12. Mr. Pagtakhan appeals from his conviction on citations:

4 – failure to deposit funds from a client to his trust account.

5 – misleading the Law Society with forms S.

7 – failing to submit GST returns and remittances.

8 – misleading the Law Society in failure to honor undertakings to comply with accounting rules.

(all paraphrased).

Mr. Pagtakhan also appeals against the sanction of disbarment.

FACTS:

13. The facts as accepted by the Hearing Committee are set out in detail in the Hearing Report. For the purposes of this Appeal, a summary of the salient facts is set out below.

14. Mr. Pagtakhan had been the subject of Rule 130 audits in 1996, 1991, 2005 and 2001. All of the audits revealed serious breaches of the Law Society accounting rules and in February, 2000, Mr. Pagtakhan gave a Compliance Confirmation to the LSA confirming his compliance with the Law Society rules and undertaking to maintain his books and records in compliance, going forward.
15. A further follow-up audit was conducted August 20, 2005, but a complete audit was impossible for the auditors. Trust reconciliations were undone since 2001, formal ledger cards were absent, the posting of accounting entries was four years behind, GST filings/remittances were undone and Law Society Form T's were not filed. Mr. Pagtakhan's accounting records were in disarray.
16. As a result of the state of his accounting records, the Member was required to appear at an interim hearing before a Hearing Committee of the Law Society in Edmonton, October 20, 2005 and at that interim Hearing, Mr. Pagtakhan was given an interim suspension from the practice of law and a custodian was appointed for his practice.
17. Arising out of the subsequent investigations, which continued after the interim suspension, the Member was charged with ten citations, the Hearing of those citations was held June 24, 2008 and Mr. Pagtakhan was convicted of the nine citations set out above and disbarred.
18. On the date of the Hearing, June 24, 2008, the Member had not returned to the practice of law since his interim suspension. There had been no stay of disbarment at the Hearing and thus on the date of this Appeal, March 4, 2013, Mr. Pagtakhan had not been practicing law since his interim suspension on October 20, 2005.

Citation 4: Failure to Deposit Funds from a Client to his Trust Account

19. Mr. Pagtakhan was retained to do a commercial real estate conveyancing. The principal of his client purchaser company was out of town and was having difficulty wiring the deposit and other monies into Mr. Pagtakhan's trust account in preparation for a deadline deposit payment. The brother (P.C.) of the principal of the corporation offered to put up the \$10,000 purchase deposit but did not want his name shown on any transactions.
20. At the instructions of P.C., Mr. Pagtakhan deposited P.C.'s \$10,000 into Mr. Pagtakhan's wife's bank account, washed that money out of his wife's bank account into his trust account for the purposes of then paying the deposit to the vendor's solicitor. Later, when the principal of the corporation returned, the corporate purchaser paid the deposit and other money to Mr. Pagtakhan, Mrs. P was paid back by Mr. Pagtakhan and she paid P.C. back.
21. The facts of the transaction were accepted by Mr. Pagtakhan and the Hearing Committee throughout.
22. Rule 123 of the Law Society Rules then in effect, required Mr. Pagtakhan to deposit trust funds directly into his trust account where the money is received "on a client's behalf"

regardless of the source of the funds. Mr. Pagtakhan acknowledged that the source of the \$10,000.00, P.C., was a “client”.

Citation 5: Misleading the Law Society with Form S

23. Form S of the Law Society inquired if a Member had performed the required monthly trust reconciliations and had a box on the Form for the Member to “check” signifying that the monthly trust reconciliations had been done. From 2002 to 2005, Mr. Pagtakhan checked off the “yes” box certifying to the Law Society that “to the best of his information and belief” the monthly trust reconciliations had been done when he had not reconciled.

Citation 7: Failing to File Returns and Remittances with Respect to GST

24. Mr. Pagtakhan had not filed GST returns between 1998 and 2005 and owed those years’ worth of GST remittances. The applicable legislation, the *Goods and Excise Tax Act* made the GST funds which Mr. Pagtakhan had been collecting from his clients’ trust funds, by definition.
25. Mr. Pagtakhan claimed to be in a dispute with the CRA concerning an alleged GST overpayment and had discontinued the use of his general account (itself a contravention of Law Society accounting Rules) in order to stop the CRA’s garnishment proceedings.

Citation 8: Misleading the Law Society – Failure to Honor Compliance Undertakings

26. After unsatisfactory Rule 130 audits, but before the citations heard by the Hearing Committee concerning accounting infractions between 2002 and 2005. Mr. Pagtakhan had signed a Compliance Confirmation dated February 15, 2000 containing an undertaking to the Law Society:
 - “3. I undertake to maintain my books and records in compliance with the Rules in the future”.
27. As per the 9 citations which he was found guilty of, he did not comply with the Rules.

STANDARD OF REVIEW

Not a Hearing *De Novo*

28. Mr. Pagtakhan did briefly mention Standard of Review in his factum, but taken as a whole, the written materials in his factum and his submissions at appeal, were a restatement of the facts and arguments heard by the Hearing Committee and an invitation to the Appeal Committee to substitute their decision and discretion for that of the Hearing Committee who heard the evidence in the first instance.
29. The Appeal Committee does not regard this Appeal as a Hearing *de Novo*.

Reasonableness or Correctness

30. The Member Conduct Appeals Guideline approved by the Benchers provides for a deferential standard of review from findings of fact by a Hearing Committee. It provides that the standard of review on “issues of law (including what amounts to conduct deserving of sanction)” is correctness. On all other issues, the Policy Guideline presents quotes from various case law inferring that the standard is deferential (reasonableness, or palpable and overriding error).
31. The sections of the *Legal Profession Act* governing this Appeal (sections 75 to 77) refer to this Hearing throughout as an “appeal” which, excepting applications for leave to receive fresh evidence, is conducted upon consideration of the Hearing Report and the Hearing Record of the Hearing Committee. This in itself, suggests a standard deferential to the Hearing Committee which heard the evidence and the submissions in the first instance.
32. The standard of review concerning judicial review of administrative decisions is evolving. This specific appeal involves the standard of review in the “appeal” from one administrative tribunal (the Hearing Committee) to another administrative tribunal (the Appeal Committee).
33. Counsel for the LSA set out in her Factum, recent Appellate level decisions regarding the standard of review in internal disciplinary regimes including:
 - Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399
 - Moll v. College of Alberta Psychologists*, 2011 ABCA 110
 - Sussman v. College of Alberta Psychologists*, 2010 ABCA
34. In summary, the analysis for this appeal would be that:
 - a. The standard of review on legal issues is “correctness”.
 - b. The standard of review on issues of fact (where the Hearing Committee heard the evidence in the first instance), or mixed facts and law (ordinarily this would include sanction) would be deferential, or reasonableness.
35. Analyzed by the factors set out in *Newton*:
 - a. The enabling legislation (Legal Profession Act) establishes a Hearing Committee to hear evidence in the first instance and an Appeal Committee to hear an “appeal” based on the record of the Hearing in the first instance.
 - b. The Hearing Committee as the Tribunal of first instance hears evidence and cross examination and is in an advantageous position regarding the evidence as opposed to the Appellate Tribunal reviewing the record.

- c. The need to limit number, length, and cost of appeals.
- d. The need to preserve the economy and integrity of the proceedings of the Tribunal of first instance.

suggests that current analysis of standard review on sanction ought to be reasonableness.

- 36. Although an analysis pursuant to the *Newton* factors and a more standard analysis of sanction decisions as mixed fact and law recommend the deferential standard review of reasonableness with respect to sanction findings, the Member Conduct Appeal Guidelines suggest that the standard of review on issues of law (including what amounts to conduct deserving of sanction) is correctness.
- 37. The Appeal Committee in this case finds that the standard of review concerning the mixed fact and law decisions with regards both the conviction of the appealed citations and sanction is the deferential standard of “reasonableness”, but that in any event the Hearing Committee decision was both reasonable and correct.
- 38. The Alberta Court of Appeal has defined “reasonableness” on more than one occasion, accepting and paraphrasing the “Dunsmuir test” (*Dunsmuir v. New Brunswick, 2008 SCC 9*)

A "reasonable" decision must be justifiable, transparent and intelligible, and must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law... Where a decision is reviewed for reasonableness, the court will not conduct its own analysis of the question and substitute its view for that of the Council.

- 39. Taken as a whole, the decisions of the Hearing Committee were comprehensive, clear and well supported by the evidence. Conviction and the sanction were justifiable on the evidence and well within the range of possible outcomes and there is no basis for appellate interference.
- 40. The decisions are so well founded in the admitted facts that the Appeal Committee would uphold them even on a standard of correctness.

DISCUSSION

- 41. Mr. Pagtakhan lists issues in his factum:
 - 1) “...does the Case at bar raise new questions of Law or about a rule of law that must be stated or revised for the general benefit of society especially dealing with the Citations against a member?”
 - 2) “...should the ensuing Disbarment Order be set aside by the Benchers on a proper application of the appropriate standard of review being “Correctness”.
 - 3) “...is the Members disbarment an unreasonable sanction...”

42. Mr. Pagtakhan's argument, as noted above, at appeal, was a re-argument of his position at the Hearing.
43. The factual matrix giving rise to the citations was agreed to by all of the parties throughout (including at the Hearing Committee and this appeal). The thrust of Mr. Pagtakhan's arguments concerning conviction seems to be that his failure to follow the Rules was justified situationally.

Depositing Trust Funds

44. Regarding P.C. and the depositing of trust funds by washing them through his wife's account, Mr. Pagtakhan's excuses this by stating that he was doing so on the instructions of P.C. and that the purchase of the property closed as contracted.
45. The defense of "no harm no foul" does not apply to the accounting Rules of the Law Society of Alberta. The Rules are just that, "Rules" not "Suggestions". Running an accurate set of books is a necessary element to any trust accounting scheme and to the protection of the public.
46. Further, the blind following of client's instructions without regard to the propriety of them jeopardizes the reputation and standing of the legal profession and potentially even the independence of the legal profession from governmental and financial review.

Citation 5 (Form S Declarations) and 8 (Compliance Undertakings)

47. Mr. Pagtakhan argues that:
 - a. That the Law Society should have audited him before 2005 and caught him sooner; and
 - b. That he was acting under a claim or color of right that his "informal ledgers" would suffice despite the fact that the Law Society had specific Rules concerning maintaining a general account (which he did not) reconciling in trust accounts (which he did not) and certifying to the Law Society that he complied with the Rules (which he misrepresented).
48. Again, there is no dispute as to the underlying facts that Mr. Pagtakhan, before the bulk of these matters developed in 2005, had given an undertaking to the Law Society to operate his accounts in compliance with the Rules.
49. This undertaking was given in response to frequent, and serious, but lesser infractions shown in the Rule 130 audits. By 2005, Mr. Pagtakhan's compliance with the Rules had in fact deteriorated to a systemic noncompliance with the Rules of which he was aware throughout. One of the noncompliance items (not maintaining a general account), which was not appealed, was done in furtherance of a dispute with the CRA for purposes of not allowing the CRA to collect on an assessment through the Garnishee process.

Citation 7 (GST returns and remittances)

50. Concerning GST returns and remittances, Mr. Pagtakhan argues that his dispute with the CRA going back to 1996 justified him closing out his general account (in order that the CRA could no longer garnishee his account for amounts owing), refusing to file GST returns, and refusing to remit collected GST funds as an act of permissible “civil disobedience”.
51. Mr. Pagtakhan is under a professional obligation to uphold the Rule of Law. He is free to dispute his obligations to the CRA and the law which is his obligation to uphold provides him with open, transparent, and quite legal remedies in this regard. Disregarding his legal obligations to the CRA and the underlying trust obligations with regards collected GST amounts in such a fashion is not justifiable.

Conduct worthy of sanction

52. The Appeal Committee upholds the decision of the Hearing Committee in regards to the conviction of the Member on the citations under Appeal as both reasonable and correct.

SANCTION

53. In consideration of Mr. Pagtakhan’s previous discipline record, the serious and ongoing accounting delinquencies and in consideration of his untruthfulness with the Law Society, Mr. Pagtakhan was disbarred in the first instance by the Hearing Committee.
54. Mr. Pagtakhan’s Appeal of the disbarment sanction concentrated on two main issues:
 - a. The Hearing Committee noted in sanction (see page 140, lines 2 to 5 of the transcript in the Hearing Report) that:

“We are simply not in a position where we could cobble together conditions which would sufficiently protect the public.”

Mr. Pagtakhan apparently took this to be an invitation for the Appeals Committee to apply its own hand at “cobbling together” appropriate conditions.
 - b. That no clients had been harmed and that no trust money was misappropriated.
55. Regarding the invitation to “cobble together” conditions, this does tie into a consideration of the standard of review. Perhaps if sanction is subject to a standard of correctness, then if the Appeal Committee could come up with its own list of accounting conditions or oversight, the original decision of the Hearing Committee would not be “correct”.
56. A review of the Hearing Committee’s complete sanction decision as set out in the Hearing Record and then later developed in the Hearing Report shows that the Hearing Committee made a complete examination of the seriousness of the citations and

Mr. Pagtakhan's governability and imposed the sanction of disbarment after a complete examination of those factors.

57. The inability, or more appropriately, the unwillingness of the Hearing Committee, to come up with appropriate conditions was clearly only one of many factors considered by the Hearing Committee. The Appeal Committee notes that the "cobble together" comment was one comment in the transcript of the Hearing, certainly not the whole of the Hearing Committee's decision and that the comment is not found in the written Hearing Report. The Appeal Committee finds that the Hearing Committee's decision for disbarment was correct.
58. In supporting the Hearing Committee's decision as correct, the Appeal Committee notes the impracticality of finding a special set of conditions or restrictions suitable for the protection of the public designed for a member whose relationship with the accounting Rules demonstrably evolved from an inability to comply, to willful non compliance, to dissembling about his non compliance, to then justifying non compliance as a permissible "act of civil disobedience".
59. Regarding the argument that Mr. Pagtakhan's situation was not the worst of situations (in that money was not misappropriated, or clients did not lose money) and therefore that the strongest of sanctions (disbarment) was not called for, the Appeal Committee disagrees entirely:
 - a. Evidence at the Hearing (paragraph 19 of the Hearing Report) indicated that Mr. Pagtakhan had not been properly closing his trust accounts, that 192 unclosed accounts, going back to 2001 and prior years existed with a balance totaling almost \$76,000.00. This was undoubtedly made up of perhaps "small" amounts of money which ought to have been refunded to clients. The fact that the amounts were small or that clients did not know to ask for them back does not change the fact that the member was using unaccounted for trust funds partially owing to clients as a "pad" to keep his trust accounts solvent.
 - b. The member acknowledged to the Law Society (paragraph 16 of the Hearing Report) that he had collected GST from clients but did not remit collected amounts to the CRA because of the alleged GST overpayment. These collected funds are trust monies but even if they weren't, the member cannot pretend to collect GST remittances from clients for the purposes of off-setting his own claimed but unproven GST overpayment. If he did overpay GST (and neither the Hearing Committee nor the Appeal Committee is in a position to make this determination) then it is properly reclaimable as a refund or other adjustment from the CRA upon proper proof, not collected bit by bit from his clients without their (or CRA) knowledge.
60. However, the Appeal Committee will not substitute its discretion for the Hearing Committee as it finds that the Hearing Committee took into account all of the relevant factual and other considerations in imposing a sanction of disbarment and that their decision was both reasonable and correct.

Conclusion and Consequential Matters

COSTS

61. Counsel for the Law Society has submitted a proposed Bill of Costs at the conclusion of the Appeal. The Appeal Committee ordered that the member pay actual costs which were confirmed subsequent to the date of the hearing of the appeal in the amount of \$4,730.00 which, costs are to be paid by Mr. Pagtakhan at the time of any application for readmission.

Reference to the Attorney General

62. No reference to the Attorney General is necessary.

Publication to the Membership

63. Mr. Pagtakhan requested that publication of the upholding of the disbarment be stayed pending his decision to appeal this decision further to the Court of Appeal pursuant to sections 80 to 82 of the *Legal Profession Act*. The Appeal Committee considered the balance between public interest in knowing about the within appeal and fairness to Mr. Pagtakhan and finds that any decision to stay publication properly rests within the jurisdiction of any further appellate tribunal.
64. The Hearing Committee orders that Notice of the Disbarment shall be published to the membership of the Law Society on or about April 5, 2013 unless Mr. Pagtakhan sooner obtains from a court of competent jurisdiction, an Order specifically staying the publication.

Fred R. Fenwick, Q.C.

Derek Van Tassell

Dennis Edney, Q.C.

Anthony G. Young Q.C.

Brett Code, Q.C.

Nancy Dilts, Q.C.

Robert Harvie, Q.C.

Kathleen Ryan, Q.C.

Dated this 19 day of March, 2013.