

THE LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *Legal Profession Act*

AND

IN THE MATTER OF JOHN A. SUTHERLAND
A MEMBER OF THE LAW SOCIETY OF ALBERTA

JURISDICTION AND PRELIMINARY MATTERS

1. A Hearing Committee of the Law Society of Alberta (“the LSA”) comprised of Ronald J. (Ron) Everard, Q.C. (Chair), Dr. Miriam Carey, and J. Royal (Roy) Nickerson, Q.C. (“the Hearing Committee”), convened at the offices of the LSA on March 21, 2011, and then on April 8, 2011, to inquire into the conduct of John A. Sutherland, a Member of the LSA (“the Member”).
2. The LSA was represented by Mr. Garner Groome. The Member did not appear on either date and did not respond to any of the LSA’s communications to him.
3. No objection was made to the composition of the Hearing Committee, and jurisdiction was established through Exhibits 1, 2, 3, 4 and 5, consisting of the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status, and Notice of Private Hearing.
4. The matter proceeded as a Public Hearing.

CITATIONS

5. The Member faced the following six Citations (Exhibit 2):

Citation 1 - IT IS ALLEGED THAT you improperly exercised a solicitor’s lien against proceeds of sale owed to S.R. and failed to implement S.R.’s proper instructions to release funds, and that such conduct is conduct deserving of sanction;

Citation 2 - IT IS ALLEGED THAT you continued to act as solicitor for S.R. when there was a conflict of interest between you and S.R. and when it was not in S.R.’s best interest that you so act, and that such conduct is conduct deserving of sanction;

Citation 3 - IT IS ALLEGED THAT you unfairly used your position and improperly communicated with S.R. and T.O in connection with a matter when you knew or ought to have known S.R. and T.O. were represented by other lawyers, and that such conduct is conduct deserving of sanction;

Citation 4 - IT IS ALLEGED THAT you failed to conscientiously serve S.R. by failing to protect, account for, and release proceeds of sale owed to S.R., and that such conduct is conduct deserving of sanction;

Citation 5 - IT IS ALLEGED THAT you wrongfully converted trust funds held by you to the credit of S.R., and that such conduct is conduct deserving of sanction;

Citation 6 - IT IS ALLEGED THAT you failed to respond in a complete and appropriate manner to communications from the Law Society that contemplated a reply in the matter of a complaint by S.R., and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

6. The Hearing Committee found the Member Guilty on Citations 1, 2, 4, 5, and 6.
7. Citation 3 was dismissed.
8. The Member was disbarred and costs of the Hearing were set in the sum of \$5,500.00.

EVIDENCE AT HEARING

9. The following witnesses were called and testified for the LSA:
 - S.R. (“the Complainant”);
 - Ms. Denise Whiteley (the Complainant’s lawyer);
 - Mr. Anthony Di Lello (the lawyer for T.O.);
 - Mr. Stephen MacNeil (the Custodian of the Member’s practice).
10. Additionally, two Exhibit Books consisting of a total of 42 individual Exhibits were tendered as evidence in the Hearing.
11. S.R. testified that in 2005 she was introduced by her friend, T.O, to the Member.
12. Although she had full time employment with a large energy company, S.R. had decided that she wanted to invest in real estate. She interviewed four lawyers and determined that she would have the Member act as her Solicitor for real estate purchases and sales.
13. In the summer of 2006, S.R. purchased property from C.C., who was a former co-worker of her’s, and she was assisted in the preparation of the Offer to Purchase by T.O. who, although experienced in real estate matters from his days as a realtor, had run afoul of the Real Estate Board, and was unauthorized to work as a licensed realtor.
14. S.R. originally purchased the property for her sister, M, who ultimately elected not to live in the property, and so S.R., with the help of friends, including T.O, readied the property for a resale.

S.R. was successful in locating a purchaser, and realized a profit of almost \$98,000.00 on the sale of the property.

15. On July 10, 2006, with the assistance of T.O., S.R. accepted an Offer to Purchase and sold the property to MAJ for \$289,900.00 (Exhibit 29, Tab 1.2).
16. Problems arose almost immediately. T.O., who was also a client of the Member's, took the position that he was a partner in a business arrangement with S.R. which entitled him to a portion of the profits. Utilizing the Member's business address, T.O. filed a Caveat at the Land Titles' Office claiming a 50% interest in the net sale proceeds of the property (Exhibit 29, Tab 2.24).
17. Shortly after T.O. filed the Caveat, the Member was informed by the Purchaser's Solicitor that a Caveat had been filed and demanding its withdrawal.
18. The Member obtained a copy of the Caveat from the Land Titles' Office, and wrote to T.O., warning him that he was not authorized to utilize the Member's office address for the purposes of filing a Caveat and demanding that the address for Land Titles purposes be changed immediately (Exhibit 29, Tab 2.25).
19. The Member then contacted S.R. and advised her that she should retain alternate counsel to discharge T.O.'s Caveat. The Member said that since T.O. was a former client of his, he could not act on S.R.'s behalf and, as well, S.R.'s new counsel might wish to call the Member as a witness on her behalf. The Member wrote to S.R. as follows:

“Although I had ceased acting for Mr. O. months prior to being retained by you, I suggest that you retain another lawyer immediately to remove this caveat. This is because of the fact that I feel that I may be in a situation that having acted for Mr. O. in the past prior to acting for you, it may be better that you get somebody completely independent who has had no previous dealings with the gentleman as he obviously feels that he is able to take liberties with this office. Further this would be advisable because I may have to be called as witness by your new counsel to say first of all that at no time during the purchase by you of this property during which time Mr. O. attended at our office with you on several occasions, did he or you or anyone indicate that there was a partnership between you and him with respect to the purchase and sale of the property. Further that when you advised my office that you had sold it, at no point did you or he advise me that there was any partnership nor that he was entitled to a share of the profits until we had received a copy of the signed purchase contact (*contract*). All this may be useful information which will be a benefit to you in your action to get this Caveat removed”. (Exhibit 25, Tab 8).

20. S.R. retained one lawyer, and then changed counsel to Ms. Denise Whiteley (“Ms. Whiteley”) for the purposes of assisting her in discharging the Caveat. T.O. retained Mr. Anthony Di Lello (“Mr. Di Lello”) to protect his interests under the Caveat.
21. Ms. Whiteley, acting on behalf of S.R., and Mr. Di Lello, acting on behalf of T.O., agreed to the terms of a Consent Order which would have the effect of removing T.O.'s Caveat from the Title and replacing it with \$50,000.00 to be paid into Court (Exhibit 11, Tab 1).

22. When Ms. Whiteley presented the Consent Order to the Member, he refused to proceed in accord with its terms and maintained that he required the Caveat to be discharged before any funds would be released (Exhibit 29, Tab 2.43).
23. As a consequence, Ms. Whiteley and Mr. Di Lello obtained a Consent Variation Order from another Judge, which provided that the Caveat would be discharged forthwith, and upon providing evidence of the discharge, that S.R. would pay \$50,000.00 into Court to stand in place of the Caveat (Exhibit 35).
24. Both Mr. Di Lello and Ms. Whiteley were of the view that T.O. stood “little” (Mr. Di Lello’s evidence) to “no” (Ms. Whiteley’s evidence) likelihood of succeeding in his claim on the Caveat, but with a view to resolving matters in the most economic way possible, S.R. agreed to a \$9,000.00 “nuisance settlement” with T.O. As part of the settlement, T.O. provided a Release and a Discontinuance of Action (Exhibit 27, Tab 20).
25. Despite repeated requests by Ms. Whiteley that he forward the net sale proceeds to her so that she could pay the money into Court, the Member steadfastly refused to do so.
26. In fact, unknown to Ms. Whiteley, the Member had written directly to S.R. as early as August 23, 2006, enclosing his account which he had paid with funds transferred from trust and indicating that \$134,000.00 was still being held in trust on her behalf (Exhibit 29, Tab 2.30).
27. The Member wrote again to S.R. on September 21, 2006, enclosing \$85,000.00 and indicating that the balance of funds could be paid into Court once the Caveat had been discharged from title to the property (Exhibit 29, Tab 2.35).
28. Throughout this matter, the Member dealt directly with both S.R. and T.O., even suggesting that they meet with him in the absence of their lawyers to resolve their dispute. In fact, Ms. Whiteley testified that she encouraged her client to deal directly with the Member with the aim of developing further information as to the extent of T.O.’s indebtedness to the Member. Mr. Di Lello testified that he was “surprised,” but he did not appear to be offended, by the fact that the Member had dealt directly with his client, T.O.
29. When the Member persisted in his refusal to release the balance of the sale proceeds to her, S.R. reported the Member to the LSA on June 10, 2008 (Exhibit 7).
30. The LSA wrote to the Member regarding S.R.’s complaint, but in the meantime, the dispute between S.R. and T.O. had been resolved (Exhibit 27, Tab 20).
31. At this point, the Member who was owed money by T.O. for outstanding legal fees, took the position that he was entitled to assert a Solicitor’s Lien for unpaid fees against the balance of S.R.’s money in trust.

32. On September 2, 2008, after settlement documentation was provided to the Member, he issued a Statement of Claim naming both S.R. and T.O. as Defendants and alleging that they had conspired together to avoid paying him the fees owed by T.O. from the sale proceeds (Exhibit 14, Tab 1).
33. In response, S.R. filed a Statement of Defence and Counterclaim against the Member (Exhibit 34, Tab 14).
34. On June 29, 2009, as a result of S.R.'s complaint, the LSA began to demand complete copies of her client files from the Member (Exhibit 19).
35. On July 28, 2009, after repeated requests, the Member finally sent some of S.R.'s files to the LSA and thereafter partial accounting records (Exhibit 25).
36. As a result of various irregularities in the Member's accounting records, the Member was suspended by the Benchers of the LSA on August 7, 2009 pursuant to Section 63 of the *Legal Profession Act*.
37. On August 10, 2009, Mr. Stephen MacNeil was appointed Custodian of the Member's practice (Exhibit 36).
38. The LSA wrote to Mr. MacNeil inquiring as to the status of any funds which might be held in trust by the Member for S.R., and after examining the Member's trust records, Mr. MacNeil advised the LSA that he was unable to locate any funds which were being held in trust for S.R. (Exhibit 32).
39. In fact, the ledger cards which the Member maintained for S.R. disclosed that the Member had transferred \$5,560.72 of S.R.'s money to pay a portion of T.O.'s outstanding accounts (Exhibit 30, Tab 1).
40. Mr. MacNeil testified that he was unable to locate any other funds which were being held to the credit of S.R.

FINDINGS ON CITATIONS:

CITATION 1

41. The Hearing Committee was of the view that the Member was not entitled to assert a Solicitor's Lien against the proceeds of sale owed to S.R.
42. As part of its deliberations, the Hearing Committee noted that the Member had even gone so far as to confirm to S.R. that she was his client and that he was of the opinion that the sale proceeds were S.R.'s property (Exhibit 25, Tab 8).

43. Moreover, even if it could be said that the Member was entitled to assert a Solicitor's Lien to proceeds from the sale of the property, his right to a Lien ought to have been asserted against the funds paid into Court rather than against the funds in the Member's trust account (S.R. herself was aware of this distinction and suggested it to the Member as a possible recourse).

44. The Hearing Committee finds the Member Guilty of Citation 1.

CITATION 2

45. It is clear from the evidence that the Member was aware of the conflict between him and S.R. and, in fact, the Member himself advised S.R. to seek alternate legal advice to deal with the Caveat filed by T.O. (Exhibit 25, Tab 8).

46. Having given express advice to S.R. that she should seek alternate counsel to assist her, the Member then took steps to enforce his Solicitor's Lien against S.R. in a manner that was contrary to her best interests and which placed the Member's position in conflict with that of his client.

47. The Hearing Committee finds the Member Guilty of Citation 2.

CITATION 3

48. The Member was aware that both S.R. and T.O. were separately represented by other lawyers and accordingly, it was inappropriate for the Member to deal directly with S.R. and T.O.

49. That having been said, Ms. Whiteley testified that she was "agreeable" to the Member dealing directly with S.R. and, in fact, she encouraged S.R. to continue dealing with the Member to develop further information as to the extent of T.O.'s indebtedness to the Member.

50. Although Mr. Di Lello was "surprised" to learn that the Member was attempting to deal directly with T.O., he took no offence to the Member doing so.

51. In summary, it appears that counsel for both S.R. and T.O. either approved, or at least did not object, to the Member dealing directly with their clients.

52. The Hearing Committee finds the Member Not Guilty of Citation 3.

CITATION 4

53. Several requests were made by S.R. and her counsel to the Member to forward funds to Ms. Whiteley, but he refused to do so.

54. The Hearing Committee finds that the Member failed to forward the trust funds to his client when he was required to do so and that he was in breach of his obligations in that regard.

55. The Hearing Committee finds the Member Guilty of Citation 4.

CITATION 5

56. The ledger cards indicate that the Member applied a portion of trust funds to the accounts of T.O. and that he had not been diligent in handling S.R.'s money.
57. Accordingly, the Hearing Committee finds the Member Guilty of Citation 5.

CITATION 6

58. In refusing to provide documents when required to do so, the Hearing Committee finds that the Member failed in his duty to his client.
59. The Hearing Committee finds the Member Guilty of Citation 6.

SANCTION

60. In many cases where a Member unlawfully converts a client's money, disbarment will be the sanction.
61. However, in cases where the amount of money taken is modest (as here), disbarment is not the automatic sanction, but what becomes important is how the Member deals with the Regulator after the LSA learns of the conversion of trust money.
62. In cases where a Member is contrite, co-operative, makes restitution, and embarks upon a course of remedial action, the Member will have gone a significant distance towards avoiding the imposition of the ultimate sanction of disbarment: *Law Society of Alberta v. Matwe*, [2007] L.S.D.D. No. 39 (H.C.); *Law Society of Alberta v. McGeachie*, [2007] L.S.D.D. No. 139 (H.C.).
63. Regrettably, that is not the course of action chosen by the Member here.
64. In this case, the Member refused to attend for any of the Pre-Hearing Conferences, has been evasive and uncooperative with the LSA, attempted to obscure his identity to the Process Server for the LSA, and even went as far to return to the LSA communications received from it. Where the Member demonstrates that he is ungovernable, often disbarment will be the result: *Law Society of Alberta v. Britton*, [2008] L.S.D.D. No. 146 (H.C.).
65. By his actions, the Member has demonstrated that he has no intention of submitting to his regulating body and has demonstrated that he is ungovernable. In fact, his conduct demonstrates that he is disdainful and contemptuous of his governing body. For that reason, it is the unanimous decision of the Hearing Committee that the Member be disbarred.

ANCILLARY ORDERS

66. Exhibits shall be open to inspection by the public subject to the proviso that any client and third party names and identifiers shall be redacted.

- 67. With respect to the evidence of Mr. Di Lello, any reference to Solicitor-client identifiers shall be redacted from the transcript of his evidence.
- 68. The costs of the Hearing are set at \$5,500.00 and are payable on or before October 31, 2011.
- 69. A Notice to the Profession in a form suitable to the LSA shall be published.

REFERRAL TO THE ATTORNEY GENERAL

- 70. Two Members of the Hearing Committee (Everard/Carey) are of the view that there are reasonable and probable grounds to believe that the Member has committed a criminal offence and in accord with Section 78 of the *Legal Profession Act*, a referral shall be made to the Attorney General of Alberta.
- 71. One Member of the Hearing Committee (Nickerson) is of the view that notwithstanding the fact that he did not give evidence, the Member may be entitled to advance a defence of “colour of right,” and that therefore there are not reasonable and probable grounds to believe that a criminal offence has been committed and to make a referral to the Attorney General of Alberta in accord with Section 78 of the *Legal Profession Act*.

RONALD (RON) J. EVERARD, Q.C.,
Chair and Bencher

DR. MIRIAM CAREY,
Public Representative and Lay Bencher

J. ROYAL NICKERSON, Q.C.
Bencher

Dated at Calgary, Alberta this 31st day of May, 2011.