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 D. BRUCE MACKIE, a Member of the Law Society of Alberta

INTRODUCTION

1. On April 6, 2010, a Hearing Committee of the Benchers convened at the Law Society office in Calgary to inquire into the conduct of D. Bruce Mackie (the "Lawyer"). The Committee was Kevin Feth, QC, Chair, Ron Everard, QC, and Miriam Carey, PhD. The Law Society of Alberta (the "LSA") was represented by Garner Groome. The Lawyer appeared on his own behalf.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1, 2, 3 and 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and Private Hearing Application Notice, and the Certificate of Status of the Lawyer, established the jurisdiction of the Committee.

3. The Parties had no objections to the composition of the Hearing Committee.

4. The LSA did not receive a request for a private hearing. Neither the LSA nor the Lawyer requested a private hearing; consequently, the Hearing was held in public.

CITATIONS

5. The Lawyer faced the following citations:

   a. IT IS ALLEGED that you failed to comply with the Law Society accounting rules, and that such conduct is conduct deserving of sanction.

   b. IT IS ALLEGED that you failed to cooperate with the Law Society audit staff, and that such conduct is conduct deserving of sanction.

6. Counsel for the LSA confirmed that the citations did not include an allegation that the Lawyer breached a written undertaking given to the LSA's audit department.

SUMMARY OF RESULT

7. At the Hearing, the Lawyer verbally entered a Statement of Admission of Guilt on the two citations, which was accepted by the Hearing Committee.

8. The Hearing Committee imposed the following sanction and directions:

    a. a reprimand;
    b. a direction that the Lawyer pay the actual costs of the Hearing;
    c. a direction that the Lawyer be given time to pay the actual costs of the Hearing, not to exceed two years from the date of service of the Statement of the Actual Hearing Costs on the Lawyer;
    d. a direction that, if the Lawyer ever seeks reinstatement to the Active List, he be directed to Practice Review as a condition of reinstatement.

EVIDENCE

9. A Binder containing Agreed Exhibits numbered 1 – 11 was entered by consent of the Parties at the start of the Hearing.

10. The discipline record of the Lawyer with the LSA was entered as Exhibit 12 by consent, and showed that the Lawyer had no prior disciplinary record.

11. Counsel for the LSA tendered a statement of estimated hearing costs, which was entered as Exhibit 13 by consent.

SUMMARY OF FACTS

12. The Lawyer admitted to the facts and breaches of the *Rules of the Law Society of Alberta* identified in Exhibit 6, a summary of which follows in paragraphs 13 and 14 of this Report.

13. A Rule 130 follow up audit of the Lawyer commenced on March 20, 2008 with the fieldwork concluded on May 30, 2008. Numerous exceptions were identified during the audit:

    a. Books and records for the Lawyer's general bank account were not current, contrary to subrule 122(3)(a), which requires that the records be entered and posted currently at all times.

b. The Lawyer was repeatedly late in providing his Form S to the LSA. Subrule 126(1) requires Form S to be furnished to the Executive Director within 45 days after the designated filing date of the law firm. The 2003 Form S was received by the LSA 635 days late. The 2004 Form S was received by the LSA 269 days late. The 2005 Form S was received by the LSA 412 days late. The 2006 Form S was received by the LSA 522 days late. The 2007 Form S was received by the LSA 157 days late.

c. The LSA had not received the Lawyer's Form T for the years ending August 31, 2003 through August 31, 2007 inclusive, contrary to subrule 126(2), which requires a law firm within 90 days after the designated filing date to have the law firm's prescribed financial records reviewed by an accounting firm and to cause an Accountant's Report in Form T (5-2) to be filed with the Executive Director. Each Form T was due on November 29 of the applicable year.

d. The Lawyer's trust receipt journal did not consistently indicate the method of receipt (cash, cheque, etc.), contrary to subrule 122(2)(a). Further, the receipts were listed as credits in the journal, which was incorrect; the receipts are debits to the bank.

e. The Lawyer's trust disbursement journal was not properly maintained. The payee on cheques written to pay a statement of account was sometimes recorded as "acct. payment" rather than "Bruce Mackie". This was a violation of subrule 122(2)(b), which requires a book of original entry to identify the name of the payee. Further, the disbursements were listed as debits in the journal, which was incorrect; these were credits to the bank.

f. The Lawyer's trust ledger cards were not properly maintained. The source of funds and payees on cheques were not accurately recorded on the ledger cards. The source was simply indicated to be "retainer" or "client". The reason for a cheque issuing was referenced, rather than the payee of the cheque. This was a violation of subrule 122(2)(c), which requires the records to indicate the source of the money or the person to whom the payment was made.

g. The Lawyer's trust reconciliations were not properly completed. In the months with no activity, the reconciliation was not dated. This was a violation of subrule 122(2)(j), which requires the records to consist of a comparison, dated and signed by the member, to be prepared within 30 days of month end.

h. The Lawyer's bank source documents were not maintained. There was no monthly trust balance statement in months with no activity. This was a violation of subrule 122(2)(i).

i. The Lawyer's trust account was not designated trust at an approved depository. The audit noted that the trust bank statement did not identify the account as a trust account. The deficiency was a violation of subrule 121(2), which requires every trust account to be maintained with an approved depository in the name of the law firm or lawyer and designated as a trust account. The Lawyer was unaware of that deficiency.

j. The Lawyer's GST filings were not current. The Lawyer acknowledged that to be the case when completing a member questionnaire for the audit.

14. In addition to the deficiencies in the Lawyer's accounting practices, he also failed to make timely responses to certain inquiries from the audit department of the LSA and refused to give the LSA authorization to contact the Canada Revenue Agency about the status of his GST remittances.

15. At the Hearing and in the Exhibits, the Lawyer provided background to these exceptions and failures.

16. For some years, the Lawyer had been involved in an office sharing arrangement with other lawyers, during which he had no difficulty with his LSA filings and compliance with the accounting rules. That association broke up, following which the Lawyer practiced from his home. His bank statements were not properly forwarded to his home address, and he fell behind in his reconciliations and filings due to the lack of bank statements.

17. The Lawyer's practice was small and generated only a modest income.

18. During an LSA audit conducted from January through April 2006, accounting deficiencies in the Lawyer's practice were identified, including trust reconciliations that were two years in arrears, late filings and remittances of GST, and a failure to file Form T for 2003, 2004, and 2005. The Lawyer undertook to the LSA not to use his existing trust bank account until his accounting records were brought up to date, but was advised by the LSA to open a new trust bank account in the interim, which he did.

19. The Lawyer's conduct was referred to the Conduct Committee, which directed the Lawyer to participate in a Mandatory Conduct Advisory with a Bencher. In October 2007, after meeting with the Lawyer, the Bencher reported that the Lawyer was genuinely apologetic and that the Lawyer had ceased to practice on his own, effective February 2007. The Lawyer had joined another law firm in a profit sharing arrangement. In that firm, he had no responsibility for or signing authority on the firm's trust accounts, thereby removing himself from any risk of deficient accounting practices. The Lawyer still had the two trust accounts from his prior sole practice, but each of those accounts had a very small amount of

20. In February 2008, relying on the Mandatory Conduct Advisory report, and the Lawyer's new circumstances in which the Lawyer was practicing under the auspices of a firm in which he had no responsibility for the firm's trust and general accounting, the Conduct Committee decided to close the conduct file.

21. The Rule 130 follow up audit of the Lawyer's former sole practice was conducted from March 20, 2008 to May 30, 2008. By then, the Lawyer had closed the original trust account, and had just $20 in the second trust account, which the Lawyer had deposited to open the account.

22. During the follow up audit, the Lawyer was asked by the LSA audit department to file Form T for the years ending August 31, 2003 through 2007. The Lawyer responded that he was unable to do so due to financial limitations.

23. As part of the follow up audit, the Lawyer was also asked to provide general bank statements, negotiated cheques, and the general bank journal (all non-trust) from August 1, 2007 to July 30, 2008, which he failed to do.

24. The LSA audit department also asked the Lawyer to provide a Compliance Confirmation attesting to his books and records being in compliance with the Rules, that all correctable exceptions had been resolved, and that he would undertake to maintain his books and records in compliance with the Rules in the future. He failed to complete and return that Compliance Confirmation.

25. The Lawyer's view appeared to be that delivery of the general bank records and Compliance Confirmation were unnecessary, as he was no longer in independent practice and not responsible for his current firm's accounting. In a sense, the LSA's follow up audit was addressing a former business operation that was all but inactive.

26. The LSA also asked the Lawyer to provide an authorization permitting the LSA to contact the Canada Revenue Agency for information about the Lawyer's GST remittances in relation to his former sole practice. The Lawyer had previously been in arrears and the LSA was concerned about the Lawyer's trust obligations to the Canada Revenue Agency. The Lawyer declined to provide that authorization, asserting that the material was "between myself and CRA and is privileged". He informed the LSA that it was not entitled to that material.

27. As of this Hearing, the Lawyer has withdrawn from the practice of law, and has placed himself on the Inactive List. He stated that he was unemployed, intended to look for work in a new vocation, and did not anticipate returning to the practice of law. His savings have essentially been exhausted.

FINDINGS RELATED TO THE ADMISSION OF GUILT

28. In accordance with Section 60 of the *Legal Profession Act*, the Lawyer verbally tendered to the Hearing Committee a Statement of Admission of Guilt to the two citations, and invited the Hearing Committee to accept that admission of guilt.

29. The Law Society governs the profession in the public interest. To protect the public, lawyers are expected to be conscientious and diligent in protecting their clients' interests, including the safekeeping of money entrusted to the lawyer.

30. The security of trust funds is a paramount concern for the Law Society. To ensure that the public is properly served, the Law Society has adopted a rigorous system of accounting and banking rules governing the creation and maintenance of a lawyer's bookkeeping and trust accounts.

31. These accounting, banking and reporting obligations are not mere technicalities. Rather, they are part of regulatory regime designed to protect the public who entrust funds to lawyers.

32. Further, the Law Society's regulatory regime is also directed at ensuring that lawyers maintain sound accounting and business practices generally, as these practices affect the public's perception of the competence and trustworthiness of the legal profession, and the confidence that should be extended to the profession.

33. These broader reputational objects are enshrined within the *Code of Professional Conduct*. Chapter 8 articulates the following statement of principle: "Except where a higher standard is imposed by the Code, a lawyer in conducting the business aspects of the practice of law must adhere to the highest business standards of the community". Rule 3 adds: "A lawyer having personal responsibility for a financial commitment incurred in the business aspects of practice must ensure that such commitment is fulfilled unless there is reasonable justification for the lawyer's failure to do so".

34. Chapter 3 contains the following statement of principle: "A lawyer has a duty to uphold the standards and reputation of the profession and to assist in the advancement of its goals, organizations and institutions". Rule 1 specifically provides: "A lawyer must refrain from personal or professional conduct that brings discredit to the profession."

35. The audit process of the LSA, and the Rules concerning accounting, banking and reporting functions are directed at protecting the reputation of the legal profession, which is dependent on sound financial practices to maintain public confidence.

36. In the present case, the Lawyer failed to comply with reasonable requests from the LSA audit department. While the Lawyer apparently felt that he had removed himself from the accounting aspects of practice in such a way that he was no longer a risk to the public or the profession's reputation, he failed to appreciate that his lack of cooperation made the regulatory task of the LSA more time consuming and complicated.

37. The Lawyer's failure to understand the role of the LSA was most acutely demonstrated in his resistance to grant the LSA access to the Canada Revenue Agency's records about his GST remittances. GST revenues are collected pursuant to a statutory trust imposed on business operators, including lawyers. A failure to honour that trust may affect the reputation of not only the lawyer in breach, but the profession as a whole. As a consequence, the request from the LSA audit department was appropriate. The Lawyer's resistance was not.

38. Indeed, the evidence revealed that the Lawyer was in arrears in remitting GST to the Canada Revenue Agency, although by the time of the Hearing, a suitable payment program had been arranged.

39. The Lawyer also acknowledged that he had failed to complete certain reporting obligations as of the Hearing, most notably submission of the Form T for 2003 through 2007. However, while not resiling from that acknowledgment, the Lawyer explained that the LSA audit showed that his clients' trust monies were not compromised. He asserted that the audit, in effect, had performed the same function as an independent accountant under the Form T process. Additionally, the Lawyer stated he does not have the financial resources to pay for the outstanding Form T reviews.

40. Having regard to all of the foregoing, the Statement of Admission of Guilt was accepted on both citations.

SANCTION AND COSTS

41. In determining an appropriate sanction, the Hearing Committee is guided by a purposeful approach, which seeks to ensure that the public is protected, that high professional standards are preserved, and that the public maintains confidence in the legal profession.

42. In *McKee v. College of Psychologists (British Columbia*), [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

> "In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings

> resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

43. Various factors may be taken into account when deciding how the public interest should be protected, including: a) the nature and gravity of the proven misconduct, including the number of times it occurred; b) whether the misconduct was deliberate; c) whether the misconduct engages the respondent lawyer's honesty or integrity; d) the impact of the misconduct on the client or other person affected; e) general deterrence of other members of the legal profession; f) specific deterrence of the respondent lawyer from engaging in further misconduct; g) punishment of the offender; h) whether the offender has incurred other serious penalties or financial loss as a result of the circumstances; i) preserving the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members; j) the public's denunciation of the misconduct; k) the extent to which the offensive conduct is clearly regarded within the profession as falling outside the range of acceptable conduct; and l) imposing a penalty that is consistent with the penalties imposed in similar cases.

44. In addition, the Hearing Committee considers mitigating circumstances that may temper the sanctions to be imposed, including: a) the respondent lawyer's attitude since the misconduct occurred; b) the prior disciplinary record of the offender, including whether this is a first offence; c) the age and inexperience of the lawyer; d) whether the individual has entered an admission of guilt, thereby showing an acceptance of responsibility; e) whether restitution has been made to the person harmed; and f) the good character of the offender, including a record of professional service.

45. In the present case, numerous breaches of the LSA's accounting Rules occurred over an extended period of time. The Lawyer failed to cooperate with the LSA audit department in several ways. However, the gravity of the breaches and failures was limited.

46. While the Lawyer knowingly allowed some of those deficiencies to persist, and failed to remedy some of the breaches in a timely way (or at all), his failings seem to be attributable to a misguided perception that no real harm was being done, a malaise about continuing to practice law, and a lack of financial resources to correct certain deficiencies (e.g. Form T).

47. Nevertheless, the Lawyer's conduct in failing to comply with accounting and reporting obligations had previously been the subject of a Mandatory Conduct Advisory, so he should have known to conduct himself better than he did.

48. On balance, taking into account all of the evidence, the Panel is satisfied that this is a situation in which the Lawyer exercised some poor accounting habits and made some errors in judgment. He was not ungovernable.

49. By his admission of guilt and testimony before this Panel, the Lawyer has demonstrated that he understands the errors he committed, and that he is contrite.

50. The Lawyer has practiced for approximately 27 years and has no prior disciplinary history.

51. The Lawyer's problem with the accounting rules occurred while he was in sole practice. Effective February 2007, he joined a firm, in part to ameliorate the challenges he was facing in running his own practice. In the new firm, he did not have signing authority on the firm trust account nor responsibility for the firm's accounting, banking and reporting practices.

52. By the time of this Hearing, the Lawyer had voluntarily removed himself from the practice of law and placed himself on the Inactive List, thereby eliminating any risk to the public and the legal profession.

53. The evidentiary record revealed numerous accounting exceptions within the Lawyer's practice; however, the evidence did not identify any loss occasioned to any client, nor any substantial reputational injury to the legal profession.

54. The Lawyer is currently unemployed and is seeking work in another vocation. He has exhausted most of his savings and does not have an alternate source of income.

55. Having regard to the sanctioning principles outlined above, the Hearing Committee made the following Orders:

    a. An Order that the Lawyer be reprimanded;

    b. An Order that the Lawyer pay the Law Society the actual costs of the Hearing;

    c. An Order that the Lawyer be given time to pay the actual costs of the Hearing, not to exceed two years from the date of service of the Statement of the Actual Hearing Costs on the Lawyer;

d. An Order directing that, if the Lawyer applies for reinstatement to the Active List, he be directed to Practice Review as a condition of reinstatement.

56. The Chair delivered a reprimand, which expressed denunciation for the conduct of an experienced member of the Bar whose behaviour failed the public interest and his profession.

CONCLUDING MATTERS

57. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of the proceeding shall be redacted to protect any information that is subject to proper claims of privilege.

58. There was no referral to the Attorney General.

59. No notice to the Profession was directed.

Dated this 4th day of May, 2010.

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KEVIN FETH, QC, Bencher, Chair

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RON EVERARD, QC, Bencher

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MIRIAM CAREY, PhD, Bencher