



## 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 Aaron Oshry, a Member of the Law Society of Alberta.

#### **A. Jurisdiction and Preliminary Matters**

1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Aaron Oshry on October 8, 2008. The Committee consisted of Neena Ahluwalia, Q.C., Chair, Peter Michalyshyn, Q.C. and Brad Nemetz, Q.C. The LSA was represented by Garner Groome. The Member was represented by Laura Stevens, Q.C.
2. Exhibits 1 through 4, consisting respectively of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Committee and were admitted into evidence by consent.
3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership of the Committee.
4. The Certificate of Discretion was entered as Exhibit 5. No request for a private hearing had been received and therefore the hearing proceeded in public.
5. Exhibits 6 through 12, contained in an exhibit binder provided to the Committee members and the parties, were admitted into evidence by consent. The following additional exhibit was also entered into evidence by consent:
  - Exhibit 13 – Agreed Statement of Facts dated October 8, 2008 and signed by the member;

#### **B. Agreed Statement of Facts**

The Agreed Statement of Facts (exhibit 13) is attached to this decision.

The two citations that the committee dealt with are as follows:

1. IT IS ALLEGED THAT you permitted your client to gain unsupervised access to a laptop computer contrary to the spirit and intent of the Order of Mr. Justice E.S. Lefsrud, and that such conduct is conduct deserving of sanction:
2. IT IS ALLEGED THAT you, without reasonable excuse, took possession of a laptop computer on July 12, 2005, rather than July 11, 2005, contrary to the Order of Mr. Justice E.S. Lefsrud, and that such conduct is conduct deserving of sanction.

**C. Evidence of the Member**

6. Mr. Oshry testified before the committee.
7. Mr. Oshry has been a member of the Law Society of Alberta since February of 1977. His practice consists of commercial litigation.
8. In 1995 Mr. Oshry began acting for a company on various commercial matters. That company and/or its principal (sometimes "Mr. Oshry's client" or "his client") later came to have a contract to act as Sales Manager of the complainant company. In that regard Mr. Oshry's client came into possession of the complainant's sensitive marketing and customer information.
9. There was a dispute between Mr. Oshry's client and the complainant concerning the nature of the relationship between the parties and in 2005 the complainant filed a Statement of Claim against Mr. Oshry's client alleging misappropriation and misuse of confidential information. The Statement of Claim included allegations of removal of confidential and proprietary information, removal of employment or termination of relationship without adequate warning, and breach of fiduciary duties in taking advantage of the confidential information.
10. An application was made to the Court of Queen's Bench to obtain computer files and information resulting in an order that a laptop computer was to be delivered to Mr. Oshry by his clients no later than the close of business on July 11, 2005.
11. The order made stipulation with respect to the data on the laptop and its inspection and preservation. The order was silent as to access to the laptop or its disposition.
12. Mr. Oshry's client phoned Mr. Oshry on the afternoon of July 11, 2005 and requested to meet with him and to deliver the laptop. Mr. Oshry, due to other commitments, did not have time to meet that afternoon and told his client that he would meet with him on the following morning and told his client to bring the laptop with him at that time.
13. On July 12, 2005 the laptop was delivered to Mr. Oshry when he met with his client. Mr. Oshry gave the laptop to his assistant for storage in the office. Instructions were given to keep the computer under lock and key and that no one was to touch it without Mr. Oshry's knowledge.
14. During the time that the laptop was in Mr. Oshry's possession, there were four occasions that it was accessed. On two occasions a computer expert retained by his client accessed the computer ostensibly to install software and copy databases. On the other two occasions (August 18 and October 26, 2005), it was the expert engaged by the complainant that accessed the computer in order to inspect it as part of the July 8, 2005 order.

15. Mr. Oshry was not present at any of the four occasions that the laptop was accessed.
16. Mr. Oshry testified that he allowed his client's expert access to the computer because his client told Mr. Oshry that there was confidential information that he was concerned about that he wanted to copy. Mr. Oshry testified that he did not believe that providing such access was in contravention of the July 8, 2005 order.
17. Mr. Oshry admitted that he had made a mistake in allowing his client's expert access to the computer as that "might" have been against the spirit of the order.
18. Mr. Oshry testified that his client did not have access to the computer, only the expert. The expert was supervised by Mr. Oshry's assistant. The expert was given a copy of the order of July 8, 2005 and Mr. Oshry spoke to him before he dealt with the computer. While Mr. Oshry did not believe that there would be any tampering of the laptop, he did acknowledge that now he thinks that the expert would have been following his client's instructions.
19. After inspection of the laptop by the complainant's expert, there were allegations made that the laptop had been tampered with; the data had been manipulated. A contempt application was brought against Mr. Oshry's clients. That application was denied on October 16, 2006. Mr. Oshry ceased to act for the defendants shortly after that date.

**D. Submissions Regarding the Citations**

20. The following was submitted by Mr. Groome with respect to the citations:
  - The order of July 8, 2005 was to preserve data that the other party alleged was stolen.
  - Once the property was within the hands of a member of the Law Society of Alberta, it should be safe.
  - While the contempt application was dismissed, the committee was referred to paragraph 42 of the decision (Exhibit 12). The following comments appear in that paragraph:

“However, I am concerned that there was any activity on the computer between the time of Lefsrud J.’s July 8<sup>th</sup> order and when the computer was first made available for inspection by the Plaintiff’s expert, particularly if the result of that activity, intended or not, was to render it impossible to determine whether any data was permanently deleted. Even if ....nothing should have been done to the computer without agreement by counsel for the Plaintiff or further court order.

- The committee should consider that at the time of access to the computer, was there an honest belief by Mr. Oshry that what was done was not untoward? It was submitted that there should be some objective basis for that belief.
  - While access was given to the expert of Mr. Oshry's client and not the client directly, it was submitted that there was no difference particularly since Mr. Oshry testified that the expert was likely doing what the client instructed him to do.
  - The Interpretation section of the Code of Professional Conduct (paragraph 3) states that the Law Society has broad powers to declare conduct to be deserving of sanctions is not limited to disciplining violations that are expressly or impliedly referred to in the Code. Disciplinary assessment of conduct will therefore be based on all facts and circumstances as they existed at the time of the conduct.
  - Chapter 1 of the Code of Professional Conduct outlines a lawyer's relationship with respect to the justice system. In particular, Rule 1 of Chapter 1 states that a lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others. It was submitted that in this case, Mr. Oshry's actions opened the door for his client to obstruct the spirit and intent of the July 8<sup>th</sup> order and that this was conduct deserving of sanction.
  - With respect to the second citation, it was submitted that Mr. Oshry was careless and cavalier in his approach to the particulars of the July 8<sup>th</sup> order. It was submitted that Mr. Oshry's busy schedule was no excuse to undermine the directions given by the court and by doing so, Mr. Oshry breached Rule 1 of Chapter 1 of the Code of Professional Conduct. It was submitted that this was not a technical nor trivial breach.
21. Ms. Stevens Q.C., on behalf of Mr. Oshry, made the following submissions regarding the citations:
- With respect to the second citation, Mr. Oshry's evidence was that he didn't put his mind to the order when he told his client to "bring it in tomorrow" when they were to meet. It was submitted that this should be looked at in terms of Mr. Oshry's "busyness" at the time of his actions.
  - It was also submitted that with respect to this citation, this conduct was disclosed by Mr. Oshry himself in response to the Law Society to a complaint.
  - While acknowledging that a mistake was made with respect to directing the client to "bring it in tomorrow", it was submitted that Mr. Oshry's actions in this regard did not meet the test of conduct deserving of sanction.

- With respect to the first citation, it was submitted that the committee take the following approach:
  1. Were Mr. Oshry's actions contrary to the spirit and intent of the order?
  2. Did Mr. Oshry believe his actions to be contrary to the spirit and intent of the order?
  3. Was that belief reasonable?
- It was submitted that in this case, Mr. Oshry did not step back from the case and from his client. Mr. Oshry did not and is not obligated to distrust his client. He did have a duty to protect his client from allegations of wrongdoing once Mr. Oshry took possession of the laptop. By allowing the expert access to the computer, Mr. Oshry exposed his client to allegations of tampering. It was submitted that while Mr. Oshry made an error in judgment in this case, it was made in good faith and without dishonesty. It was submitted that cannot found a basis for a decision that Mr. Oshry's conduct was deserving of sanction. (Law Society of Alberta v. Ter Hart [2004] L.S.D.D. No. 25 and Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372, 2002 SCC 65)

#### **E. Decision Regarding Citations**

22. Both citations against Mr. Oshry were dismissed.
23. It was clear from the evidence of Mr. Oshry that he was not acting dishonestly nor in bad faith. It was evident that there were errors of judgment on this file. The committee was not satisfied that they could characterize those errors as conduct deserving of sanction.
24. With respect to the second citation, the committee accepted Mr. Oshry's testimony that he did not address his mind to the date set out in the order. His inattention to that detail came from being busy. Red flags should have been raised, and it was clear that Mr. Oshry was not following best practices in his suggestion to meet with his client the next morning rather than later that afternoon. It would have been preferable that the client drop off the laptop that afternoon and a meeting scheduled for later. The committee was mindful that it was Mr. Oshry's own response to the Law Society in a formal setting that laid the foundation for this citation.
25. With respect to the first citation, the committee was struck by Mr. Oshry's failure to address his mind to the potential mischief that might have flown from giving access to the laptop to the client's expert. This led to protracted litigation and, as Mr. Oshry testified, a great deal of grief. Because of this error in judgment, Mr. Oshry found it necessary to cease to act. We accept that, as Ms. Stevens suggested, Mr. Oshry was

unable to take a step back from this litigation and that clouded his judgment and coloured his actions.

26. Not all errors in judgment and actions can be immediately found to be conduct deserving of sanction. In this case, it cannot be said that Mr. Oshry had anything to gain personally from his actions. It cannot be said that any effort was made to conceal his actions. The fact that Mr. Oshry gave access to the expert and not to his client is relevant to the bona fides that the committee accepts in dismissing this citation.

**F. Concluding Matters**

27. There will be redaction of any information that would be subject to solicitor client privilege from the Law Society file and the transcript.

Dated this 22nd day of May, 2009

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N. Ahluwalia Q.C. – Chair and Bencher

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B. Nemetz Q.C. – Bencher

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P. Michalyshyn Q.C. – Bencher

**IN THE MATTER OF *THE LEGAL PROFESSION ACT***

**AND**

**IN THE MATTER OF A HEARING REGARDING THE  
CONDUCT OF AARON OSHRY,  
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**AGREED STATEMENT OF FACTS**

**GENERAL BACKGROUND**

1. The Member was admitted to the Bar on February 4, 1977. He had previously practiced in South Africa since 1964. He has practiced in Edmonton since his admission in Alberta.

**CITATIONS**

2. On August 7, 2007, the Conduct Committee referred two citations to hearing:
1. IT IS ALLEGED THAT you permitted your client to gain unsupervised access to a laptop computer contrary to the spirit and intent of the Order of Mr. Justice E.S. Lefsrud, and that such conduct is conduct deserving of sanction;
  2. IT IS ALLEGED THAT you, without reasonable excuse, took possession of a laptop computer on July 12, 2005, rather than July 11, 2005, contrary to the Order of Mr. Justice E.S. Lefsrud, and that such conduct is conduct deserving of sanction.

**FACTS**

3. At all material times the Member acted on behalf of DT, G... Ltd., and BM.
4. At all material times the Complainant, Patrick Kirwin, acted on behalf of A...Ltd.
5. At all material times GH operated a computer business through R... Corp.

6. A... Ltd. is in the business of selling heavy equipment and the service and sale of parts. DT is alleged to have been a sales manager for A... Ltd (the exact nature of their relationship is in dispute in the civil proceedings). BM is the common law spouse of GH. G... Ltd. is a company owned by DT and BM.
7. Sometime during March or April of 2005, DT brought to GH an IBM laptop computer which he had been using while working for A... Ltd. GH was instructed by DT to copy some of the data on the IBM laptop to a second laptop manufactured by Acer (the "Acer laptop").
8. GH made an image copy of the IBM laptop – a clone – on to a DVD disc, which was then transferred to the Acer laptop.
9. GH extracted data that allegedly belonged to DT and then destroyed the balance of the data transferred to the Acer laptop. Ultimately the IBM laptop was returned to A... Ltd.
10. A dispute arose between DT and A... Ltd. as to who owned what information in the data originally on the IBM laptop and what may have been improperly transferred to the Acer laptop and retained by DT and/or G... Ltd.
11. On May 3, 2005, A... Ltd. filed a Statement of Claim (Ex 6) against DT, and G... Ltd. (and BM by later amendment to the pleadings) seeking injunctive relief regarding what it alleged to be its property copied onto the Acer laptop, and alleging that the Defendants misappropriated its intellectual property, its customers and its contacts. DT, G...Ltd. and BM denied the allegations and ultimately filed a counterclaim against A... Ltd. for unpaid commissions.
12. On July 8, 2005, on motion by A... Ltd. (Ex 7) a consent order was issued by Mr. Justice E.S. Lefsrud that provided, *inter alia*, that DT, G... Ltd., and BM cause the Acer laptop to be delivered to the Member no later than the close of business on July 11, 2005 (Ex 8 and Ex 9). At that time the Acer laptop was in the possession of GH at R... Corp. The order made stipulations with respect to the data on the Acer laptop and its inspection and preservation on terms more particularized in the order. The consent order is silent as to access to the Acer laptop or its disposition, and this was not discussed or raised before Lefsrud, J.
13. DT was expected to deliver the Acer laptop to the Member's office on July 11, 2005. DT called the Member that afternoon and requested to meet with the Member when he brought in the Acer laptop. Due to other commitments the Member did not have time to meet with DT that afternoon. Instead, the Member told DT that he would meet with him the following morning and to bring the Acer laptop in with him then.

14. The Acer laptop was delivered to the Member when DT met with him the morning of July 12, 2005, but there is no record of the exact time of receipt.<sup>1</sup> The Member provided the Acer laptop to his assistant for storage at his office.
15. When the Acer laptop was inspected by A... Ltd.'s expert on August 18, 2005, pursuant to the terms of the July 8<sup>th</sup> order filed the day before, they alleged interference by GH and the Member's clients in that they were not allowed to inspect the Acer laptop directly, only through questioning GH. They also suspected that the Acer laptop presented at the Member's office that day was not the same one to which DT had copied the cloned IBM laptop as it did not match their understanding of the serial number of the Acer laptop.
16. On September 26, 2005, Mr. Kirwin on behalf of A... Ltd. issued a Notice of Motion seeking an amendment to the July 8, 2005, order providing, *inter alia*, that the Acer laptop be delivered to his office for examination by A... Ltd.'s experts without interference (Ex 10).
17. On October 6, 2005, Mr. Justice E.S. Lefsrud amended his earlier order permitting unobstructed access by A... Ltd.'s experts and directed that the potentially second Acer laptop be delivered forthwith to Mr. Kirwin's office for inspection (Ex 11). It seems that the confusion regarding a possible second Acer laptop was resolved.
18. On or about October 26, 2005, the Member permitted unsupervised access to GH on at least two admitted occasions for the ostensible purpose of copying what was on the said laptop and installing additional software just before the said laptop was inspected by A... Ltd.'s experts.
19. After A... Ltd.'s experts examined the Acer laptop at the Member's office on or about October 26, 2005, it was alleged that there had been significant modifications, alterations, deletions, and additions made to the said laptop between June 11, 2005 to October 26, 2005, including activity on July 11, 2005, and repeated activity on the Acer laptop after it was delivered to the Member, sometimes showing at very odd hours such as the middle of the night. These allegations were never proven beyond a reasonable doubt (see the decision of Madam Justice L.D. Acton dated October 16, 2006 at Ex 12).
20. It is not known exactly what was done when GH accessed the Acer laptop at the Member's office prior to the unfettered inspection by A... Ltd.'s experts. The Member

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<sup>1</sup> It should be noted that DT, in his August 28, 2006, answers to undertakings on cross-examination on affidavit in the related civil proceedings, stated that BM delivered the Acer laptop to the Member late in the morning on July 11, 2005. For the purposes of the present hearing the Member's version is accepted as it is consistent with his contemporaneous notes on file.

has no explanation as to why, according to A... Ltd.'s experts, the Acer laptop appeared to have been accessed repeatedly while it was in his possession. The Member maintains that the only occasions when the Acer laptop was accessed was on August 18, 2005, the two times by GH on or about October 26, 2005, and when A... Ltd.'s experts inspected it on or about October 26, 2005.

21. On December 14, 2005, A... Ltd. brought a related but separate action against GH and R... Corp. alleging a conspiracy with DT, G... Ltd. and BM to deprive it of its intellectual property. That action is still ongoing.

22. A... Ltd. ultimately brought a contempt application against the Member's clients on the grounds, *inter alia*, that the data on the Acer laptop had been manipulated. This portion of the contempt application was denied on October 16, 2006 (Ex 12).

23. Some time after the October 16, 2006, decision the Member ceased to act for DT, G... Ltd. and BM. The civil proceeding is still ongoing.

24. There is no evidence that the Member was a party to or aware of any alleged modifications, alterations, deletions or additions to the Acer laptop, if these indeed occurred, and no involvement on his part is alleged.

### **ADMISSION OF FACTS**

25. The Member admits as fact the statements contained within this Agreed Statement of Facts. However, the Member does not admit that his conduct as described in the within statement of facts is conduct deserving of sanction with respect to either citation.

**THIS AGREED STATEMENT OF FACTS IS MADE THIS 8th DAY OF OCTOBER, 2008.**

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**Aaron Oshry**