

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the “LPA”); and

IN THE MATTER OF a Hearing regarding the conduct of
Terry L. Britton, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On September 11, 2008, a Hearing Committee (the “Committee”) of the Law Society of Alberta (“LSA”) convened at the LSA office in Calgary to inquire into the conduct of Terry L. Britton, a Member of the LSA. The Committee was comprised of Dale Spackman, QC, Chair, Peter Michalyszyn, QC, Member and Larry Ohlhauser, MD, Member. The LSA was represented by Garner Groome. The Member was not present or represented by counsel at the Hearing. Also present during her evidence to the Hearing was Sara Jimenez, former LSA Auditor.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [2] At the direction of the Chair, the commencement of the Hearing was delayed for 15 minutes to provide a grace period for the Member and/or his counsel to attend the Hearing.
- [3] Exhibits 1 through 5, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member, the Affidavit of Service on the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.
- [4] The Chair introduced the Members of the Committee and there was no objection by Counsel for the LSA regarding the constitution of the Committee.
- [5] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the Rules of the LSA (“Rules”), the Affidavit of Service of a Notice to Attend the Hearing on Sara Jimenez and the Application of Service of a Private Hearing Application Notice on Justin O’Connell, the informal Custodian of the practice of the Member following the suspension of the Member on March 2, 2006, were entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and, accordingly, the Chair directed that the Hearing be held in public.
- [6] Exhibits 7 through 20 contained in the Exhibit Book provided to the Committee and the parties were entered into evidence in the Hearing with the consent of the Committee and

Counsel for the LSA. Counsel for the LSA also provided to the Committee a letter dated March 3, 2007 to the Member from Barbara Cooper, Manager of Practice Review for the LSA, which was marked as Exhibit 21 with the consent of the Committee. Exhibits 22 and 23, the Certificate of Record of the Member from the LSA and the Estimated Statement of Costs, were provided by Counsel for the LSA and entered with the consent of the Committee at the sanctioning stage of the Hearing.

CITATIONS

[7] The Member faced the following Citations:

1. IT IS ALLEGED that you failed to follow the accounting rules of the Law Society of Alberta, and that such conduct is deserving of sanction.
2. IT IS ALLEGED that you failed to cooperate fully with an investigation with the Law Society of Alberta, and that such conduct is deserving of sanction.
3. IT IS ALLEGED that you failed to respond to the Law Society of Alberta on a timely basis and in a complete and appropriate manner, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

[8] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee found that the Member was guilty of conduct deserving of sanction in respect of all Citations. The Member was disbarred and ordered to pay the actual costs of the Hearing with 30 days to pay from the date of receipt by the Member of the Statement of Costs. The Committee ordered that there would be no referral to the Attorney General and that there would be a Notice to the Profession as required by the Rules in the case of disbarment. The Exhibits are to be made available to the public with any references to client names, bank accounts or other confidential information redacted.

OPENING STATEMENT OF COUNSEL FOR THE LSA

[9] Counsel for the LSA advised that Section 70(2) of the LPA allows the Committee to proceed with this Hearing in the absence of the Member. Counsel further informed the Committee that he had advised the Member in writing in his letters to the Member of January 11, 2008 (contained in Exhibit 4) and March 4, 2008 (Exhibit 16) that the citations, if proven, may give rise to a lengthy suspension or disbarment and, if the Member chose not to attend the Hearing and were found guilty, this would no doubt result in disbarment of the Member for ungovernability. Counsel for the LSA sought disbarment in the circumstances. Counsel advised the Committee that the three citations came about as a result of a Rule 130 audit conducted in respect of the practice of the Member. Counsel submitted that there was no requirement for a referral to the Attorney General in this case. A pre-hearing conference with the Member and/or his counsel was set for November 18, 2007, at which the Member did not attend in person or by counsel. The Member also did not provide any input as to the proposed hearing date of the matters before this Committee. Counsel advised that Sarah Jimenez, the LSA Auditor who had

conducted the investigation into the Member's practice resulting in the Final Investigation Report dated October 20, 2006, would be called as a witness for the LSA. Counsel advised the Committee that the failure of the Member to file his Forms S and T as referred to in the Final Investigation Report had been dealt with by a prior conduct hearing and, accordingly, were not part of the citations being considered at this Hearing.

BACKGROUND AND FACTS GIVING RISE TO CITATIONS

- [10] An audit of the financial records of the Member's practice pursuant to Rule 130 of the Rules was commenced on October 19, 2005 on written notice to the Member (Exhibit 8, Tab 1). At the time, the Member had not filed his Forms S and T for the years 2003 and 2004 and his Form S for the year 2005 (as referred to above, this conduct has already been dealt with in a previous hearing). At the commencement of the audit, the Member represented to the LSA Auditor (Sara Jimenez) that he had Goods and Services Tax (GST) arrears owing to Canada Revenue Agency (CRA) of approximately \$12,000 plus interest and penalties in relation to his law practice and that he was a minimum of four quarterly remittances behind in filing his GST Returns with CRA. The LSA Auditor requested copies of the most recent GST filing and GST Notice of Assessment from CRA for the Member, as well as an authorization from the Member to allow the LSA Auditor to contact CRA directly to obtain information relating to the GST balances of the Member with CRA. None of the requested information or the authorization were provided by the Member, notwithstanding repeated requests from the LSA Auditor. A form of CRA authorization was presented to the Member, which he refused to sign.
- [11] By letter dated December 16, 2005 (Exhibit 8, Tab 2), the LSA Auditor provided the Member with her Audit Report on the Rule 130 audit of the financial records, accounts and trust moneys of the practice of the Member. The Audit Report noted numerous exceptions, including the following:
- (i) Trust Receipt Journal not properly maintained;
 - (ii) Trust Ledger Cards not properly maintained;
 - (iii) General Receipts and Disbursements Journal not current;
 - (iv) Trust Reconciliation not properly completed;
 - (v) Duplicate Cash Receipts Book not maintained;
 - (vi) trust funds not expeditiously deposited into trust;
 - (vii) more than \$100 of personal funds in trust;
 - (viii) late Form Ss;
 - (ix) late Form Ts

- (x) undisbursable trust money (stale dated cheques and inactive accounts); and
- (xi) GST filings and remittances not current.

- [12] At the conclusion of the Audit Report, the LSA Auditor again requested that the Member provide the information on GST and the authorization that had been previously requested together with client trust ledger cards for two files. The Member was required to bring his accounts into compliance with the accounting Rules of the LSA by December 23, 2005 or face further investigation and costs. The Member did not comply with any of the foregoing.
- [13] By letter dated May 3, 2006 to the LSA Auditor (Exhibit 8, Tab 3), the LSA Director, Lawyer Conduct ordered an investigation pursuant to section 53(3)(b) of the LPA into the conduct of the Member identified during the Rule 130 audit.
- [14] A Final Investigation Report was issued by the LSA Auditor on October 20, 2006 (Exhibit 8). The Report confirmed the issues with respect to the Member not complying with the accounting Rules of the LSA identified in the section 130 audit. Further, the Report alludes to the fact that on January 10, 2006, the Member signed (i) a confirmation that he had “corrected all of the correctable exceptions noted [in the section 130 audit report]” at a time when he knew this was not the case and (ii) an undertaking to maintain his law firm’s “books and records in compliance with the Rules in the future”, which undertaking was not complied with.
- [15] A copy of the Final Investigation Report was provided to the Member by letter from the LSA sent by registered mail dated October 31, 2006 (Exhibit 9) inviting his response within 14 days of the letter pursuant to section 53 of the LPA. A reminder letter dated November 24, 2006 (Exhibit 11) was sent to the Member. No response was received from the Member other than a letter dated November 29, 2006 (Exhibit 12) advising that he would be out of the country until December 13th, upon which he would “work toward putting a response together”. This was followed by a letter dated December 27, 2006 from the LSA to the Member (Exhibit 13) advising him that he had a further 14 days to respond. By letter dated November 3, 2006 (Exhibit 14), the Member wrote to the LSA to advise that he would require the assistance of counsel to respond and seeking a list of counsel. A list of pro bono counsel was provided to the Member by letter from the LSA dated January 23, 2007 (Exhibit 15). No further extension of time for a response was granted.
- [16] As the Member did not respond to the Final Investigation Report, the matter was referred to the Manager, Lawyer Conduct and ultimately to this Hearing. LSA Counsel attempted to arrange a Pre-Hearing Conference with the Member, but the Member failed to attend personally or by counsel at the conference. Attempts by LSA Counsel to arrange with the Member for a mutually agreeable hearing date were unsuccessful.

EVIDENCE OF WITNESS FOR LSA

[17] Counsel for the LSA called Ms. Sarah Jimenez as a witness to give testimony in the Hearing. The Chair administered the oath to Ms. Jimenez.

Examination by LSA Counsel

[18] Ms. Jimenez testified that she was employed as an auditor with the LSA and, in such capacity, was responsible for the section 130 audit of the books and records of the Member. When questioned by Counsel for the LSA in respect of her qualifications, she indicated that she was a Chartered Accountant with a Bachelor of Commerce degree and a Certificate in Business and Forensic Audit and Fraud Investigation. Her employment with the LSA commenced in 2004 and ended in January of 2007. Counsel for the LSA directed Ms. Jimenez to Exhibit 8, being her Final Investigation Report in respect of the Rule 130 audit of the practice of the Member. Ms. Jimenez testified that the investigation into the Member's practice was initially commenced due to the Member being three years delinquent in filing his Forms S and T and that the investigation disclosed many other accounting deficiencies. In addition, the Member was ten months behind in his general account and twelve months behind in his GST reporting and accounting. The witness was referred by Counsel for the LSA to Exhibit 8, page 2, being the Executive Summary in the Final Investigation Report, and the witness testified that the information contained therein is accurate. The initial questionnaire provided to the Member in the course of the section 130 audit disclosed GST arrears of approximately \$12,000. Ms. Jimenez requested from the Member a copy of his last filed GST Return, which was not provided and on numerous occasions requested information from the Member to assist in completing the audit, with no response. The witness testified that the Member further refused to sign the authorization for the LSA to get information from the CRA, which funds constitute a trust in favour of CRA under Generally Accepted Accounting Principles. The witness was referred to Tab 4 of Exhibit 8 setting forth the time line of the investigation conducted under section 130 of the LPA. She testified that there were no trust shortages other than a minimal bank charge of approximately \$75. The witness was referred to Exhibit 8, Tab 9, being a letter dated March 13, 2006 from the witness to the Member requesting his most recent GST filing, a copy of his most recent CRA GST Notice of Assessment and a signed copy of an attached GST authorization letter, and testified that these three items plus the Member's unfiled Forms S and T continued to be outstanding as at the date of that letter. The witness referred to Exhibit 8, Tab 10, being a letter dated March 20, 2006 from the Member to the LSA where he appeared to indicate that he was in the "midst of concluding [his] practice". The witness testified that she received no response from the Member to her letters of May 18, 2006 and August 2, 2006 (Exhibit 8, Tabs 11 and 12) requesting information from the Member relating to his GST and accounting records, his Form Ts and the GST authorization letter, other than the Member's letter of August 11, 2006 (Exhibit 8, Tab 13) where the Member indicates that he is waiting to hear from his accountant and raises issues of the authority of the LSA and privacy concerns in respect of the requests for information and documents by the LSA. The witness testified that there were no further requests by the LSA for information or responses from the Member subsequent to this letter. The witness testified that at this time the Member was nearing the end of his suspension by a previous hearing committee

and that this committee ordered a mandatory referral of the Member to Practice Review. The witness was referred to Exhibit 8, page 6 and confirmed the accuracy of the calculation that the estimated GST remittance for the Member's practice for the period ended September 30, 2005 would have been \$19,273.56, rather than the \$12,000 estimated by the Member. Counsel for the LSA and the members of the Committee having no further questions, the witness was dismissed.

CLOSING ARGUMENT

LSA Counsel

[19] Counsel for the LSA referred the Committee to the balance of the materials contained in the Exhibit Book not referred to by the witness as demonstrating a lack of the Member providing any tenable response to the inquiries and requests for information by the LSA. Counsel highlighted the fact that the Member was asked by the Practice Review Panel by correspondence dated February 5, 2007 (Exhibit 21), to provide a Business Plan by February 23, 2007 and that no response or Business Plan were received. Counsel advised that the Member had been suspended as a result of a discipline hearing held on March 2, 2006 and had not, to the date of this Hearing, applied for reinstatement. Counsel emphasized the fact that the previous participation of the Member in Practice Review was as a result of a mandatory referral by the previous hearing committee. Counsel referred to the letter dated May 3, 2007 from the Manager, Practice Review to the Member summarizing his interaction with the Practice Review Committee subsequent to his discipline hearing on March 2, 2006 (Exhibit 21). Dr. Ohlhauser referred to Tab 10 of Exhibit 8, being the letter dated March 20, 2006 from the Member to the LSA and inquired as to whether the LSA had responded to the inquiries of the Member relating to the authority of the LSA and privacy issues. Counsel referred the Committee to the letters from the LSA to the Member contained in Tabs 11 and 12 of Exhibit 13 and argued that, in the circumstances, a response to the Member's concerns relating to authority and privacy were not justified or required. Mr. Michalyshyn clarified the citations against the Member and asked for further information on failure to comply with the accounting rules of the LSA. Counsel responded by referring the Committee to the Section 130 Audit Report and the Final Investigation Report contained in Exhibit 8 and in Tab 2 of Exhibit 8 of the materials together with the testimony of the LSA Auditor. There being no further questions, Counsel for the LSA was requested to make his submissions on guilt.

SUBMISSIONS ON GUILT

[20] Counsel for the LSA referred to the standard of proof contained in the Conduct Hearing Guide and submitted that the standard of proof has been met and the test contained in section 49 of the LPA has been made out in this case. Counsel submitted that the failure of the Member to provide the information requested by the LSA in the course of their section 130 audit and investigation was no doubt due to the fact that the Member was not in possession of nor had he every produced such information. Counsel submitted that there is no such thing as a "minor" breach of the accounting Rules of the LSA. Counsel

referred the Committee to pages 6 and 7 of the Final Investigation Report and highlighted the numerous breaches by the Member of the accounting Rules of the LSA and, the fact that the Member signed a compliance confirmation before being in compliance with the Rules. As referred to in the Final Investigation Report, this latter matter “displays a lack of respect for and a failure to comply with the Rules. Mr. Britton did not file the forms required by the Rules until almost eight months after he had signed this confirmation that he was in compliance with the Rules”. Although the Member did not completely fail to cooperate with the LSA, he did not cooperate in any way in respect of the GST issues, even after a formal investigation had commenced. Counsel submits that the Member was being obstructive in raising his concerns relating to the authority of the LSA and privacy issues with no authority being put forward on his part for the raising of such issues, especially in light of the clear investigative authorities conferred on the LSA by the LPA and the Rules. Counsel referred the Committee to the reverse onus provisions contained in section 67 of the LPA relating to a Member receiving money or any other property in trust, where the burden of proof that the money or other property has been properly dealt with lies on the Member. Counsel referred the Committee to Tab 12 of Exhibit 8, being the letter dated August 2, 2006 from the LSA Auditor to the Member of the relevant provisions of the *Excise Tax Act* which provide that unremitted GST is deemed to be held in trust for Her Majesty In Right of Canada and that in any disciplinary proceedings arising out of the LSA investigation the LSA may rely on the reverse onus provisions in section 67 of the LPA, specifically with respect to the GST issue. Counsel submitted that the burden of proof on the Member was not discharged in this case. There was no indication from the Member that he had any reason not to remit GST. On the issue of whether GST should not be a concern of the LSA, being a civil dispute between the Member and the CRA, Counsel referred the Committee to the Hearing Committee in the Hermo Toribo Pagtakhan decision of the LSA Conduct Hearing Committee Report dated July 24, 2008, where the Committee decided, in considering the failure of the Member to remit GST to the CRA, to have “failed to deal with the GST collected to the standard required of trust property”. Counsel also emphasized that the significant underestimate by the Member of the GST arrears payable highlights why the LSA needs investigative powers in respect of all financial aspects of a Member’s practice, including GST requirements. Counsel submitted that the October 31, 2006 letter from the LSA to the Member (Exhibit 9) requesting his response to the Audit Report in accordance with section 53 of the LPA and the Member’s failure to respond in any realistic way is evidence of the ungovernability of the Member. Further, counsel submitted that the absence of the Member at the Hearing should be given significant weight by the Committee in rendering its decision regarding guilt. Mr. Michalyshyn asked Counsel whether he was aware if the GST arrears had been made good by the Member. Counsel indicated that he was not aware of the answer to this question. There being no further submission of Counsel for the LSA or questions from the Committee, the Committee adjourned to consider the issue of guilt.

DECISION AS TO CITATIONS

[21] Based on the foregoing, the Committee unanimously found the Member guilty of conduct deserving of sanction in respect of all Citations.

SUBMISSIONS OF COUNSEL REGARDING SANCTION

- [22] Counsel for the LSA submitted the discipline record of the Member to the Committee which was entered as Exhibit 22 and the Estimated Statement of Costs which was entered as Exhibit 23. The record of the Member disclosed that at a discipline hearing held on March 2, 2006 into the conduct of the Member, the Member admitted guilt on two counts of conduct deserving of sanction for failure to respond to clients, four counts of conduct deserving of sanction for failure to respond to the LSA and one count of conduct deserving of sanction for failure to file Form T and failure to file Form S in a timely fashion. The Member was suspended and a mandatory referral made to the Practice Review Committee for a period of two years and an order to pay actual costs of the hearing.
- [23] Counsel for the LSA submitted that there were two main factors to be considered by the Committee in determining what sanctions to impose on the Member in this case, being protection of the public interest and maintenance of confidence in the legal profession. In addition, the issue of preservation of self governance of the profession must be considered a major factor. In this case, the LSA was stymied in respect of its investigation due to the lack of cooperation of the Member. Specific and general deterrence must also be considered by the Committee. Counsel referred to section 79 of the Conduct Hearing Guide and submitted that the Member in this case does not “accept governance” and paragraphs 80 and 81 of the Conduct Hearing Guide which provide examples of cases where Members of the Law Society of Upper Canada were disbarred for failure to cooperate with or respond to the Law Society. Counsel further referred to the decision of the Conduct Hearing Committee in the Darren Matwe decision of the LSA dated December 15, 2006 where, in addition to numerous other citations, the Member was charged with failing to respond to the LSA and breach of an undertaking to the LSA. In that decision, the Hearing Committee concluded *inter alia*, that “But for the fact the Member appeared at the Hearing, disbarment would have been under consideration.”. Counsel submitted that failure to attend the Hearing shows a refusal on the part of the Member to be governed by and in accordance with the Rules of the LSA. In addition, Counsel referred to the fact that the prior record of the Member shows a conviction for failure to respond to the LSA resulting in a suspension of the Member for which he has not sought reinstatement. Counsel referred to the “step principle” referred to in the Conduct Hearing Guide in respect of decisions on sanction. Counsel indicated that he would be seeking actual costs of this Hearing and advised the Committee that the Member had not yet paid the cost award ordered in the previous conduct hearing. Counsel referred the Committee to the letter from the Member dated March 20, 2006 (Exhibit 8, Tab 10) wherein the Member indicated that he was winding down his practice in light of the fact that the Member had been suspended on March 2, 2006. Counsel further reiterated the lack of cooperation of the Member in the practice review process which had been ordered by the hearing panel.
- [24] Counsel for the LSA urged the Committee to consider disbarment of the Member effective immediately. Counsel indicated that there was no need for a custodian in this matter since the Member was not currently practicing law. Counsel recommended redaction of any names of clients or other individuals and bank account numbers from

any materials made available to the public in respect of this Hearing and that the Member be provided with thirty (30) days for payment of any costs awarded by the Committee from the date of receipt by the Member of the Statement of Costs. The Committee adjourned to deliberate regarding sanction.

SANCTION

[25] The Chair advised that the Committee considered the conduct of the Member in this case to be a serious breach of the Code of Professional Conduct and the Rules of the LSA. The unanimous decision of the Committee is that the Member be disbarred. The Committee noted, in particular, the overwhelming evidence of the ungovernability of the Member based on his lack of response to or cooperation with the LSA, his failure to attend the pre-hearing conference and to participate in the scheduling of or to attend this Hearing and referred to the decision in the Matwe case referred to in paragraph [23] above. There will be no referral to the Attorney General of Alberta. The Committee awarded the actual costs of the Hearing to be paid by the Member within thirty (30) days of receipt by the Member of the Statement of Costs. The Committee ordered a Notice to the Profession in accordance with the LPA and that the materials in respect of the Hearing be made available to the public with client names or references to bank accounts or any other confidential information be redacted.

DATED this 9th day of January, 2009.

Dale Spackman, QC (Chair)

Peter Michalyshyn, QC (Member)

Larry Ohlhauser, MD (Member)