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 THOMAS ENGEL, a Member of The Law Society of Alberta

Jurisdiction and Preliminary Matters

1. The Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Thomas Engel on April 23rd to 25th, 2008. The Committee was comprised of Vivian Stevenson, Q.C., chair, J. Roy Nickerson Q.C. and Yvonne Stanford. The LSA was represented by Garner Groome. The Member was present throughout the Hearing and was represented by Gwilym J. Davies and Charles Davison.

2. Exhibits one through four, consisting 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.

3. There was no objection by Counsel for the Member or Counsel for the LSA to the membership of the Committee.

4. The Certificate of Exercise of Discretion was entered as exhibit five. Counsel for the LSA advised that no request was received for a private hearing. The Hearing was held in public.

Citations

5. The Member faced a single citation:

    1. IT IS ALLEGED that you acted in a manner that brought discredit to the profession, by publicly characterizing the investigation conducted by the Complainant as “purposefully flawed”, and that such conduct is conduct deserving of sanction.

6. The Hearing Committee dismissed the Citation.

Facts

7. There were two volumes of Exhibits numbered 6 through 12 that were marked and entered at the outset of the Hearing. During the Hearing additional Exhibits were marked as Exhibits 13 to 21.

8. Counsel for the LSA called Superintendent L. The Member called Laura Stevens Q.C. and also testified on his own behalf.

9. This matter arose in connection with an incident that occurred at the O… (the "Lounge") on Thursday, November 18th, 2004. On that evening there was a gathering of the Canadian Association of Journalists. Also in attendance were a number of local politicians, the Chair of the Police Commission and a well-known local journalist.

10. Sometime that evening several members of the Edmonton Police Service (the "EPS") attended at the Lounge, apparently on the basis of a tip that there were certain individuals there who were intoxicated and might be intending to drive. No arrests were made.

11. The next day a meeting was held involving, among others, the Chair of the Police Commission, the Chief of Police and the Deputy Chief at which the Chair expressed his concern about how the EPS came to be in attendance at the Lounge and whether there had been some improper motive behind the attendance.

12. The Deputy Chief contacted Inspector B. and asked for an opinion as to what should be conveyed to the media, as a result of which contact, Inspector B. and another member of the EPS Member Relations Unit drafted a press release that went out on November 21st.

13. The November 21st press release included the following paragraph:

On Thursday evening, police received information that a drunken patron was going to leave a downtown restaurant in his car. Officers went to the restaurant and identified the person. The man later left without taking his own car. During their investigation, officers noticed a second intoxicated man whom they recognized as a high-profile member of the community. Officers remained at the restaurant and saw the man leave in a taxi. The officers then concluded their investigation.

14. Since by this time the publicity surrounding the events of the 18th made the two individuals involved readily identifiable to the public, the press release itself caused further concern.

15. On November 23rd, 2004 the Member, in his capacity as Chair of the Police Conduct Committee of the Criminal Trial Lawyer's Association ("CTLA") forwarded a letter of complaint to the EPS. That complaint is Exhibit 6 in these proceedings.

16. The CTLA complaint related both to the matter of the EPS attendance at the Lounge and to the circumstances surrounding the press release.

17. On November 24th Deputy Chief B. phoned Superintendent L. and advised that the issue of the media release was to be investigated separately from the main matter relating to the EPS attendance at the Lounge. The Deputy Chief asked Superintendent L. if he would be in a position to conduct the investigation regarding the press release and Superintendent L. agreed to do so. Superintendent L. confirmed with the Deputy Chief that his investigation was to be limited to the press release.

18. Superintendent L. conducted his investigation and issued a report. His report is Exhibit 7 in these proceedings. The report went to the Deputy Chief and was also sent to Deputy Chief S. of the Calgary Police Service. Deputy Chief S. was brought in as an independent party to address concerns that the EPS could not produce an unbiased report in these circumstances.

19. The Member first received a copy of Superintendent L.'s report on October 7th, 2005 when the report was made an exhibit at a disciplinary hearing involving Inspector B. The Report was faxed to the Member by Mr. R., a reporter for the Edmonton Journal who asked the Member to read it and grant an interview. The Member read the article and gave Mr. R. an interview by telephone shortly afterwards.

20. On October 8th, 2005, Mr. R.'s article appeared in the Journal. The article quoted the Member as saying with respect to the report that "The investigation was purposefully flawed".

21. It is this quote that forms the subject of the citation against the Member.

22. The Member admits that this was an accurate quote. He also admitted that by using these words he intended to convey that in his opinion the investigation by Superintendent L. had been carried out with a view to reaching a result favourable to the EPS.

23. The Member testified as to the reasons why he reached this conclusion.

24. First of all, the Member said that he knew something about Superintendent L.'s background having dealt with him in the past. He knew that the Superintendent had a law degree and that he was extremely familiar with the *Police Act*, the regulations under that *Act* and the internal policies of the EPS. Therefore, in his view inexperience could not be an explanation for deficiencies in the investigation.

25. Secondly, the Member testified that he believed, as he does in all of these matters, that officers will be influenced by their own career path aspirations and that since Superintendent L. was upper management, he would be subject to the same influence.

26. The Member also indicated that he knew that the Superintendent would have had a close working relationship in the past with other EPS inspectors involved in the matter including Inspector B.

27. In terms of the report itself, the Member said that Superintendent L. had a duty as an investigator, if he became aware of any misconduct of any EPS member to investigate that conduct. In his view the Superintendent had not done so, but had restricted his investigation to the actions of Inspector B.

28. The Member testified that the regulations under the *Police Act* allow for the appointment by the Police Commission of a Public Complaints Monitor. The EPS Internal Affairs Manual, a portion of which was marked as Exhibit 12, Tab 8 in these proceedings, sets out those things that the Monitor is to consider in reviewing an investigation including:

- what are the allegations made by the complainant and was each allegation addressed during the investigation?

- was the member named in the complaint interviewed, and if not, why not?

- were all witnesses interviewed, and if not, why not?

- was the Investigator impartial and not involved in any way with any of the parties?

29. In the Member's view this list sets out the things to be done by an investigator in any investigation done by the EPS. He thought that Superintendent L.'s investigation had failed to meet these requirements. He testified that it was obvious from the Report that there were other police officers involved who were superior in rank to Inspector B. who were involved in the press release, but who were never interviewed or investigated. He thought this was a significant flaw, and to him, this had to be deliberate. He says it was clear that the complaint made by the CTLA was against "any police officer who was involved in the writing or release of the news release".

30. The Member testified that none of the people involved in the press release were interviewed except in the most perfunctory way, and that was probably the

biggest reason why he made the statement about the investigation being purposefully flawed.

31. The reasons given by the Member are set out in the article itself and in the correspondence from the Member's Counsel to the Law Society of November 28th, 2005, marked as Exhibit 12.

32. The Member conceded on cross-examination that he had expected from the outset that the CTLA's complaint would be dismissed based on his past experience with the EPS, because of the involvement of the Deputy Chief and because the EPS had retained control over the investigation. He was shown newspaper articles dating back to February 2005 in which it was being reported that he thought that Superintendent L.'s report would be a whitewash (Exhibit 21). He denied this was a pre-judgment of the report, and said he reviewed the report on its merits when he received it.

33. The Member testified that the members of the CTLA were of the view that the EPS would try to cover up the circumstances surrounding 'the Lounge" incident, sanitize it, and put a certain spin on it. The CTLA had made these complaints from the beginning and had been publicly commenting to this effect all along. In the Member's view the public had a right and need to know what CTLA thought of the EPS handling of the issue.

34. The Member did not feel that the involvement of the Calgary police through Inspector S. negated the problems with Superintendent L.'s investigation because Inspector S. was not conducting his own investigation, but simply reviewing Superintendent L.'s report. That said, Inspector S. did not suggest that there were any inadequacies in the process that Superintendent L. had followed.

35. The Member has a well-known relationship with the police and the press. He has been characterized by media as an "outspoken police critic" and in his testimony he agreed with that characterization.

36. For his part, Superintendent L. denied that his investigation had been anything but appropriate and thorough. He testified at some length about the process that he had followed, the reasons he had followed that process, why he had interviewed some witnesses and not others, and the manner in which those interviews were conducted.

37. Superintendent L. testified that he did not deliberately conceal anything in the course of his investigation and did not purposefully try to steer the investigation in any particular direction. He said that by the time of the report he had been with the EPS for 24 years, that he had never done such a thing in the past and that he would never do so in the future.

Submissions

Burden of Proof

38. Counsel for the LSA acknowledged that the LSA carried the ultimate burden of proof on a preponderance of fair and credible evidence with respect to proving that the Member's conduct is conduct deserving of sanction. However, he submitted that on its face, saying that a senior member of the EPS and a lawyer were involved in covering up a cover up and thereby implying that they had broken the law, was discreditable. He argued that it then fell on the Member to show that the comment was justified (i.e. that the comment was true, or that the comment was fair and accurate and that the Member had an honestly and reasonably held belief in the same).

39. It was the position of Counsel for the Member that the comment could not be considered discreditable if it was true or if it was made by the Member honestly and reasonably believing it to be true. Accordingly, it was the position of Counsel for the Member that the onus was on the LSA to demonstrate that the comment was untrue or that it was not based on the Member's honest belief.

The Nature and Tone of the Comment

40. With respect to the language of the comment itself, Counsel for the LSA referred the Committee to a number of passages in Gavin MacKenzie's text on Lawyers and Ethics including the following:

> 4-7 Lawyers should deal with one another courteously and in good faith. If they behave otherwise they do a disservice to their clients. Ultimately, unfair and discourteous behaviour impairs the ability of lawyers to perform their function properly and it is antagonistic to the public interest which demands that matters entrusted to lawyers be dealt with effectively and expeditiously.
>
> Lawyers acting as counsel in litigation should never allow acrimony between their clients to influence their conduct and demeanour towards each other or the parties. Personal animosity between lawyers may cause their judgment to be clouded and hinder the proper resolution of the dispute.
>
> 8-11 Professions, like families, have pride and traditions. Our greatest advocates have been renowned for their courtesy. A former Chief Justice of Canada, John Cartwright, has been described as having the characteristics of "gentlemanliness, fairness, reasonableness, candour, magnanimity and complete integrity."

41. Counsel for the LSA argued that the Member had launched an unnecessary personal attack on Superintendent L. rather than commenting on the merits of his investigation. He suggested that the Member could have criticized the investigation without criticizing the individual who had carried it out. The Committee had some difficulty with the suggestion that this type of distinction was possible in the circumstances.

42. Counsel for the LSA also argued that the language used by the Member was intemperate and exaggerated. In this regard he not only referred to use of the words "purposefully flawed", but also the use of the word "whitewash" which had appeared in the article in question.

43. The Committee was also referred to Chapter 1 Rule 3, Chapter 3 Rules 2 and 11 and the general commentary to Chapter 4 of the Code of Professional Conduct, which provides:.

> G.2 The tone and content of remarks by a lawyer affecting the profession or one of its members must at all times be appropriate, despite strongly-held opinions or

personal animosities. With respect to criticism of colleagues (see also Commentary G.2 of Chapter 4, *Relationship of the Lawyer to Other Lawyers*). Rule 2 is not intended to inhibit honest disagreement or criticism, nor to curtail activities by lawyers designed to bring about changes in the administration of justice or professional organizations such as the Law Society.

To the extent that dealings among counsel are observed by the public, polite and professional conduct fosters respect for lawyers on an individual and collective basis. Conversely, rude or offensive behaviour reflects adversely on the lawyer involved, the profession and the administration of justice.

Examples of specific conduct contrary to the principles of this chapter are…unfair criticism or denigration of a colleague, particularly when publicized to others (for example, in a courtroom or by letter copied to a client). Personal animosities and emotional factors must not be permitted to affect the professional relationship between counsel, which should be characterized at all times by courtesy and objectivity (see also Rule 2 of Chapter 3, *Relationship of the Lawyer to the Profession*).

44. It was the position of Counsel for the LSA that the Member's comments were discourteous, rude or otherwise inappropriate in tone or content.

45. It was the position of Counsel for the Member that the Member's comments were not extreme or inflammatory in the circumstances of this case. He submitted that the words were certainly meant to convey a message, but did not constitute the type of invective or exaggeration that had been addressed in other cases. In fact, counsel for the Member argued that the comment "purposefully flawed" was a restrained and measured comment in all of the circumstances.

46. Counsel for the Member argued that the descriptions that have been employed about the type of language used by lawyers that got them into trouble have included: personal insults, name-calling, excessive rhetoric, invective, ill-considered and ill-informed. He submitted the language used by the Member did not fall into any of these categories.

47. Counsel for the Member also referred to the Charter and the need for the LSA to be careful in policing the language used by its Members. He suggested that a proper restriction upon a lawyer's freedom of expression comes at the point

where he or she utters abusive, objectively offensive or malicious comments, which was not the case here.

Justification

48. Both Counsel were agreed that a lawyer acts inappropriately if he or she makes uninformed and unsubstantiated comments, or comments that he or she knows to be untrue. They were also agreed that truth was a defence to the citation faced by the Member as was a finding that the comments were made honestly and in good faith on a matter relevant to the public interest.

49. Counsel for the LSA took the position that the Member's comments in this case were uninformed and unsubstantiated. He referred to the decision of *R.* v. *Mukherjee* [1995] O.J. No. 520 in this regard. He argued that the Member had called Superintendent L.'s investigation "purposefully flawed" simply because he did not agree with the result and not on any reasoned basis.

50. LSA Counsel also made reference to *Law Society of Alberta* v. *McCourt* [2005] L.S.D.D. No. 91 where the Member was found to have engaged in conduct deserving of sanction for making irresponsible or unjustified allegations of corruption or partiality against two Alberta MLAs. In that case the Member had published apologies to the MLAs before the Hearing acknowledging that the allegations were without foundation.

51. Counsel for the LSA argued that this case was similar to *McCourt* in that there had been nothing offered in evidence by the Member to justify what LSA Counsel characterized as a personal attack on Superintendent L.

52. Counsel for the LSA also made reference to the *Law Society of Alberta v. Kozina* [2005] LSDD No. 68. In that case the Member, who was acting for two accuseds in criminal proceedings, alleged that one police officer had sworn a false affidavit and that another had obstructed justice by attempting to cover up the false affidavit and misplacing part of the evidence in the case. The Member

subsequently admitted guilt and acknowledged that he had allowed his personal relationship with his clients to impair his objectivity.

53. Counsel for the LSA pointed out that Superintendent L. had denied under oath that he had any ulterior motive and had testified that he had conducted a bona fide investigation. An independent review of the procedure followed by Superintendent L. had been undertaken by a member of the Calgary Police Department who had concluded that the investigation had been complete and that there were no additional steps that should have been taken. In this context it was the position of counsel for the LSA that the Member could not hold an honest or reasonable belief that his comment was fair, accurate or reasonable.

54. Counsel for the LSA also argued that the Member's explanation for his belief was not persuasive. The suggestion that Superintendent L. would be biased because of his career aspirations was speculation at best. In short, counsel for the LSA argued that the Member's motivation was to ratchet up the rhetoric, and to take advantage of media attention surrounding "the Lounge" incident.

55. Finally, counsel for the LSA also suggested that the evidence was clear that the Member had made up his mind some months before that the report would be a whitewash and not on the basis of his review of the report on the day of his interview.

56. Counsel urged the Hearing Committee to find that the Member's zeal in challenging the EPS in this matter clouded his judgment as a professional and that this conduct was incompatible with the public interest and tended to harm the effective administration of justice and the standing of the legal profession.

57. Counsel for the Member took the position that the Member's comments were true and therefore could not be the subject of a finding of conduct deserving of sanction since it could not be incompatible with the best interests of the public to speak the truth.

58. Counsel for the Member argued that if the Committee was not satisfied as to the truth of the comments, that it was clear that the Member honestly and in good faith believed what he said and offered it in the context of overall criticism to improve the justice system.

59. In support of this argument Counsel for the Member pointed to the reasons given by the Member as the basis for his belief that Superintendent L.'s investigation had been purposefully flawed, which have been outlined above.

60. Counsel also argued that in deciding where to draw the line, the Committee should consider the context and in particular that the Member was addressing issues that are of key importance in a free and democratic society.

Truth

61. Counsel for the Member took the position that the comment by the Member was true and the truth was an absolute defence to the citations. Accordingly, much of the evidence led by the defence in the course of the Hearing was directed towards demonstrating the truth of the Member's comment and Counsel for the Member cross-examined Superintendent L. at length regarding the steps that he took and did not take during the investigation and the reasoning behind his choices.

62. Counsel for the Law Society took the position that the Hearing was not about whether or not Superintendent L.'s investigation was adequate or biased. He focused instead on the language used and his characterization of the comment as a personal attack as opposed to a fair, accurate and courteous observation.

Decision

63. As noted above, there was no dispute that the Member used the words "purposefully flawed" to describe Superintendent L.'s investigation. There was also no dispute that these words were intended to convey the Member's view

that Superintendent L. had deliberately conducted his investigation in such a way that the outcome would be favourable to the Edmonton Police Service.

64. The Member conceded during testimony that he understood that this was a serious allegation and that in saying this he was challenging the integrity of a senior member of the EPS and a lawyer.

65. Counsel for the Law Society made it clear at the outset that he was not challenging the proposition that the Member had the right to criticize the EPS in appropriate circumstances. Counsel for the Member conceded that although the LSA was bound by the terms of the *Canadian Charter of Rights and Freedoms*, the freedom of expression of its members was not absolute.

66. As noted by the Committee in *McCourt* at paragraph 49:

> …While there is not doubt in our minds that the Charter of Rights and Freedoms does apply to the Law Society in its disciplinary process, lawyers, unlike average citizens, are held to a higher standard in their activities which fall within the jurisdiction of the Law Society. Every member of our profession is one by choice and as a part of that choice, you submit yourself to the Code of Professional Conduct and its obligations of integrity and civility.

67. The Committee did not accept the position of Counsel for the LSA that the comment made by the Member was unprofessional on its face. The Committee was not prepared to find that it is *prima facie* inappropriate for a lawyer to directly challenge the integrity of another lawyer or someone who plays a role in the administration of justice.

68. In fact, Rule 2 of the Code of Professional Conduct and the accompanying commentary provide as follows:

R.2 A lawyer should seek to improve the justice system.

C.2 Efforts to improve the justice system, including constructive criticism of its operation and institutions, are consistent with a lawyer's responsibilities to the administration of justice. Legal training and the opportunity to observe the justice system in operation uniquely qualify lawyers to evaluate and seek improvements

to that system. The justice system includes not only the courts and the judiciary, but all public institutions involved with the administration of justice such as the legal profession, the police department, and various governmental departments and agencies, including legislative bodies.

69. Nor was the Committee in agreement with Counsel for the Member that truth or honest belief was necessarily an absolute defence to a charge that a Member had made inappropriate or improper remarks. The Committee was of the view that a Member could make remarks which were true, or honestly believed to be true, but still be found guilty of conduct deserving of sanction if the language used by the Member was unnecessarily inflammatory or otherwise inappropriate.

70. Therefore the Committee thought it necessary to consider both the language used by the Member and whether or not the comments were justified, in the sense that they were true or reasonably and honestly believed to be true. The Committee proceeded on the basis that the onus of proof lay with the Law Society with respect to both issues.

71. The Committee did not view the Member's comments to be extreme or inflammatory in the circumstances of this case. The words used were certainly meant to convey a message, but the Committee did not consider the language to constitute the type of invective or exaggeration that had been sanctioned in other cases. The comment was not abusive or offensive or unprofessional

72. In contrast, in *McCourt*, the Member had characterized the MLA's committee as "obscenely biased" and had mused that the MLA "may be in bed with the mortuary industry and not just the insurance lobby" and that "I can't imagine that he'd actually back fatally flawed insurance reforms just to spike the family flower shop's sales revenues by increasing the number of funerals".

73. The Committee was also not prepared to find, as suggested by LSA counsel, that the Member's criticism of the Superintendent was ill-considered or irresponsible because it had been made only fairly shortly after he had seen the report in question. The Member had knowledge of the circumstances surrounding the investigation and had been involved in the matter since shortly after it occurred.

74. The Committee then turned to consider whether the comment made by the Member was justified because it was true, or because it was made by the Member reasonably believing it to be true.

75. Much of the evidence and argument in this case from Counsel for the Member was directed at proving that the investigation by Superintendent L. was "purposefully flawed" in the sense that the Superintendent had made decisions about how the investigation would be conducted which would tend to lead to a favourable result insofar as the EPS was concerned.

76. On the other hand, Counsel for the LSA took the position that the Hearing was not about whether or not Superintendent L.'s investigation was adequate or biased. His examination of the Superintendent on the issues was not as detailed on this issue, and the LSA called no other evidence on EPS policies and procedures in this regard.

77. In these circumstances, and given the conclusion of the Committee as to whether or not the Member had an honest belief in what he said, the Committee did not feel it appropriate or necessary to make any determination as to whether or not the Member's comment had been proven to be true. Certainly to the extent that the Committee had determined that the Law Society bore the burden of proof on this issue, the Committee was not satisfied that the Law Society had proven that the comment was demonstrably untrue.

78. The Hearing Committee was satisfied based on the evidence of the Member that he had an honest belief that what he had said was true. Furthermore, the Committee was satisfied that there was evidence based upon which a reasonable person could reach such a conclusion. In reaching this conclusion, the Committee also took into consideration the Member's unique position to comment on the events in issue and the significance of the matter in terms of public interest and information.

79. Accordingly, the citation was dismissed.

80. The Hearing having proceeded in public, the public will have access to the Exhibits after personal information is removed from Exhibits 16.1 and 18.

Dated this 21st day of August, 2008.

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Vivian Stevenson, Q.C. Chair and Bencher

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Royal J. Nickerson, Q.C., Bencher

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Yvonne Stanford, Bencher