

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING  
THE CONDUCT OF KELLY STEWART  
A MEMBER OF THE LAW SOCIETY OF ALBERTA

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**REPORT OF THE HEARING COMMITTEE**

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[1] On July 17, 2007, a hearing committee comprised of Peter Michalyszyn, Q.C. (Chair), Carsten Jensen, Q.C., and Yvonne Stanford, convened at the Law Society offices in Calgary, Alberta to inquire into the conduct of Kelly Stewart. Ms. Stewart was represented by Graham Price, Q.C. The Law Society was represented by James Conley. Ms. Stewart was present throughout the hearing.

*Introduction*

[2] Ms. Stewart is a sole practitioner in Calgary since 2002, working in association with lawyers of considerable experience, carrying on for the most part a family law practice, but also performing real estate and simple corporate transactions, wills and estates, and the like.

[3] An agreed statement of facts including an admission of guilt was exhibited before the Panel. The Panel found the citation to have been made out. The Member was reprimanded and ordered to pay the actual costs of the hearing.

*Citations*

[4] The Member faced the following Citation:

It is alleged that you did breach a trust condition imposed upon you, and that such conduct is conduct deserving of sanction.

*Jurisdiction*

[5] Jurisdiction was established by entering as Exhibits the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Ms. Stewart accepted the jurisdiction and composition of the Panel.

*Private Hearing*

[6] No application was made to hold any portion of the hearing in private. However, in these Reasons and for purposes of any transcript, no reference is made to client names or identifying client information.

Facts

[7] The Member acted for a purchaser in a real estate transaction in the City of Calgary. The deal was to close April 28, 2006.

[8] Counsel for the vendor in the real estate transaction was one J.D.

[9] On March 29, 2006 J.D. provided the Member with a Transfer of Land on certain trust conditions. Amongst other things, the Member was to confirm to J.D. in writing, before submitting the transfer to Land Titles for registration, that she held a certain “cash difference” – here approximately \$70,000 -- in trust for the Vendor.

[10] On April 28, 2006, the Member wrote to J.D. confirming “...I hold the cash difference in trust”.

[11] On the same date, the Member submitted registration documents to Land Titles. At the time she did so, the Member *did not* have the cash difference in her trust account. The Member was entirely aware she did not hold the funds, both at the time she corresponded with J.D., and when she submitted registration documents to Land Titles.

[12] On May 5, 2006, J.D. inquired for the funds. At that time – for the first time – the Member revealed to J.D. she did not have the funds in her trust account.

[13] In fact, the funds were in *another* lawyer’s trust account. The Member had expected that by April 28, 2006 – the closing date of her client’s real estate purchase – the \$70,000 would be available from the other lawyer’s office. That other lawyer acted for the Member’s client’s husband. In unrelated proceedings, the Member’s client’s husband was to pay her \$70,000, being sale proceeds from an unrelated real estate transaction.

[14] Unfortunately, delays occurred in the husband’s real estate closing, which in turn bedeviled the wife’s, such that at the end of the day on April 28, 2006 the sum of \$70,000 in trust with the husband’s lawyer could not be released to the wife’s. Unable to comply with J.D.’s trust condition, yet the Member felt intense pressure to close the deal on time for her purchaser client – a close friend of the Member’s who was herself going through tough times – and as such the Member chose to breach the trust condition, submit for registration, and send the deceptive letter. It should be noted that no evidence was before the Panel that the Member’s client played any part in encouraging or condoning the Member’s conduct.

[15] It was obviously the Member’s hope that funds would arrive in *her* trust account before J.D. discovered the ruse. From April 28, 2006 to May 5, 2006, the Member inquired several times of the husband’s lawyer as to the funds. On May 5, 2006, the Member was told by the husband’s lawyer that funds may not be available till May 8 or 9, 2006. The same day, as noted J.D. called the Member inquiring as to the funds. That inquiry resulted in essentially a full confession by the Member of her breach of trust.

[16] As it turned out, later still on May 5, 2006 fortuitously the husband’s lawyer was able to release the \$70,000 to the Member, who promptly forwarded the funds, plus interest, to J.D.

[17] At no time before May 5, 2006 did the Member consider self-reporting herself to the Law Society on account of the breach of trust; nor during the same period did the Member speak with any colleague in her office.

[18] On May 8, 2006 J.D. reported these events to the Law Society.

[19] On February 13, 2007 the Member attended a Mandatory Conduct Advisory as directed by a panel of the Conduct Committee of the Law Society. The report of the Mandatory Conduct Advisory was exhibited before this Panel. A Conduct Committee panel considered the Mandatory Conduct Advisory report, then directed the within hearing.

### Decision

[20] Ms. Stewart did not contest the submission of counsel for the Law Society that on the agreed facts her conduct was conduct deserving of sanction. The Panel agreed, and as such found the evidence supported a conviction for the citation at paragraph 4 herein.

### Sanction

[21] Counsel for the Law Society urged the Panel to sanction the Member by way of a reprimand and payment of the actual costs of the hearing. Counsel referred to authorities involving similar facts in which in addition to a reprimand and costs, members have been fined up to \$1,000.

[22] Counsel for the Member urged the Panel to restrict sanction to a reprimand and costs.

[23] The following factors touching on the appropriate sanction were referred to by both counsel, and were considered relevant to the Panel:

- that the conduct was serious, involving not only the breach of trust referred to in the Citation itself, but also the aggravating factor of the letter of April 28, 2006. The letter was evidence of a conscious act of deception, an out-and-out lie; the deception remained until a week following, when the Member was contacted May 5, 2006 by J.D. directly;
- that no prejudice was caused the vendor;
- that the Member had no record;
- that it was unlikely the Member's misconduct would be repeated;
- that indeed it appeared the Member had begun to come to terms with the pressure she succumbed to in this case – in putting her client's own interest in a timely possession of property ahead of the Member's interest in the inviolability of trust conditions – by refusing to budge on trust obligations in subsequent transactions of a somewhat similar nature;
- that once directed to hearing, the Member urged that the matter be dealt with expeditiously and by way of a guilty plea;
- that before the matter was directed to a hearing, the Member participated in the Mandatory Conduct Advisory process, wherein she fully admitted the conduct complained of;
- that earlier, the Member acknowledged her misconduct in her initial dealings with the Law Society June 30, 2006;

- that the entire process had affected the Member significantly, such that she sought counseling through Kelly Luttmer & Associates;
- that the Member brought forth seven positive references in writing, all attesting to her good character, and that through counsel the Panel was informed the complainant JD continued to have files with the Member, and lacked no confidence in his dealings with her; and;
- that the Member maintained a strong supporting cast, particularly of lawyers in her office, on whom she could rely in future when ethical dilemmas arise.

[24] The Panel seriously contemplated a fine of up to \$1,000, and expressed concern that not to fine could send the wrong message – both to the Member and to the profession and the public – that a breach of trust is not a serious matter. The cases are compelling with regard to the sanctity of trust conditions, and the need to impose strict penalties for their breach. However, the Panel did not read the cases referred to it to require that fines be imposed in *all* cases of breached trust conditions. Nor was that the submission of the Law Society's counsel.

[25] The Panel concluded a fine was unnecessary to achieve specific deterrence, of course so far as the Member was concerned. As put in a note of her psychologist:

*In my professional experience, a complaint regarding one's actions to a professional body, is a significant stressor, especially when the actions are out of character for the professional involved. It is often an opportunity to reflect on values and practices, as well as ways to ensure one's practice is ethical, honorable, and above reproach. I believe this has been Ms. Stewart's experience.<sup>1</sup>*

[26] And the Panel was equally convinced that in all the circumstances the objectives of general deterrence, and of maintaining public confidence, would be met by the sanction of a reprimand upon Mr. Stewart, together with a requirement she pay the actual costs of the hearing.

[27] The Chair delivered the reprimand.

#### Time to pay

[28] The Member will have 60 days from the date she is informed of the actual costs of the hearing, to pay those costs, estimated at the time of the hearing at just under \$1,800. Mindful of s. 76 of the *Legal Profession Act*, the Member will remain active pending payment of costs within the prescribed time.

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<sup>1</sup> Exhibit 8 was a letter from a psychologist with Kelly Luttmer & Associates, together with a brief note from the Member's family physician as to the adverse physical effects of the stress on the Member's pre-existing multiple sclerosis.

Exhibits Order

[29] Except as noted herein, exhibits will be available for inspection upon request. Should a request be made, the names of individuals will be reduced to initials, in the interest of privacy. In the case of letters of reference at Exhibit 7, any identifying information of the referees will be blacked out. The contents of Exhibit 8 will be kept private.

Dated this \_\_\_\_ day of July, 2007.

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Peter Michalyshyn, Q.C., Chair

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Carsten Jensen, Q.C.

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Yvonne Stanford