IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
CHARLES HOTZEL, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

On April 18, 19 and 20, 2007, a Hearing Committee composed of Bradley G. Nemetz, Q.C., (Chair), Peter Michalyshyn, Q.C., and Brian Beresh, Q.C., convened at the Law Society offices in Calgary to inquire into the conduct of Charles Hotzel. Ms. Virginia May, Q.C., appeared for the member who was also present and Mr. Garner Groome appeared for the Law Society.

INTRODUCTION

[1] The member is charged with failing to ascertain who had authority to give instructions concerning funds wired to his trust account and failing to understand the trust conditions associated with the funds. The facts reveal that the member thought he was being retained by someone described as a "fiduciary" on behalf of the purchaser of an internet pharmacy ("fiduciary"). The "fiduciary" arranged for the Manitoba vendor to wire $1,000,000 U.S. to the member's Calgary trust account and then, once the funds were received, gave instructions that they immediately be forwarded on. The member was suspicious that the funds were tainted by illegality and called the Practice Advisor of the Law Society of Alberta, who advised that the member had no obligation to report the funds under the anti-money laundering legislation and suggested that the money be returned to the "client".

[2] In the circumstances the member was not prepared to act and gave the "fiduciary" two choices; provide the name of another lawyer who would act on the transaction, or the member would attempt to reverse the wire transfer, which, if it could be done, would return the funds the sender. The "fiduciary" chose the first option and gave the member the name of another lawyer. The bulk of the funds were forwarded to the new lawyer with a letter indicating that they were to be applied to the sale of the pharmacy. On instructions from the "fiduciary", the member held back the sum of $40,000 Canadian, which the member later paid to the "fiduciary", being instructed that this was the commission on the transaction of the "fiduciary". The member took no fees as he had done no legal work and had rejected the retainer.

[3] As it turned out, unbeknownst to the member, the owner of the funds was the victim of a fraud. The funds were transferred offshore.

[4] The Hearing Committee concluded that the charge was not made, that the funds were not forwarded to the lawyer on trust conditions, and that the lawyer's conduct did not constitute 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. Further, the member's counsel accepted the jurisdiction and composition of the panel.

OTHER PRELIMINARY MATTERS

[6] There were no other preliminary matters.

THE CITATION

[7] The member was charged with the following citation:

> 1. IT IS ALLEGED that you failed to take steps to clarify and ascertain who had authority to give instructions pertaining to trust funds, and failed to understand trust conditions pertaining to the funds, and thereby breached the rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.

FACTS

Evidence of Charles Hotzel

[8] Mr. Hotzel is a single practitioner with a full-time associate and has carried on a general practice in Calgary for approximately 25 years. In 2004 his practice consisted of real estate, corporate and commercial, and wills and estates. He had volunteered for approximately 25 years at Calgary Legal Guidance and had worked with the elderly at the Kirby Centre.

[9] In late March 2004 Mr. W.L., for whom the member had acted from time to time, called the member and asked if the member would be prepared to act on the sale of an internet pharmacy. Mr. Hotzel agreed to act.

[10] Mr. L. then forwarded to Mr. Hotzel an email that Mr. L. had received from the purchaser of the pharmacy. That email is reproduced below.

> From: [email address removed]
> To [email address removed]

> Sent Wednesday, March 31 2004 7:43 PM
> Subject"fiduciary"
>
> Dear Mr. L.,
>
> We are completing the purchase of Mr. K.C.'s mail order pharmacy business, through our Mail Order Prescription arm, M….
>
> To satisfy our interpretations of his unaudited statements and future projections, he is depositing $1,000,000 USD with you as fiduciary.
>
> Please accept this as your advice to accept these funds on our behalf
>
> F.C.,
> Director Corporate Finance

[11] Mr. Hotzel knew nothing of Mr. F.C., or M…. He knew Mr. L.. Mr. L. was a client of Mr. Richard DeVries, who had formerly had an office in the same building as Mr. Hotzel. Mr. L. had been referred to Mr. Hotzel by Mr. DeVries in 1996 or 1997 and Mr. Hotzel had dealt with Mr. L. thereafter from time to time. On one occasion Mr. Hotzel prepared security documentation for an investment. The investors were eventually repaid. On another occasion a client lost money on an investment with Mr. L..

[12] Mr. Hotzel received the above email on April 2, 2004 and supplied Mr. L. with particulars of his trust account as Mr. L. had indicated that he would like to have the $1,000,000 US wired to Mr. Hotzel's account.

[13] On April 6, 2004 $817,174.43 Canadian was deposited by wire transfer to Mr. Hotzel's trust account and on April 8, 2004 a further $488,161.98 Canadian was wired to his account. These sums represented the $1,000,000 US less currency exchange fees and wire fees.

[14] Mr. Hotzel's assistant opened a file under the client name "M…", the matter being "sale mail order pharmacy" and prepared two trust receipts describing the funds as being received from "K.C.".

[15] Mr. L. called Mr. Hotzel to confirm that the funds had arrived and then asked Mr. Hotzel to have the funds wired to a bank in the Bahamas.

[16] Mr. Hotzel was reluctant to wire the funds offshore, as he was fearful that the funds might be part of an illegal money laundering scheme. On April 8, 2004 he called Mr. McLaughlin, Practice Advisor of the Law Society of Alberta, to discuss the matter.

[17] Neither Mr. McLaughlin nor Mr. Hotzel had any detailed recollection of the telephone conversation. Mr. McLaughlin made a note of the call. Mr. McLaughlin did not testify before us as he had indicated that he could recall nothing of the call beyond what he wrote down. What he noted was this:

> "April 08, 2004. Client deposited $1 million for purchase of an internet pharmacy. New client wants the $$ transferred to an offshore bank account. No evidence that there actually is a transaction. Suspicious transaction. No obligation to report to FINTRAC but must not participate in money laundering. Safest course is to return the money to the client."

[18] Mr. Hotzel stated that, while he did not have a specific recollection of the discussion with Mr. McLaughlin, he would have told Mr. McLaughlin about the state of affairs as he knew them at the time. This included the fact that he had not received any documents on the proposed sale but had received the money in advance of documents, an unusual event. He would have advised that he suspected that he was being used to launder money. He said that he was seeking advice from the Practice Advisor and that his suspicion had been heightened by the fact that in recent publications to the profession, the Law Society has pointed out the fact that money laundering through lawyers' trust accounts was occurring and that lawyers needed to be alert to improper use of their trust accounts. Other than the brief telephone call with Mr.Hotzel, Mr.McLaughlin neither made further inquiries nor did he request a copy of any documents received by the member.

[19] Mr. Hotzel said that Mr. McLaughlin's advice that he did not have to report the matter to FINTRAC was useful but Mr. Hotzel did not find the balance of the advice, to the return of the money to the client, to be particularly helpful.

[20] The member decided that he did not want to be involved in the matter and advised Mr. L. (the only individual with whom he had had any contact) that he was not prepared to act and that he was not prepared to send the money offshore. He gave Mr. L. two choices: he would send the money on to another lawyer in Alberta who was prepared to act in respect of the matter, or he would attempt to reverse the wire transfer and return the funds to the sender.

[21] At this point the only thing that the member knew about the source of the funds was that they had been sent by a "Mr. K.C." after Mr. Hotzel had given Mr. L. the particulars of his

trust account. From the email he further knew that $1,000,000 US was coming from a "Mr. K.C.", who was supposedly the vendor of an internet pharmacy.

[22] Mr. L. advised that Mr. Richard DeVries, a lawyer in Calgary whom Mr. Hotzel knew, would handle the transaction. Mr. L. asked Mr. Hotzel to forward the funds, with the exception of $40,000, which he said was to be held back constituting fees in respect of the transaction to Mr. DeVries.

[23] On April 14, 2004 Mr. Hotzel forwarded $1,265,366.41 Cdn. to Mr. DeVries. The letter forwarding the funds read, in its body, as follows:

> Re: M… Purchase
>
> I attach hereto a cheque in the value $1,265,366.41CDN which was originally forwarded to me as $1 million US. I am directed to forward to your office in connection with the above noted transaction to your office and I understand that Richard will deal with the transaction and transfer of funds involved. I understand that the funds are in trust for I….

[24] Mr. Hotzel has been given the name of I…. by Mr. L..

[25] Approximately a month later, on May 10, 2004, Mr. Hotzel issued a cheque for $40,000 to Mr. L.'s company, L…, on Mr. L.'s instructions.

[26] Mr. Hotzel kept no funds. He did not issue any statements of accounts for legal fees and did not speak to anyone other than Mr. L. and Mr. McLaughlin regarding the file. Nearly half a year later, in August or September of 2004, Mr. K.C. called Mr. Hotzel asking what had happened to his money. Mr. Hotzel told him what had happened. This was Mr. Hotzel's only conversation with Mr. C..

[27] A year and a half after the funds were sent to Mr. Hotzel, and over a year after the only contact between Mr. Hotzel and Mr. C. Mr. Hotzel received a letter dated November 25, 2005 from a Ms. Avaline Thrush of the Selby Law Office in Manitou, Manitoba. Ms. Thrush was Mr. C.'s lawyer and she was writing to enquire about the $1,000,000 US. In that letter she asserted that "These funds were not to be released for this investment/trading purpose until certain conditions precedent had been met. Specifically, an Irrevocable Standby Letter of Credit from Citibank to Mr. C. was to have been issued".

[28] Mr. Hotzel responded to that letter explaining the situation from his perspective and denied that he received the funds subject to any condition concerning Letters of Credit or any security for the funds. On November 30, 2005 Ms. Thrush reported Mr. Hotzel to the Law Society of Alberta's Discipline and Complaints Department.

The Evidence of K.C.

[29] Mr. C. became a pharmacist in 1991 and by 2004 he had acquired a number of pharmacies in rural Manitoba and had also been operating an internet pharmacy business. By 2004 the drug companies were clamping down on internet pharmacies, making it difficult for pharmacists who had Canadian retail pharmacies to obtain product if the owners were simultaneously selling pharmaceuticals over the internet to US customers.

[30] Mr. C. decided to sell his internet pharmacy and was put in touch with some businessmen in Kelowna, British Columbia, by a drug salesman with whom he dealt in his retail pharmacy business. Mr. C. traveled to Kelowna and met the businessmen. The people he met included a Mr. M.S., Mr. R.F., Mr. G.J., and Mr. F.C..

[31] Mr. C. was advised that they were interested in acquiring his internet pharmacy. They were also interested in helping him invest his money offshore in a "private capital enhancement programme" which was marketed under the T….

[32] Mr. C. left Kelowna interested both in the investment opportunity and in the sale of the internet business. He later agreed to and sold his internet business for $830,000. He also invested $1,000,000 US, proceeds of US drug sales, in the investment fund.

[33] Mr. C. did not meet Mr. L. but he understood that Mr. L. was a "fiduciary" of the Kelowna businessmen, "who would look after Mr. C.'s money and ensure all the paper work was in place before the funds were released".

[34] At this time Mr. C.'s marriage was in some difficulty and he eventually separated from his wife with an effective date for the separation being May 1, 2004.

[35] Mr. C. proceeded with the sale of his internet pharmacy. It does not appear that he used a lawyer with respect to that. He received $200,000 in mid-April and a further $230,000 for inventory in May or June of 2004. Payments were then to be made over a period of 4 months. These were not made on time. The pharmaceutical representative who had

introduced Mr. C. to the businessmen in Kelowna took over the internet business and eventually paid Mr. C. the balance of the $830,000 purchase price.

[36] Mr. C. acknowledged that, given the timing of his forwarding the $1,000,000 and the timing of his payments that the businessmen in Kelowna may have used his own money to buy his internet pharmacy business.

[37] Mr. C. indicated to the businessmen in Kelowna that he was interested in investing $1,000,000 US offshore with them. The people he spoke to were generally either Mr. C. or Mr. J.. He stated that he was not prepared to advance the $1,000,000 until they had provided him with a Standby Letter of Credit that would guarantee him 106% of his money back in 12 months. They advised him that before they could get the Standby Letter of Credit they needed to be sure that he had the money necessary to make the investment.

[38] Mr. C. did not use his Manitoba lawyers in connection with the investment, despite the fact that they had been retained and they were dealing with his separation and divorce. The obvious inference was that he was seeking to move $1,000,000 offshore to make it difficult for his wife to trace and recover the funds or her portion thereof. While Mr. C. said that he had consulted with his wife on the investment and that it was made with her consent, we find this evidence incredible. Mrs. C. was not called to testify before us.

[39] We have concluded that Mr. C. was interested in moving the $1,000,000 offshore so as to make it more difficult for his wife to obtain those funds and he did not consult with or use his law firm with respect to the $1,000,000 because he did not want the law firm that was handling his matrimonial matters to know he was moving funds offshore.

[40] Mr. C. was not prepared to advance the money until he received a guarantee and the Standby Letter of Credit. He was given a promissory note dated April 2, 2004, signed by G.J. and witnessed by F.C., which provided for the repayment of the $1,000,000 US together with 6% interest due April 2, 2005. After receiving this promissory note, on the advice of Mr. J., Mr. C. forwarded the $1,000,000 to Mr. Hotzel's account rather than sending it to Mr. L.. He then waited for the Standby Letter of Credit. Upon forwarding the funds to Mr. Hotzel, Mr. C. did not communicate with him nor did he directly or indirectly provide instructions to him. He did not consider Mr. Hotzel to be his lawyer.

[41] The Standby Letter of Credit was not obtained. Mr. C.'s funds were moved to Mr. DeVries' account and then on to the Horizon Bank in the Bahamas. Initially Mr. C. was told by Mr. J. that the Standby Letter of Credit was delayed, later Mr. C. was advised that the Standby Letter of Credit from Citibank could not be obtained and that the monies that he had forwarded were tied up at the Horizon Bank whose accounts had been frozen.

[42] Eventually Mr. C. was told that his funds had been distributed among the Kelowna businessmen and he has been unable to recover them although he has not initiated any complaints to the police, nor has he initiated any civil proceedings.

[43] He understood that Mr. S. received approximately $600,000, that Mr. J. and a company named P… received somewhere between $300,000 and $340,000 and that Mr. L. also obtained some money in the transaction.

[44] Mr. C. said that he did not speak with Mr. L. until he began asking where his money was and where the Standby Letter of Credit was. Basically once the funds were offshore and were distributed Mr. C. got the run around from Messrs. J., C. and L..

[45] The Kelowna businessmen are under investigation by the RCMP and Mr. L. gave his evidence under the protection of the Canada and the Alberta Evidence Act and the Charter as he is also under investigation in connection with this fraudulent scheme.

Other Evidence

[46] Mr. L. testified before us. Counsel for the Law Society in final submissions took the position that where the evidence of Mr. L. differed from that of Mr. Hotzel that we ought to accept the evidence of Mr. Hotzel. We agree with this submission. Without finding as a fact, it appears to us that Mr. L. had been a knowing participant in the fraudulent scheme.

[47] An employee of the Toronto-Dominion Bank also testified on the issue of whether or not the wire transfer could have been reversed. The evidence in that regard was not conclusive. The Committee does not doubt that the banks would be able to trace the money back to its source and might be able to reverse the transaction, but whether or not they would be prepared to do so in circumstances that suggested money laundering is an open question.

[48] However, Mr. Hotzel's behaviour is to be judged on the basis that he made no inquiries and made no attempts to reverse the transaction.

[49] Ms. Tracy Gillis, Mr. Hotzel's legal assistant for 13 years, testified about the manner in which the file was opened, the funds received and disbursed, and the busy nature of Mr. Hotzel's practice that could involve $30,000,000 or more going through the trust account on a monthly basis.

DISCUSSION - LEGAL ANALYSIS

[50] At the outset the Committee notes that Mr. C. was never a client of Mr. Hotzel, that Mr. C. never intended that Mr. Hotzel be his lawyer, and that Mr. Hotzel never contemplated that Mr. C. was or would be his client.

[51] Mr. C. deliberately chose not to retain a lawyer with respect to his $1,000,000 investment with the Kelowna businessmen. He consciously decided not to use the assistance of his lawyer in Manitoba. He felt that he could look after himself. As it transpired, he could not. He did not attempt to speak with Mr. Hotzel until months after he forwarded the funds to Mr. Hotzel and long after he knew that the funds had gone to the Bahamas. It was only a year and a half later that he attempted to affix Mr. Hotzel with responsibility for his own failure to look after himself. Mr. C. was willfully blind as to the route the funds where to be moved from Canada to an offshore location.

[52] As far as Mr. Hotzel knew there was a sale pending of an internet pharmacy. He had been contacted by an individual described by the purchaser as a ""fiduciary"" who was to hold $1,000,000 US which was to be paid by the vendor with respect to outstanding financial issues and projections.

[53] The email did not make much sense, but Mr. Hotzel expected that it would become clear when he received documents and that the documents would explain the transaction, the parties, and how the $1,000,000 was to be held and applied. The funds that Mr. Hotzel received, insofar as Mr. Hotzel was aware, were received <u>on</u> the instructions and directions of the "fiduciary", Mr. L., and were directed by that "fiduciary" into Mr. Hotzel's account.

[54] When the funds were wired they were not accompanied by any instructions from Mr. C. and indeed did not even provide particulars of who Mr. C. was and how he could be reached. The fact that someone wires funds to a lawyer's account does not make the funds subject to a trust, as will be described in more detail below.

[55] Pausing at this point, the Committee notes that if anyone owed fiduciary or trust duties to the owner of the funds, insofar as Mr. Hotzel was aware, it was Mr. L. who was holding the funds in a fiduciary capacity in respect of the proposed sales transaction. Mr. Hotzel's obligations were to Mr. L..

[56] When Mr. Hotzel did not receive documents, but rather received instructions from Mr. L. to transfer the funds offshore, he became concerned and was not prepared to follow these instructions.

[57] At this point, if Mr. Hotzel had a client it was likely Mr. L.. Mr. L. might have been the client as principal or Mr. L. might have been representing the purchaser of the pharmacy as that purchaser's agent. Mr. L. was not, on the basis of anything known to Mr. Hotzel, the agent for the vendor. Mr. Hotzel was reluctant to follow the instructions of Mr. L. given their unusual nature and the absence of proper documentation and instructions concerning the commercial transaction.

[58] Mr. Hotzel quite properly called the Practice Advisor. He had a number of concerns. He thought that he and his trust account were being used to launder money. He thought that he might have an obligation to report the matter to authorities. He did not wish to transfer the funds offshore. He was concerned that if he continued to hold in excess of $1,000,000 Canadian that someone would be expecting interest on the money or expect the money to be put to use and that they might be looking to him for failing to follow instructions. He noted that interest would probably run at $3,000 a day. He wanted to resolve these issued promptly to minimize his exposure.

[59] After speaking with Mr. McLaughlin, Mr. Hotzel decided that he did not wish to accept a retainer with respect to the matter. Mr. Hotzel was entitled to decide not to act. He then had the difficulty of what to do with the money. He was prepared to send it on to a lawyer who would be prepared to act on the transaction. There is nothing improper about a lawyer taking this course of action. The responsibility of properly dealing with the funds, or taking a risk with respect to the funds, was through this mechanism passed on to the new lawyer. In doing this, Mr. Hotzel's conduct does not amount to conduct deserving sanction.

[60] Mr. Hotzel sent the money to Mr. DeVries indicating that it was forwarded in connection with the sale of the pharmacy and was to be dealt with in that transaction. If Mr.

DeVries did not deal with it appropriately, that is not Mr. Hotzel's responsibility. Mr. Hotzel is not liable to be sanctioned for an error of Mr. DeVries. Passing a problem along to a new lawyer rather than solving it oneself does not constitute improper conduct.

[61] The Law Society suggested that Mr. Hotzel owed a duty to Mr. C. to return the funds to him. The Committee does not agree. Mr. L. was the "fiduciary" with respect to the funds. This implies that he was in charge of the funds and owed duties to others with respect to the funds. To have sent the funds back to Mr. C. might well have placed Mr. Hotzel in a position of breaching his duties concerning the holding of the funds. It would certainly have created a liability for Mr. L. and in turn might have created a claim by Mr. L. against Mr. Hotzel for putting Mr. L. offside his "fiduciary" duties.

[62] Mr. McLaughlin's suggestion that the funds be "returned to the client" also presented difficulties. Was Mr. L., the "fiduciary" and the only person with whom Mr. Hotzel had any contact, the client? If so, Mr. Hotzel could have provided the funds to Mr. L. or paid the funds as directed by Mr. L.. Mr. Hotzel did not feel comfortable following Mr. L.'s instructions to move the funds offshore.

[63] To return the funds to Mr. C. raised a number of issues. First, doing so was contrary to Mr. L.'s instructions and possibly contrary to the terms upon which Mr. L. had obtained the funds. Second, Mr. Hotzel did not know who Mr. C. was or how to get in contact with him. The bank would likely not reveal Mr. C.'s personal information and the bank might or might not have co-operated with Mr. Hotzel in attempting to reverse the wire. Mr. Hotzel feared that the money was being laundered. This implies that Mr. C. was part of a money laundering scheme and was part of the scheme to move the funds offshore. Returning the funds to one of the launderers does not seem to be an immediate solution to the problem faced by Mr. Hotzel. Mr. Hotzel had no way of knowing, and indeed did not suspect, that Mr. C. wanted anything other than to have the funds sent offshore. He had no reason to believe that Mr. C. expected anything from Mr. Hotzel concerning the funds. How could he when Mr. C. did not provide Mr. Hotzel with any information on how he could be contacted? If anything, Mr. Hotzel had the right to expect that if Mr. C. intended to impose any obligations or duties on him with respect to the funds that he would have contacted Mr. Hotzel or that the funds would have been sent on some type of condition.

[64] The case law provides some assistance to us in evaluating Mr. Hotzel's responsibility to Mr. C..

[65] The Alberta Court of Appeal in the case of *Luckiw Holdings (1980) Ltd. v. Murphy* (1986) 49 Alta. L.R. (2d) 200, dealt with an investor giving a cheque to a promoter. The investor's cheque was made payable to a lawyer "in trust". The investor told the promoter that the funds were not to be released until satisfactory security was in place. The promoter deposited the cheque with the lawyer, who was the promoter's lawyer and did not disclose to the lawyer the conditions under which the cheque had been given to him. Over time the promoter instructed the disbursement of the funds and all funds were eventually lost. The Alberta Court of Appeal held that the lawyer did not owe trust duties to the investor and noted that by giving the cheque to the promoter, the investor "clothed him (the promoter) with apparent or ostensible authority over the disposition of the funds" and that "such ostensible authority is a clear answer to the Respondent's claim against the Appellant (the lawyer)".

[66] The *Luckiw Holdings* case was cited in a disciplinary decision that counsel for the Law Society placed before this Committee, *The Law Society of British Columbia v. Hops* [1999] LSBC 29.

[67] The *Hops* case involved a fraudulent scheme similar to that which confronted Mr. Hotzel. As with Mr. Hotzel, funds from non-clients were deposited to Mr. Hops' trust account. The B.C. Hearing Committee noted, at paragraph 80, that:

> Transactions looking like trusts may be merely contractual; trust duties may arise from situations looking contractual; the reconciliation of the apparent conflict in the cases lies in the actual or imputed knowledge of the solicitor in the particular case.

It went on to note, at paragraph 82,

> The whole edifice the Law Society seeks to construct over Counts 1 and 2 is founded on the "Payment Details" on the incoming wire transfer forms. In our judgment, especially bearing in mind the burden of proof and standard of proof we have previously described, Mr. Hops did not have knowledge sufficient to acquaint him with specific objects sufficient to create a trust. Rather, funds from a contractual matter on which he was not engaged by either party, flowed through his trust account. There is simply no gainsaying Mr. Hops' explanation that he believed these were earnest monies payable to his client, Mr. Lumley Jones. Mr. Jones had no reason to believe Mr. Bock or Barlind Services Ltd. required anything of him other than the transmission of the funds to Mr. Jones. … It was some 2 years and 2 months after remitting funds that Barlind Services Ltd. felt aggrieved enough to write to Mr. Hops. It is not a reasonable view of the evidence that either Mr. Bock or Barlind Services Ltd. expected Mr. Hops to retain the money in his trust account; indeed, they both expected that he would pay it over to the agent of the bonding company so that bonds would issue in

> favour of Euro Nor-Am. The real complaint of both parties is not that funds were paid out; it is over some obligation both parties seek to impose on Mr. Hops to verify the worth of the transaction. That obligation could only be imposed by retaining Mr. Hops and that was not done. In short, Mr. Hops is simply not fixed with sufficient knowledge to make the funds a trust, or him a trustee, and we can not find him to have professionally misconducted himself as alleged in Counts 1 and 2. Those counts are dismissed.

[68] In our view the Law Society of Alberta ought not to impose upon Mr. Hotzel a duty to search out Mr. C. and try to find out if he had forwarded the funds in trust, what any trust conditions might have been, and then try to reconcile those trust conditions with the obligation that Mr. L. had with respect to the funds.

[69] In the British Columbia case Mr. Hops was acquitted on the breach of trust charges but convicted on a charge of failing to warn unrepresented third parties that he was not acting for them. The conviction on failing to warn was modified on appeal and the penalty was substantially reduced. However, the facts concerning Mr. Hops' knowledge of the investors, as well as the nature of the charges, distinguish Mr. Hops' conviction for failure to warn from the situation facing Mr. Hotzel.

[70] In the end we are satisfied that the funds were not forwarded on trust conditions which attach to Mr. Hotzel. Further, we find that Mr. Hotzel, in forwarding the bulk of the funds to Mr. DeVries to be applied to the sale, took a course of action that was open to him. In following Mr. L.'s instructions with respect to the $40,000 fee, Mr. Hotzel was acting on Mr. L.'s apparent authority and, in the circumstances, so acting does not rise to the level of behaviour deserving of sanction.

[71] Mr. Hotzel feared that he was being used to launder money. Although he had a short time frame in which to act, with hindsight, other steps may have been taken by him which may have avoided the complaint as to his actions, but a trust cannot be created by the mere wiring of money into a lawyer's trust account. Further, the provision of funds with no strings attached and no information, even the basic information concerning how to contact the person who is sending the funds, does not impose upon a lawyer an obligation to start making inquiries to determine who they belonged to, whether or not the owner of the funds intended to send under trust conditions and if so what those trust conditions are. Where would such inquiries end? Does the lawyer then need to determine whether or not the trust

conditions that are now being suggested by the owner of the funds are consistent with the obligations owed, with respect to the funds, to others involved in the transaction?

[72] Counsel for the Law Society also suggested that if the Committee found that the citation was not made out, that the Committee could direct other citations arising out of the facts. This Committee declines to do so and further is of the opinion that such a power should be used sparingly. In particular, it is uncomfortable using the power to direct additional citations in circumstances where the material facts known to the Law Society at the time the citations were drawn up have not changed. The Committee would be more comfortable directing charges in circumstances where entirely new facts, unconnected with the citations came to light during the course of the hearing, revealed other potentially sanctionable conduct. That is not the case here.

CONCLUSION

[73] The Hearing Committee finds, based upon the law cited herein, the evidence accepted by us as true does not support the citation. Accordingly, the citation is dismissed.

[74] No notice to the profession is required.

Dated this10th Day of May, 2007.

_____
Bradley G. Nemetz, Q.C. (Chair)

_____
Peter Michalyshyn, Q.C.

_____
Brian Beresh, Q.C

IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
CHARLES HOTZEL, A MEMBER OF THE LAW SOCIETY OF ALBERTA

ADDENDUM TO THE REPORT OF THE HEARING COMMITTEE

On April 18, 19 and 20, 2007, a Hearing Committee composed of Bradley G. Nemetz, Q.C., (Chair), Peter Michalyshyn, Q.C., and Brian Beresh, Q.C., convened at the Law Society offices in Calgary to inquire into the conduct of Charles Hotzel. Ms. Virginia May, Q.C., appeared for the member who was also present and Mr. Garner Groome appeared for the Law Society.

Subsequent to the issuance of the written reasons in this matter in May 2007, Mr. Garner Groome, counsel for the Law Society, with the consent of Ms. Virginia May, counsel for the Member, sought the following orders with respect to the hearing:

1. Any client names and identifying information be redacted, including the Hearing Committee Report, transcript and exhibits.

2. Any bank account numbers be redacted from the transcripts and exhibits.

3. Reference to third party investors be redacted from Exhibit 28 and the transcripts.

4. Personal addresses be redacted from the Affidavits of Service in Exhibit 5.

The Hearing Committee agreed with the request and makes the four orders requested regarding the material to be released to the public.

Dated at the City of Calgary, Province of Alberta this 19th Day of June, 2007.

_____
Bradley G. Nemetz, Q.C.
Chair for the Committee