

IN THE MATTER OF THE LEGAL *PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF **ROBERT
BURGENER**, A MEMBER OF THE LAW SOCIETY OF ALBERTA

**REASONS FOR DECISION OF ROBERT
BURGENER HEARING JUNE 26 and 27, 2006**

On June 26-27, 2006, a hearing committee comprised of Peter Michalyszyn, Q.C. (Chair), Vivian Stevenson, Q.C., and Wilf Willier convened at the Law Society offices in Edmonton, Alberta to inquire into the conduct of Robert Burgener ("The Member"). The Member was represented by Robert Gillespie. The Law Society was represented by Lindsay MacDonald, Q.C.. The Member was present throughout the hearing.

JURISDICTION AND PRELIMINARY MATTERS

Jurisdiction was established by Exhibits 1-4. At the outset of the Hearing, an originally appointed Member, Michelle Crighton, Q.C., was substituted by Ms. Stevenson owing to the Member's expression of concern for a reasonable apprehension of bias regarding Ms. Crighton. That aside, no objection was made to the composition of the panel. No private hearing application was made and as such the Hearing proceeded in public.

CITATIONS

The Member faced 1 citation as set out in Exhibit 2, as follows.

1. IT IS ALLEGED that you failed to be candid with the Law Society of Alberta in your responses, particularly, in denying you were present and in denying you overheard a third party make improper representations as to the third party's identity, and thereby breached Chapter 3, Rule 3 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

EVIDENCE

A binder of Exhibits marked 1 - 29 was entered by consent. A variety of other exhibits were entered during the hearing. The Hearing Committee heard testimony of D.D.P., the Member, and J.M.

Evidence of D.P.

On or about Thursday, November 7, 2002 the Member and M. attended the C. G. on Calgary Trail in Edmonton. The restaurant was sparsely populated and quiet. The two sat in a booth in the lounge near the door. They were waited upon after a couple of minutes by a server, D.P.

D.P. testified the Member and M. entered the restaurant together. They were dressed similarly, in golf shirts, without coats. It was near the beginning of her shift which would have started between 4:30 - 5:00 p.m. She had never met the two before.

D.P. asked the two if they wanted a drink. Rather than order, she was asked if a Mr. T. was present in the lounge. She responded by stating no, they had just missed T. She then asked if she could let T. know who stopped by. One of the men, M., responded that yes, tell T. that J. F. or F. was here. There was some mention of 'securities'. A note was written out with the visitor's name. Ms. D.P. placed the note in her pouch.

Although earlier in her evidence D.P. was uncertain which of the two initially asked for R.T., later in her testimony she stated she had no recollection of the second, taller man saying anything at all. She described the overall conversation as "nondescript". She focused on the blond man as he was doing most of the talking.

D.P. described M. as blond-haired, shorter than his companion, and with a cherubic face. The companion, the Member, was described as somewhat taller, with brown hair graying on the edges.

D.P. knew T. as he was a regular at C.G. She also knew him to be involved in a publicly-traded company and thus to her the reference to 'securities' made sense. She was intrigued by the exchange with the two men. She believed it would be good for a story to tell when she next saw T.

D.P. could not say if the two addressed her as "we are looking for" versus "I am looking for". Nevertheless, she had the "impression" they were both there looking for the same person, R. T.

The two men sat in a horseshoe-shaped booth. They were about 3 1/2 feet apart from one another. The Member was to her left, M. to her right. She stood between them. She had no difficulty hearing and taking part in the conversation with M. She noted the Member to be looking straight ahead, as though at M. She could say nothing with regard to the Member's actual awareness of the conversation.

The two left shortly after D.P. advised T. was not present. They were in the restaurant not more than 10 minutes.

D.P. was uncertain just when T. next attended the restaurant. It may have been the next day, it may have been a week later. In any case, on his next visit she approached him with information of the two men looking for him, one of whom identified himself as F. or F. She gave T. the message which was still in her apron. (D.P. had no idea what became of the message she handed to T.) T. immediately responded by asking her what the two looked like. Before she could answer, he stated "oh wait, let me guess", then proceeded to describe the two men. D.P. confirmed T.'s description. T. told her he knew the men. He told her he knew neither of them was J.F. He told her both were trying to create problems for him.

Later that same evening, T. was still in the restaurant in the company of others when T. brought to D.P.'s attention the presence of the Member and J.M. T. asked D.P. to confirm they were the two she had seen earlier. She confirmed they were. (In the course of the Hearing, it was admitted that the two men identified by D.P. on the first occasion were the same two men she identified on the second occasion.)

Exhibit 9(1) was D.P.'s typed statement of January 20, 2003. With regard to the statement, she testified that T. stated he intended to do something about what T. alleged was impersonation. He told her he may need her to sign a statement. She agreed to do so. She then repeated to T.

what occurred. Mr. T. typed up a draft statement. D.P. made some changes, then signed off on a final version being dated January 20, 2003.

Evidence of the Member

The Member testified he recalled none of the events in question.

That said, he did not dispute he may have been with M., his long time friend and client, on the occasion identified by D.P. As noted, it was admitted that he was in the C.G. on a second occasion, also with M.

The Member was first put on notice of T.'s complaint in April 4, 2003 correspondence from Complaints Officer Richard Hilborn, Q.C. It appears that attached to Hilborn's correspondence was a series of letters from T. to the Law Society dated November 11 and 13, 2002, a second November 13, 2002, then April 3, 2003 attaching the January 20, 2003 D.P. statement.

The Member replied April 8, 2003. He professed some inability to understand T.'s particular complaint, but did distill that T. was complaining about comments he alleged were made by M. to an employee of the C.G. Nothing more was said of the alleged incident. The balance of the Member's reply deals with other issues, particularly T.'s *bona fides*.

Hilborn replied to the Member's April 8, 2003 letter by seeking the Member's specific reply to the allegation that he was present when M. allegedly impersonated another individual.

The Member replied May 1, 2003. His reply was unequivocal: "I have not been present when, nor have overheard, Mr. M. make any representations to anyone as alleged in the complaints made by Mr. T."

In his evidence before the Hearing Committee, the Member was somewhat less unequivocal, testifying that he could not recall being present or overhearing the comments attributed to Mr. M.

As the complaint continued to unfold, and as further allegations were made against him, the Member maintained the denial originally set out in his May 1, 2003 letter to the Law Society.

Evidence of M.

M. testified that before being approached by the Law Society almost two years after the alleged November 7, 2002 incident, he had no notice of the matters in issue other than the Member's advice that the Law Society wished to speak with him about Mr. T. and the C.G.

Nevertheless, M. had a vivid and detailed recollection of the first occasion he and the Member were in the C.G.

M. testified that on November 7, 2002 he arrived in Edmonton from Calgary intending to meet the Member at the C.G. It was around supper time. The sun had set and the temperature was below freezing. He was dressed formally in jacket and tie.

M. cruised the restaurant parking lot looking for the Member's vehicle. Not seeing it, he entered the restaurant lounge. It was quiet. He sat at a booth to the right of the entrance. He had a glass of water while waiting for the Member. He had a brief conversation with the server, presumably D.P.

Not much later, the Member entered the lounge. The two decided not to stay. Before leaving the Member excused himself to use the washroom. M. testified it was at *that* time - the Member having absented himself - that he asked D.P. to tell R.T. that J.F. was looking for him. M. denied he identified himself as J.F. He denied writing a note. He stated the conversation with D.P. was the one and only time he said words to the effect 'J.F. was looking for T.'.

M. acknowledged his comment was meant to needle T. as he believed the reference to J. F., an investigator with the A.S.C., would be a sore point with T. M. made no secret of his hostility toward Mr. T., then or now. He admitted to "having my own agenda" with T.

Exhibited before the Hearing Committee (#34) was M.'s recorded statement to the Law Society. The statement was not entered for the truth of its contents, but rather for impeachment purposes. In some respects the statement is distinctly at odds with M.'s testimony. For example, in the statement M. says he made the J.F. remark before the Member even arrived at the lounge. He stated the Member came in some 5 - 10 minutes later. He refers to having a drink at the bar. On two occasions in the statement he refers to "we" entering the lounge.

M. testified he had reviewed the statement before giving evidence. He testified everything in the statement was true.

ARGUMENT

Counsel for the Law Society says the Member failed to be candid in his May 1, 2003 letter in which he denied unequivocally any awareness of M.'s alleged impersonation. Counsel urged the Hearing Committee to accept the evidence of D.P. over M. that the Member was present when M. made the alleged remark, and to infer from all the circumstances that the Member must have heard the alleged remark.

Counsel for the Law Society further urged the Hearing Committee to draw an inference against the Member as a result of his initial reply of April 8, 2003 to the Law Society wherein the Member denied he could distill a complaint from Mr. T.'s "letters".

Counsel for the Member argued the Member's responses to the Law Society were appropriate and candid, particularly in view of the alleged uncertainty of T.'s complaint. Counsel urged the Hearing Committee to reject the evidence of D.P. over that of M., and of course to accept the Member's evidence that he had no recollection of the alleged remark.

DECISION

At the close of the Law Society's case, counsel for the Member applied for a non-suit on the basis of a lack of evidence. After submissions, the Hearing Committee unanimously rejected the application on the basis that some evidence existed from which an inference could be made the Member was less than candid in his responses to the Law Society in respect of these matters.

Having heard all the evidence and having heard argument including submissions as to the appropriate test, the Hearing Committee is unanimous that the citation against the Member should be dismissed.

The test is proof on a balance of probabilities, but to a higher degree given the law society's allegation of deceit: *Ringrose v. College of Physician and Surgeons of Alberta*, [1978] 2 W.W.R. 534 (Alta. C.A.); *Law Society of Alberta v. Estrin* (1992), 4 L. R. (3r) 373 (C.A.).

The Hearing Committee is unanimous that the Member knew or ought to have known by the Law Society's initial letter of April 4, 2003 what conduct was being complained of. As such, the Member's April 8, 2003 reply could have been more responsive. However, the Hearing Committee draws no inference adverse to the Member as a result of his April 8, 2003 letter, particularly in light of the fact that upon the law society's further request of April 30, 2003, on May 1, 2003 the Member unequivocally addressed the complaint.

The Hearing Committee is unanimous that insufficient evidence exists that the Member lied in his May 1, 2003 response, or in his subsequent avowals of that response.

The Hearing Committee does not rely on M.'s evidence to reach its conclusion. Indeed, where the evidence of M. conflicts with that of D.P., the Hearing Committee prefers the latter.

D.P.'s evidence was not perfect. For example, there was some uncertainty with regard to whether in fact she took a note of the name of Mr. F., put the note in her apron, then days later brought the note to T.'s attention. No note was referred to in D.P.'s statement of January 20, 2003. And in his several letters to the law society, T. himself never raised the note, except on May 5, 2003, when he said "It is indeed unfortunate that she (D.P.) didn't let him write the message down".

This frailty aside, the Hearing Committee is nevertheless impressed with D.P.'s recollection of M.'s statements. She had reason to remember the event for she knew T., and she thought he would be interested in it. She recorded her memory of the event within a couple of months of the event. Of all those giving evidence, she was the most neutral witness.

In contrast, M.'s apparently vivid recollection of events is implausible given the passage of time between November, 2002, and the time he was asked to provide a recorded statement to the law society on October 20, 2004. He freely admitted his antipathy for T. And as noted, on a few issues M.'s testimony before the Hearing Committee was at odds with his own statement, notwithstanding that fact he had earlier testified the statement was true.

At the end of the day the Hearing Committee finds M. and the Member were at the C.G. on or about November 7, 2002, then again shortly afterwards. On November 7, 2002 - while both men sat at a table to the right of the door of the lounge - M. told D.P. he was J.F., and would she tell T. that J.F. was looking for him.

While the Member was present when this occurred, there was no *direct* evidence that he paying any particular attention. There were no outward signs that he heard M., or was somehow part of the ruse. There was no evidence the "impersonation" would have been of any consequence to the Member.

Aside from direct evidence, the Hearing Committee is not prepared to draw an inference from the circumstances that the Member must have heard M.'s remarks, or could not have forgotten them. The latter is plausible given the Member's evidence that he was often in M.'s company, often at the C.G., and that it was some five months after the incident when he was first asked to recall the circumstances.

Having considered all of the evidence, the Hearing Committee is unanimous that the evidence falls short of the required high standard to convict the Member for lying to the law society, and as such the citation against Mr. Burgener is dismissed.

EXHIBITS

Subsequent to the end of the hearing it came to the attention of the Chair that no order was sought, and no order was thus made, with regard to Exhibits. The Chair convened a telephone conference November 6, 2006 at which time, following submissions of counsel, it was decided that all Exhibits in the Hearing be kept private with the exception of the jurisdictional Exhibits (1-5), and with the exception of a series of photographs of the C.G. (Exhibit 30).

Dated this of November, 2006.

Peter B. Michalyshyn, Q.C. (Chair)

Vivian R. Stevenson, Q.C.

Wilf Willier