IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF **SUSAN LAWSON**
A MEMBER OF THE LAW SOCIETY OF ALBERTA

REASONS FOR DECISION

On April 11, 2006, a Hearing Committee Panel comprised of Peter Michalyshyn, Q.C. (Chair), Brian Beresh, Q.C., and Wilf Willier convened at the Law Society offices in Edmonton, Alberta to inquire into the conduct of Susan Lawson ("the Member"). The Member was represented by John Weir, Q.C. The Law Society of Alberta was represented by Garner Groome. The Member was present throughout the hearing.

Jurisdiction and Preliminary Matters

Jurisdiction was established by Exhibits 1-4. There was no objection to the composition of the Panel. No private hearing application was made and as such the hearing proceeded in public.

Citations

The Member faced 3 citations as set out in Exhibit 2 and 21. The citations are set out below as part of the Exhibit 21.

Admission of Guilt

All Exhibits were entered by consent. Exhibit 21 was an Agreed Statement of Facts and Admission of Guilt. The Panel reviewed Exhibit 21 and found the admission of guilt was in a form acceptable to it. The Member's conduct was thereby deemed to be conduct deserving of sanction.

Evidence

The Agreed Statement of Facts as set out in Exhibit 21 is as follows:

AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT

GENERAL BACKGROUND

The Member is a sole practitioner in Edmonton, Alberta. She was admitted to the Bar on July 20, 1979.

On April 26, 2005, the Conduct Committee referred the following three citations to hearing:

1. IT IS ALLEGED THAT YOU failed to comply with undertakings given to a lawyer in a timely manner, and such conduct is conduct deserving of sanction.

2. IT IS ALLEGED THAT YOU failed to respond in a timely manner to communications from another lawyer that contemplated a reply, and such conduct is conduct deserving of sanction.

3. IT IS ALLEGED THAT YOU failed to respond in an appropriate and timely manner to communications from the Law Society that contemplated a reply, and such conduct is conduct deserving of sanction

The facts giving rise to the citations include the following:

a. On October 20, 2003, as solicitor for a vendor in a residential real estate transaction the Member undertook to the purchaser's solicitor to, *inter alia*, discharge a maintenance enforcement order registered on title as Instrument Number [deleted] and a vendors lien caveat registered as Instrument Number [deleted], and to provide a clear tax certificate.

b. On November 7, 2003, the transaction closed.

c. On January 15, 2004, the solicitor for purchaser and complainant Donald L. Masson reminded the Member of her outstanding undertakings. The Member received this correspondence but did not respond.

d. On April 28, 2004, Mr. Masson again reminded the Member of her outstanding undertakings. The Member received this correspondence but did not respond.

e. On July 23, 2004, Mr. Masson demanded that the Member comply with her outstanding undertakings by August 9, 2004. The Member received this correspondence but did not respond.

f. When Mr. Masson did not receive an answer from the Member within the time stipulated by him he complained to the Law Society on August 12, 2004.

g. On August 18, 2004, the Member did finally respond to Mr. Masson by writing to him and explained her efforts to discharge the encumbrances.

h. In processing the complaint, a Law Society Complaints Resolution Officer ("CRO") left a telephone message at the Member's office on August 23, 2004. The Member received the message but did not respond.

i. On September 7, 2004, a CRO attempted to contact the Member by telephone but her telephone message box was full. The CRO left a message on the Member's general telephone mailbox for her to call the Law Society. The Member did not respond.

j. On September 22, 2004, the CRO wrote to Member forwarding the complaint of Mr. Masson to the Member, confirming he had received no response to his several voicemail messages, and requested a response to the complaint by September 29, 2004. The CRO invited the Member to contact him by phone if there was going to be any difficulty responding to deadline. The Member responded by telephoning the CRO on September 23, 2004, promising to provide a response to the complaint forthwith.

k. On November 29, 2004, Mr. Masson wrote the Member advising her that he was still waiting for evidence of discharge of the registrations she undertook to discharge. The Member received this correspondence but did not respond.

l. Of his own volition, Mr. Masson performed a title search on December 16, 2004, to ascertain whether the outstanding encumbrances had been discharged. He discovered that the maintenance enforcement order had been discharged but the vendor's lien caveat remained. That same day Mr. Masson wrote to the Member literally begging for the fulfillment of her last remaining undertaking. The Member received this correspondence. Notwithstanding Mr. Masson's impassioned plea, the Member still did not respond.

m. On February 7, 2005, the Law Society couriered to the Member a Section 53 Demand Letter which was received by the Member on February 8, 2005. A reply was demanded within 14 days of receipt.

n. In the meantime, the Member finally fulfilled her undertaking to Mr. Masson on February 17, 2005, and apologized for her delay. The next day Mr. Masson confirmed he considered the undertakings fulfilled.

o. On February 23, 2005, the Member wrote to the Law Society advising that the undertakings were now completed, indicating that she had been ill with the flu and she promised a full reply to the complaint the next day. She did not provide the reply as promised nor did she contact the Law Society to seek an extension.

p. On March 1, 2005, the Law Society wrote the Member indicating that the matter will be referred to the Conduct Committee, giving Member one last opportunity to provide a complete response to the complaint and warning the Member that failing to respond to the LSA in an appropriate and timely manner is sanctionable.

q. In response, the Member provided the Law Society with her reply to the complaint on March 2, 2005.

r. At the time she gave her undertakings the Member did not have sufficient funds to discharge the maintenance enforcement order unless she successfully made a variation application on behalf of the vendor in his divorce matter. At best she believed she could comply with this undertaking but at the time she gave it she could not comply. At no time did the Member inform Mr. Masson of the circumstances surrounding the discharge of this encumbrance nor was her undertaking in any way qualified or conditional.

s. Instead of taking the necessary steps to fulfill her undertaking in a timely manner, the Member inappropriately allowed her client's circumstances and her personal difficulties to dictate the fulfillment of her professional responsibilities. The Member gives no excuse for the failure to discharge the vendors' lien caveat, which at all material times was entirely within her control to do had she paid sufficient attention to her file.

ADMISSION OF FACTS AND ADMISSION OF GUILT

The Member admits all of the citations within this Agreed Statement of Facts and the facts contained herein. The Member further acknowledges her conduct as contained in the within

Agreed Statement of Facts is conduct deserving of sanction. The Member makes this admission as an admission of guilt within the meaning of Section 60 of the *Legal Profession Act*.

The Member has been in practice since 1979, initially with a two-member firm but by 1980 as a sole practitioner. In the fall, 2003, as now, she practiced primarily family law; she had only a limited real estate or other practice.

The Member's vendor client ("the Vendor") retained the Member to assist in the sale of his farm property. The Vendor had successfully negotiated a private sale and had thereby avoided a foreclosure. The Member concurrently represented the Vendor in his attempts to vary his obligations to the Maintenance Enforcement Program (MEP) arising from earlier domestic litigation. The Vendor's monthly support payments were $888; as of November 7, 2003 – the closing date of the real estate deal – the Vendor owed MEP $22,929. Those arrears were secured by a writ against the Vendor's title.

On the evidence paragraph 3(r) of Exhibit 21 is in error, in that the Member testified before the Panel that at the time of the real estate closing, her client had sufficient net sale proceeds to pay out all encumbrances, including the $22,929 MEP writ. As of November 7, 2003, the net sale proceeds of the real estate deal were $23,301. As such the Member testified she could have applied $22,929 of the net proceeds to the MEP arrears and could thus have immediately complied with the undertaking. Indeed, the Member testified that the Vendor was aware and had instructed the Member that, all else being equal, the net sale proceeds were to be used accordingly. In the result the Vendor would have been left with $372 net sale proceeds.

The Member intentionally chose not to comply immediately with the MEP undertaking.[1] She chose instead to take the "calculated risk" of attempting first to apply to reduce the MEP arrears. An application to reduce the arrears had been underway well before the November 7, 2003 real estate closing. Arguably, the Vendor's arrears as at November, 2003 were artificially high owing to the fact the Vendor had been disabled from earning income following a December 5, 2002 motor vehicle accident, and had been unemployed a full year before the motor vehicle accident. Arguably only a small fraction of the $22,929 arrears was in fact owing. It was expected the application to reduce arrears "would be dealt with in short order", with the expected happy result that, first the undertaking to discharge the MEP writ would easily be complied with, and second, the Vendor would retain thousands more than the $372 in net sale proceeds from sale of his property.

In all of this, the Member had only a month-long window of opportunity to reduce the arrears and still be in a position to comply with the MEP undertaking. Any delay beyond the month of November, 2003 would instantly result in a breach of undertaking in that another month's increase in arrears of $888 would hike the accumulated arrears over the available net sale proceeds.

The Member's strategy to deal with the MEP arrears was never disclosed to the purchaser's solicitor. That solicitor knew only of the Member's clear undertaking to pay out the arrears and to obtain a discharge of the writ against title, and funds were advanced on that basis. Before the Panel the Member acknowledged the purchaser's solicitor's position that he would have refused an undertaking "…to make such applications as may be necessary to obtain a variation of your client's maintenance enforcement arrears and then have the writ discharged…"

Unhappily, the Member's calculated risk turned out to be a poor one. The application to reduce the MEP arrears was held up well beyond the month available to the Member. What was originally contemplated to be a consent matter "to be dealt with in short order" became a contested matter after a change in counsel opposite, and doubtless for other reasons the full details of which were not before the Panel. (In fact, litigation surrounding the arrears has persisted to this day, some 2½ years later.)

[1] While mostly at issue was the MEP undertaking, related undertakings also not complied with were to discharge a vendor's lien caveat, and to provide evidence of clear title.

To make matters worse, the Member revealed nothing to the purchaser's solicitor even when she knew or ought to have known she was no longer in a position to comply with her undertaking. Indeed, on all the evidence, it is doubtful the Member gave much thought at all about timely compliance with the undertaking. She admitted in her testimony she had not performed a careful calculation of monies available when she bound herself to undertakings October 20, 2003; the figures set out above regarding arrears and net sale proceeds appear to be fortuitous, and calculated after the fact.

The Member further admitted in her testimony she gave little if any thought to compliance with the MEP undertaking until some 9 months after the November 7, 2003 closing. It was only until the spectre arose of the law society's involvement in August, 2004 that the Member awoke to her unmet obligations. Before then, she testified she was distracted not just by her good-faith efforts to better her Vendor client's position on the arrears, but also by staffing and technology problems in her office, and by illness and related events in her immediate family. Thus letters from the purchasers' solicitor in January and April, 2004, urging compliance with the undertakings, were either ignored or not brought to her attention until mid-August, 2004.

As noted above, on August 18, 2004 the Member did finally respond to the purchaser's solicitor. And fortunately the Member was able to take steps to see the MEP writ discharged from the subject title, yet only by mid-December, 2004. (And it took even longer, until February 17, 2005, to see the unpaid vendor's lien caveat discharged from title, and clear title finally provided.)

It is worth noting that ultimately the MEP arrears were dealt with in a manner that might have occurred to the Member well before the fall, 2004: with MEP's consent, the Member applied to pay the Vendor's $23,301 net sale proceeds paid into court. MEP then agreed to discharge its writ from the purchaser's title. Payment into court allowed the dispute over arrears to continue without further holding up the purchaser's title.

With regard to the involvement of the Law Society, the Member made no excuses for her failure to respond first to a Complaints Resolution Officer, then to the Manager of Complaints, on a timely basis. The underlying facts are noted above as part of Exhibit 21. The Member of course admitted her failures to respond were conduct worthy of sanction. However, the Panel took note of the fact that on the eve of her first response deadline to the s. 53 demand, the Member copied the Manager of Complaints with a letter to the purchaser's solicitor setting out many of the circumstances underlying her conduct. And the Member replied directly to the Manager of Complaints within one day of being given a further and final chance to respond to the original s. 53 demand.

In summary, the Panel considered the misconduct in Citation #1 and the breached undertaking, to be the most serious misconduct before it. The Member seemed never to appreciate the significance of the MEP undertaking. On its strictest interpretation, the undertaking allowed only immediate payment of arrears; in the alternatively, arguably it allowed a timely application to reduce arrears, or to see funds paid into court. And at the moment the arrears application stalled – and in any event within the month of November, 2003 – the undertaking compelling the Member to act on her client's instructions to pay out the arrears and to provide clear title. She might have hoped to renegotiate the terms of the undertaking with the purchaser's solicitor; however, success in that regard could not be guaranteed. Stuck between the proverbial rock and a hard place, put in its best light the Member lost control of the situation and let it remain unattended some 9 months before she was finally pushed into action. And it was only the result of good fortune that the real estate transaction was saved when, some 12-plus months later, MEP agreed to terms upon which the writ could be discharged.

Submissions on Sanction

Counsel for the Law Society entered Exhibits 22 and 23 which were, respectively, an estimated Statement of Costs respecting the Hearing, and a Certificate by the Law Society evidencing the absence of a discipline record.

Law Society counsel argued for the sanction of a reprimand on Count #1, and a reprimand and fine of between $500 - $1,000 on each of Counts #2 and #3. Counsel also sought a mandatory referral to the Practice Review Committee, and payment of the actual costs of the hearing.

Law Society counsel acknowledged mitigating factors including that the Member had no record, had admitted guilt well before the beginning of the hearing, and had engaged productively in the Practice Review process of the Law Society since the onset of these matters.

Mr. Weir for the Member urged the sanction of a reprimand on all three citations, plus cost of the hearing. He stated no objection to at least a limited Practice Review referral.

Decision on sanction

The Hearing Committee took into consideration amongst other things the Member's lack of disciplinary record over some 27 years of practice, her early admission of guilt, and her pre-hearing participation in the practice review process. The Panel considered that a reprimand on each citation was the appropriate sanction, together with payment of the actual costs of the hearing, with time to pay 60 days from notice of the actual costs.

The Panel directed continued contact with the Practice Review Committee. The Panel was divided however with regard to the terms of the Practice Review referral.

The majority of the Panel (Brian Beresh, Q.C. and Wilf Willier) directed the referral be specific to the manners arising before the Panel, and at most for 18 months in length, or less at the discretion of the Practice Review Committee.

A minority of the Panel (Peter Michalyshyn, Q.C.) would have left the period of the mandatory referral to the discretion of the Practice Review Committee.

The majority reasons as provided by Brian A. Beresh on behalf of him and Wilf Willier are as follows:

1. This hearing committee is called upon to determine imposing a sanction of mandatory compliance with the Practice Review Committee for an indefinite period of time.

2. Counsel for the Law Society urges an indefinite period during which the Practice Review Committee would determine termination of its involvement which would be of the discretion of the Practice Review Committee Chair.

3. Counsel for the member urges a finite period to be established by this panel.

4. The issue to be resolved is whether in the circumstances of this case, the "indefinite period" position is either permissible or appropriate.

5. Of paramount consideration on this aspect of sanction must be the rehabilitation of the member or more accurately put the continued mandatory supervision and support to be supplied to the member.

6. Indirectly, the panel received evidence of the member's past and present participation with the Patrice Review process. Specifics as to the issues of concern which give rise to that past participation where not provided to us.

7. This panel is bound by Section 72 (1) of the Law Society Act of Alberta in terms of the three major potential sanctions available.

8. Ancillary sanctions are prescribed by Section 72 (2) of the Act.

9. The authority of the Practice Review Committee is clearly prescribed by the Act and its mandate is to review the practice of members.

10. The Practice Review Committee has no authority or ability to impose a sanction on a member. It has authority, in the appropriate circumstance, to refer specific conduct to further investigation by the Conduct Committee.

11. Given the manner in which sanctions are set forth in Section 72 (2) of the Act, the ability of a panel to engage the practice review process is "ancillary" to its major authority to sanction.

12. If those sanctions are truly ancillary, then such sanctions ought not to trump or any way constitute a harsher penalty then the penalty available pursuant to Section 72.

13. Maintaining an open-ended potential for review by the Practice Committee would, in my respectful opinion, constitute a harsher penalty than that imposed by this panel of a reprimand.

14. In addition, failing to impose a fixed period, practice review supervision is a delegation of authority to the Practice Review Committee which is not sanctioned by the Act.

15. The Act and Rules clearly define the authority of each Committee and they are distinct.

16. The legislative authority does not cloak the Practice Review Committee with any ability to sanction and the lines of authority between each committee must be kept distinct.

17. There exists good public policy or professional policy to maintain clear and distinct lines of authority not only for the proper operation of the society but also for the purposes of notice to the profession.

18. A lawyer ought not to fear cooperation with the Practice Review Committee for fear of some potential sanction.

19. To find that the Practice Review Committee decided when our sentence is complete is a delegation of authority to that committee which is not permitted by statue rules or good common sense.

20. In conclusion, no such authority exists for the imposition of an "indefinite term" as suggest by counsel for the Law Society.

21. Is it appropriate in the circumstances of this case if we are wrong in our analysis of whether it is permissible we find that it is still not appropriate in the circumstances of this case?

22. We are governed by the rules of fairness which govern the process throughout.

23. In this case, we have an admission of responsibility from a senior member of the Society who appears before us with no prior conduct record.

24. In the circumstance of the present case, we find that it is fair and reasonable to fix a term not to exceed 18 months in duration for involvement by the Practice Review Committee with the member. Should the Practice Review Committee decide that their involvement is no longer required within this time frame, it shall discontinue its involvement with the member.

With regard to issues specifically arising from this hearing to be considered by the Practice Review department, the Panel noted the law office management issues – in particular staffing and technology problems -- which apparently contributed to her failure to deal with the disputed undertaking. The Panel also noted the Member's own evidence that she is stressed more by often by personal issues, as distinct from those arising from the pressures of practice.

The Chair delivered the reprimand to the Member.

There was no need for a Notice to the Profession.

This decision, the evidence and Exhibits in this Hearing are to be made available to the public with the exception that clients' names will be redacted, and Exhibits #9, 10, 15, and 20(2), (3), and (4) will be kept private. Any third party request for copies of the Exhibits remaining public will be that third party's reasonable expense.

No notice to the Attorney General is required.

Dated this 12th day of July, 2006.

Peter Michalyshyn, Q.C.

Brian Beresh, Q.C.

Wilf Willier