

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
JAMES CHARNOCK,
a Member of The Law Society of Alberta

INTRODUCTION

1. On January 26, 2006, a Hearing Committee of the Law Society of Alberta (LSA) convened at the LSA office in Calgary, Alberta to inquire into the conduct of James Charnock, a Member of the LSA. The Committee was comprised of Mona Duckett, Q.C., Morris Taylor and Charles Gardner, Q.C., who acted as Chair. The LSA was represented by Lindsay MacDonald, Q.C. and the Member was represented by J.L. Thornborough. The Member was present for the Hearing. The Hearing did not conclude on January 26 and was adjourned and completed on April 10 and 11, 2006.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 through 4 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 were entered to establish the jurisdiction of the Committee to proceed.
3. There was no objection by the Member's Counsel or Counsel for the LSA regarding the constitution of the Hearing Committee.
4. Exhibit 5 is the Certificate of Exercise of Discretion regarding the service of Private Hearing Application Notices. Counsel for the LSA advised that they did not received a request for a private hearing and neither Counsel for the LSA nor Counsel for the Member requested a private hearing; therefore, the hearing was held in public.

CITATIONS

5. The Member faced the following citations:

Citation 1: IT IS ALLEGED that you misled or attempted to mislead the Manager, Complaints of the Law Society of Alberta, with respect to the issue of when you were retained by your client, and that such conduct is conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you failed to review the client's file before taking steps on the client's behalf, or in the alternative, failed to render competent advice to the client, and that such conduct is conduct deserving of sanction.

Citation 3: IT IS ALLEGED that in advising your client and accepting instructions to bring an *ex parte* application to transfer proceedings from Edmonton to Calgary, and to seek a waiver of notice of future applications to the Trustee, you misled or attempted to mislead the Court, or in the alternative, you failed to render competent advice, and that such conduct is conduct deserving of sanction.

Citation 4: IT IS ALLEGED that in advising the Court that all creditors had been served when they had not, and advising that all deficiencies had been addressed when it was the Trustee's position that they had not, you misled or attempted to mislead the Court, and that such conduct is conduct deserving of sanction.

Citation 5: IT IS ALLEGED that you failed to serve notice of the application for discharge on all of the client's creditors, and that such conduct is conduct deserving of sanction.

Citation 6: IT IS ALLEGED that in bringing an application to move proceedings to Ontario before your client had paid costs as directed by Justice Burrows, you implemented instructions contrary to professional ethics, and that such conduct is conduct deserving of sanction.

6. At the commencement of the Hearing, Counsel for the LSA invited the Committee to dismiss Citation 6, which is an allegation that the Member had acted improperly in bringing a Court application to move bankruptcy proceedings to the Province of Ontario in the face of a Court Order which prevented the bringing of any application until certain costs were paid by the Member's client. Counsel for the Member, during his preparation for this Hearing, learned that the Order in question, an Order of Mr. Justice Burrows, did not reflect what in fact his Lordship had ordered due to the insertion of an incorrect page at the time the Order was filed. Mr. Thornborough on behalf of the Member of course had no objection to Mr. MacDonald's request and accordingly the Committee dismissed Citation 6.
7. A second preliminary matter was raised by Mr. MacDonald, which stems from his concern about an issue of procedural fairness in the LSA's process which brought the Citations before the Hearing Committee. As part of that process, the LSA's Manager of Complaints, the Executive Director's designate, is called upon to assess a complaint and the material in support of it to determine whether or not a threshold as set out in the Threshold Guide has been met before referring the matter on to a conduct committee panel for a decision as to whether or not a hearing is warranted.
8. Mr. MacDonald's concern here was that the Manager of Complaints insofar as some of the citations which the Member was facing in this Hearing, used words in her referral to the conduct panel which suggest that she felt that that threshold had not been met.
9. A discussion then took place at the Hearing as to whether or not it was appropriate for the Hearing Committee, if it saw fit, to enter a stay of proceedings regarding the relevant citations. In the end the matter was resolved when Mr. MacDonald, in the interest of fairness, elected to call no evidence with respect to those citations and invited the Hearing Committee to dismiss them. Those citations were Citation 1, the first portion of Citation 4 dealing with service on creditors, and Citation 5. His position was accepted by the Committee and as a result, Citation 1, the first part of Citation 4 and Citation 5 were dismissed.

10. Prior to any evidence being called, the Member, through his Counsel, admitted that he had failed to review his client's file before taking steps on the client's behalf as alleged in Citation 2 and that such was conduct deserving of sanction. This admission with respect to Citation 2 in this form was accepted by the Hearing Committee.

SUMMARY OF RESULT

11. In the result, Citation 1, the first part of Citation 4, Citation 5 and Citation 6 were dismissed prior to the calling of evidence. The Member admitted Citation 2. After hearing the evidence and argument, the Hearing Committee dismissed Citation 3 and the remaining part of Citation 4.

EVIDENCE

12. A binder, Volume I, containing Exhibits 1 through 26, being the LSA exhibits, was entered by agreement.
13. Two binders, Volumes II and III, containing the Member's Exhibits 1 through 30 in Volume II and 31 through 67 in Volume III, were entered by agreement.
14. During the course of the Hearing, additional Exhibits numbered 1 through 15 and contained in Volume IV were entered by consent. Exhibit IV-9 of that binder is an Agreed Statement of Facts.
15. The Hearing Committee heard evidence from an inactive Member of the Law Society, Mr. Wayne Lenhardt, two Members of the Law Society, Mr. Douglas Tkachuk and Mr. Kent Rowan, Adia Currie, a legal assistant, and from the Member.

FINDINGS OF FACT

16. The Citations which the Member faces, arise out of a difficult and indeed, somewhat notorious bankruptcy proceeding in which the Member was retained by the bankrupt, a Mr. "R". These proceedings began in 2005; the Member's involvement commenced in 2002 when he took over conduct of the file from Mr.

- Wayne Lenhardt, who had become an inactive member and with whom the Member was sharing office space. To say the least, the proceedings prior to the Member's involvement, were protracted and the file material was voluminous.
17. The Member was retained to bring these proceedings to an end by securing the client's discharge in bankruptcy.
 18. At the conclusion of the evidence, Counsel for the LSA and the Member agreed that the second part of Citation 3 was essentially subsumed in the admitted Citation 2. The Hearing Committee was then left to determine whether or not the Member's conduct as alleged in the first part of Citation 3 and Citation 4 had been proven to the requisite standard. The relevant portion of Citation 3 alleged that the Member had misled the Court in making an *ex parte* application to transfer the proceedings from Edmonton to Calgary. Citation 4 was also an allegation of misleading the Court in this instance concerning service on creditors, which had not taken place, and also as to whether or not certain ordered obligations of the Member's client to the Bankruptcy Trustee had been met when they had not.
 19. It was the Member's position in his testimony that while he had been negligent in advising the Court that the creditors had been served, when they had not, that he was under the impression that they had, and that he did not intend to mislead the Court in this regard. He further testified that he made the representation concerning his client having fulfilled all of his obligations to the Trustee based upon what he had been told by the client, whose veracity he had no reason to question.
 20. Mr. Douglas Tkachuk was called as a witness at the Hearing. For a number of years he was Counsel for Mr. "R"'s Trustee in Bankruptcy, Price Waterhouse Coopers Inc. Although, during much of the time relevant to these citations, he was appearing as a friend or officer of the Court. For reasons that were never made clear to the Hearing Committee in the Fall of 2002, the Trustee lost interest in opposing the bankruptcy and overturning the Discharge Order obtained on an *ex parte* basis by the Member before Bankruptcy Registrar Alberstat. As a result,

- Mr. Tkachuk was instructed not to take any further proceedings on behalf of the Trustee. He did, however, persist as a result of strong feelings, on his own as he felt that a fraud had been perpetrated on the Court by the Member's client. Mr. Tkachuk obviously had very strong, unfavourable feelings about Mr. "R".
21. Indeed, ultimately Mr. Tkachuk brought an application against the Member personally for costs arising out of the Member's representation of his client in the numerous ensuing court applications which followed the granting of the *ex parte* Discharge. Madam Justice Bielby heard the costs application and made several unfavourable findings against the Member arising out of a number of things which he did and did not do in the proceedings. She, in the result, ordered the Member to personally pay costs to Mr. Tkachuk in the sum of \$15,000.00. She was not prepared, however, on the basis of the evidence before her, to find that the Member had knowingly and intentionally misled the Court.
 22. All that can be said of Mr. Tkachuk's evidence on the subject was that he felt that Mr. Charnock must or should have known certain facts which were contained in correspondence sent by him to Mr. Lenhardt. If he had read those letters, as he should have, then clearly he misled the Court. Mr. Tkachuk's suspicions were further aroused when the Member repeatedly failed to respond to his allegations that these misrepresentations had been made to the Court. But Mr. Tkachuk also conceded that Mr. "R" "had pulled the wool over Mr. Charnock's eyes". That the Member persisted in representing his client in the face of these allegations gave further support to Mr. Tkachuk that the Member must have the requisite knowledge. However, Mr. Tkachuk's evidence provided no real evidence that he did.
 23. Mr. Kent Rowan was retained to represent the Trustee after it determined that it no longer required Mr. Tkachuk's services. He appeared on behalf of the Trustee on Mr. Tkachuk's subsequent applications to overturn the discharge. It was his evidence concerning whether or not the Member had misled the Court as alleged in the citations, that he did not "think that he was trying to hide anything from anybody" and that he had been "sandbagged" by his client. Further, he

stated that “I did not have the opinion that he (Mr. Charnock) was being deceitful”.

24. Wayne Lenhardt had previously and successfully represented Mr. “R” in a defamation matter. Mr. “R” wished Mr. Lenhardt to take over his bankruptcy file in order to complete it and secure a discharge. While he testified, oddly, that he never opened a bankruptcy file and that his correspondence with Mr. Lenhardt was actually located on the defamation file, he did considerable work on the bankruptcy matter before referring it to Mr. Charnock. He advised that some three boxes of documents were received by him from Price Waterhouse Coopers Inc.
25. Mr. Lenhardt’s evidence could be described as somewhat imprecise and left the Hearing Committee with the feeling that he was being less than candid in his testimony. However, he testified that while he himself knew of the requirements of service and that the Trustee was alleging that Mr. “R” had not fulfilled his bankruptcy requirements, he could not recollect ever passing this information on to Mr. Charnock when the file was transferred.
26. Ms. Adia Curry was a part-time legal assistant who provided secretarial assistance to both Mr. Lenhardt and the Member. She testified as to the location of the correspondence file and the three boxes of documents in the office in a location apparently easily available to the Member for his review.

DECISION AS TO CITATIONS

27. Mr. Thornborough, at the commencement of argument made two applications. In the first, he argued that issue estoppel prevented the Hearing Committee from making a finding on Citation 4 as that matter had essentially been determined by the finding of Justice Bielby in Mr. Tkachuk’s cost application. Argument on that application revolved around whether or not the parties in the cost application were sufficiently similar to the parties in these Law Society conduct proceedings to justify the raising of the issue estoppel argument. Mr. Thornborough also made an application, essentially a non-suit or no evidence application with

respect to Citation 3. Both applications were dismissed by the Hearing Committee and this report will not go into detail as to the reasons for those decisions given the ultimate determination by the Committee on Citation 3 and Citation 4.

28. While the Committee was left with considerable suspicion regarding the Member's requisite knowledge of the requirement to serve, and whether or not Mr. "R" had in fact met the obligations of the Trustee, it could not find that the evidence before it had proven, to the required standard, that the Member had misled or attempted to mislead the Court, and accordingly, the first part of Citation 3 and Citation 4 were dismissed. The Committee noted that its suspicions were heightened by the Member's failure to be forthright with Mr. Tkachuk about what he knew and when he knew it in the face of repeated allegations by Mr. Tkachuk that the Member had misled the Court concerning these matters. The Hearing Committee was also troubled by the continued association of the Member with Mr. Lenhardt in the shared office and by the Member's continued acceptance of what his client was telling him in the face of overwhelming circumstances which should have told him to be cautious in that regard. However, the Hearing Committee was unable to find that those suspicions, given the allegation in both citations of deceit, met the standard of proof with strong, clear, convincing and cogent evidence.
29. The Hearing Committee then heard submissions from Counsel as to the appropriate sanction on Citation 2. Mr. MacDonald advised that given that the admission was one of incompetence, that any sanction should include a referral to the Practice Review Department. He also advised that a cost order against the Member should be made and that the total estimated costs of the Hearing exceeded \$10,000.00.
30. Mr. Thornborough, on behalf of the Member, had no objection to a Practice Review Referral and urged the Committee in making a determination on the question of costs, to take into account the fact that the Member had met with considerable success regarding the Citations other than Citation 2. He also pointed out that his client's admitted failure to adequately review the file had

already resulted in significant penalty to him in the form of Madam Justice Bielby's Cost Order.

31. On the issue of costs, Mr. MacDonald pointed out that the Member's admission with respect to Citation 2 came at the Hearing, after considerable preparation time by Law Society Counsel.
32. The Committee's decision was that the Member pay costs of the Hearing in the sum of \$2,500.00 and a fine in the sum of \$5,000.00 and that he be granted 30 days from April 11, 2006 to pay the costs and the fine to the LSA. In addition, it was directed that the Member be reprimanded and that reprimand was delivered by the Chair at the conclusion of the Hearing.
33. Further, the Hearing Committee ordered that the Member shall be referred to the Practice Review Department without specific conditions but with a notation that the Committee was particularly concerned about the Member's practice in the insolvency area and that, as an officer of the Court and as a Barrister and Solicitor, he had approached a serious litigation matter in a somewhat cavalier fashion.
34. With respect to the Hearing Exhibits, it was the direction of the Hearing Committee that they be made available for public inspection with the exception of the Member's correspondence which make reference to his client.

DATED this 29th day of January, 2007.

Charles D. Gardner, Q.C., Bencher
Chair

Mona Duckett, Q.C., Bencher

Morris Taylor, Bencher