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 D. Miles, Q,C., a member of the Law Society of Alberta

Jurisdiction and Preliminary Matters

1. On March 28, 2006, a Hearing Committee of the Law Society of Alberta (LSA) convened at the offices of the LSA in Calgary to inquire into the conduct of James D. Miles, Q.C. (the "Member"). The Committee was comprised of 3 Benchers of the LSA, being Hugh D. Sommerville, Q.C., chair, Dale Spackman, Q.C. and Stephen Raby, Q.C.

2. The Member was represented at the hearing by John E. Davison, Q.C. and the LSA was represented by Garner Groome.

3. The Jurisdiction of the Committee was established by the entry, by agreement, of an Exhibit Book containing 9 exhibits, including:

    a) Exhibit 1 - Letter of Appointment

    b) Exhibit 2 - Notice to Solicitor

    c) Exhibit 3 - Notice to Attend

    d) Exhibit 4 - Certificate of Standing of Member

    e) Exhibit 5 - Certificate of Exercise of Discretion

4. The Committee asked whether the Member's counsel had any objection to the membership of the Committee based on bias, and no objection was made.

5. The chair invited applications to have all or part of the hearing held in private. No such applications were made, so it was ordered that the hearing be open to the public.

Citations

6. As per the Notice to Solicitor, the Committee was inquiring into the conduct of the Member on the following Citations:

    1. IT IS ALLEGED that you failed to comply with your undertaking to maintain a $15,000.00 holdback, and that such conduct is conduct deserving of sanction.

    2. IT IS ALLEGED that you failed to comply with your undertaking to apply for a relaxation, and that such conduct is deserving of sanction.

Facts -- Evidence and Submissions

Evidence of the Law Society

7. The documentary evidence in this matter was largely contained in Tabs 1 through 21 of Exhibit 6, which were admitted as part of the Exhibit Book at the beginning of the hearing. Exhibits 7, 8, and 9 contained communications between the LSA and the Member.

8. The only witness called by LSA counsel was the complainant, Mr. Kerry McLelland. Mr. McLelland was sworn, and testified that he, a member of the LSA, had been acting for the purchasers on a real estate transaction where the Member was acting for the vendors. Both counsel had been retained just a few days before the proposed closing date of July 15, 2004.

9. Mr. McLelland explained that he received the Transfer of Land with the Member's letter of July 13, 2004, (Exhibit 6, Tab 1) which contained the statement:

> **We undertake to provide you with a Real Property Report with Certificate of Compliance. Should we be unable to obtain compliance, we will use reasonable efforts to apply for the necessary relaxation and/or encroachment agreement, if required, with costs for the same to be the responsibility of our clients.**

10. The Real Property Report (Exhibit 6, Tab 2) arrived on July 14, and disclosed some serious problems. There were fence and retaining wall encroachments on a City lane, and, more troubling, part of a wooden addition to the home encroached onto the neighbour's property. Mr. McLelland testified that he discussed the matter with the Member by phone, and suggested that a holdback might adequately deal with the matter, although he would need to seek instructions.

11. Mr. McLelland's position was complicated by the fact that he had two clients. He was acting both for the purchasers and for the mortgage company lender. He received instructions from the purchasers, and then sent the Member a fax letter of July 14th (Exhibit 6, Tab 3) requesting a $15,000.00 holdback. This letter indicates that he was still seeking instructions from the mortgage company.

12. Mr. McLelland testified that he received instructions from the bank that they would agree to having their interest protected by Title Insurance. Mr. McLelland contacted the Member's office by phone, and left a message explaining his position.

13. On the morning of July 15, 2004, the Member's office sent Mr. McLelland a fax letter agreeing to pay for the Title Insurance. This letter (Exhibit 6, Tab 4) is date and time stamped as "JUL 15, 2004 8:01AM" and is sent under the Member's name, although he did not personally sign it.

14. Mr. McLelland testified that he phoned the members office, after reviewing the 8:01 AM letter, in order to request confirmation that the $15,000.00 holdback would still be in place. His position was that the Title Insurance protected the lender, but might not adequately protect the purchasers

15. At 9:14 AM on July 15th the Member's office sent Mr. McLelland another letter (Exhibit 6, Tab 5) advising that **"we are agreeable to hold back the $15,00.00 from the proceeds of the sale until such time the City of Calgary advises whether they are agreeable for the structure to remain".** It is agreed by all that the "$15,00.00" was a simple typographical error. This letter was also sent under the Member's name, though not personally signed by him.

16. Mr. McLelland's evidence was that he then called the Member's office again, to clarify the undertaking for a holdback. He testified that he requested that the Member agree to the terms of Mr. McLelland's July 14th letter "or call".

17. A third letter (Exhibit 6, Tab 6) was faxed from the Member's office to Mr. McLelland at 9:34 AM on July 15th. This letter states **"Amended to read $15,000.00 and terms of your letter, however, we advise that Title Insurance covers the cost to tear down the addition or alter the addition by the Buyers of the property (see attached info)."** This letter is dated July 13, 2004, although all parties agree that this is a typographical error. The letter was date stamped, and sent, on July 15th.

18. Mr. McLelland's evidence was that he then sent the cash difference with his letter of July 15th (Exhibit 6, Tab 9). This letter includes a paragraph reading **"I would also confirm that the $15,000.00 holdback is to be held in accordance with the terms of my letter dated July 14, 2004. I would confirm that F has indicated to me that the insurance for the purchasers will contain a limitation which may limit my clients' right to claim under the insurance under these circumstances."**

19. On July 22nd Mr. McLelland sent the balance of the cash to close to the Member, and the cover letter (Exhibit 6, Tab 8) stated **"I trust this is satisfactory and all funds are releasable subject to your undertakings as per your trust letter and your undertaking -to hold back $15,000.00 in accordance with the terms of my letter dated July 14 pertaining to the encroachment issues."**

20. On July 28th Mr. McLelland received a fax letter from the Member (Exhibit 6, Tab 10) stating that **"The $15,000.00 we have held back pertained only to the sunroom addition which costs for revision are now included in the insurance coverage. We are now releasing the $15,000.00 held back to our client."**

21. Mr. McLelland immediately sent a hand written fax response to the Member (Exhibit 6, Tab 11) making it clear that any release of the held back funds would be considered a breach of undertaking. The letter concludes **"Please call me to discuss this matter, but you are not at liberty to release the $15,000.00"**

22. The Member's office replied to Mr. McLelland on July 29 by way of a fax letter (Exhibit 6, Tab 13) stating that **"by purchasing the liability insurance for your client that it relieves us of our undertaking. Therefore, we are releasing the monies held in trust to our client."** Mr. McLelland replied by fax that he did not see how the purchase of Title Insurance relieved the Member of his undertaking (Exhibit 6, Tab 14).

23. On August 5, 2004, the Member's office sent Mr. McLelland the Encroachment Agreement prepared by the City of Calgary. The cover letter is Exhibit 6, Tab 15. The Member sent Mr. McClelland a further fax on August 17th again arguing that **"when the Title Insurance was issued we obviously are relieved from our undertaking with respect to the hold back."**

24. On August 17, 2004, the Member faxed a letter to Mr. McLelland (Exhibit 6, Tab 16) again arguing his position on the holdback. This letter included the statement **"When the Title Insurance was issued we obviously are relieved from our undertaking with respect to the holdback".** As to the second point in issue, the letter added **"In the meantime, we have provided you with the Encroachment Agreement from the City".**

25. There appears to have been no further communication between the parties until September 30, 2004, when Mr. McLelland sent the Member the letter set out at Exhibit 6, Tab 17. In this letter Mr. McLelland explains that he last spoke with the Member's secretary a month and a half earlier, after having just received the encroachment agreement. At that time Mr. McLelland inquired into the status of the Member's application for a Compliance Certificate and/or relaxation from the City. The secretary had told Mr. McLelland in August that she had not yet received an answer from the City, but the letter stated that after one and a half months **"this should be ample time to determine whether or not a relaxation was required and, if so, whether or not it would be granted".**

26. Mr. McLelland's letter of September 30th goes on the specifically remind the Member of his undertakings in his letter of July 13th (Exhibit 6, Tab 1). He also explains that he considers the release of the $15,000.00 holdback to be a breach of undertaking, as his clients are potentially still at risk of financial loss regardless of the existence of Title Insurance. He states **"I feel I am obligated to report this situation to the Law Society as a breach of your solicitor's undertaking".**

27. On October 6, 2004, the Member faxed Mr. McLelland (Exhibit 6, Tab 18) to inform hire that **"we have forwarded the executed encroachment agreement to the City of Calgary for registration at Land Titles and will advise their position on compliance when we receive a registered copy of the encroachment".**

28. Mr. McLelland received the Registered Encroachment Agreement with the Member's letter of December 13, 2004, (Exhibit 6, Tab 19). In this letter the Member concludes **"As we have now satisfied our undertakings we are closing our file".**

29. Mr. McLelland testified that, while he had received an encroachment agreement, he had not received a Certificate of Compliance. As the November 15, 2004, letter from the City (Exhibit 6, Tab 20) shows, the application for a Stamp of Compliance was rejected.

30. On January 11, 2005, the Member's office sent Mr. McLelland a letter enclosing **"a Certified Copy of Title evidencing the discharge of appropriate encumbrances as per our undertakings".** This appears to be the last communication directly between the Member and Mr. McLelland.

31. Exhibit 7 is the Member's letter of April 6, 2005, to Linda Threet of the LSA. In this letter the Member states his view that **"upon our client purchasing Title Insurance to cover any loss his client may incur in connection with the encroaching solarium that the writer would thereby be relieved from the undertaking to holdback $15,000".**

32. In her letter of April 19, 2005, (Exhibit 8) Ms. Threet writes back to the Member and summarises the facts much more concisely than is done in this hearing report. She also asks the Member to comment on his obligation to "use reasonable efforts to apply for the necessary relaxation and/or encroachment agreement".

33. Exhibit 9 is the Member's May 2, 2005, reply to Linda Threet of the LSA. The Member again argues that the holdback was "to cover the cost" Mr. McLelland's clients may incur in connection with the encroaching solarium as well as two additional encroachments. As the Member was able to obtain Encroachment Agreements for the two additional encroachments, "the only issue remaining was with respect to covering possible costs in connection with the solarium". The Member again stated that he was of the view that Title Insurance would cover any costs related to the solarium, and he was therefore relieved of his undertakings.

34. In the Exhibit 9 letter the Member also states that his undertaking to use reasonable efforts to apply for a relaxation regarding the solarium is no longer necessary as Mr. McLelland's clients have approached their neighbours about an encroachment agreement. Further, the Member position is that the purchasers should first look to their Title Insurance to cover any costs involved.

Evidence for the Member

35. The first witness for the Member was Mr. Richard L. Lyle, Q.C. Mr. Lyle is a senior and experienced real estate lawyer, who has been in active practice since 1967. Mr. Lyle was originally tendered as an expert in real estate law, but, as no notice had been given of this application pursuant to Section 31 of the Pre-Hearing Guide, counsel for the Member withdrew the application. Mr. Lyle proceeded to testify based on extensive personal experience.

36. Mr. Lyle testified that Title Insurance could replace the need for a holdback. On further questioning he confirmed that he would have accepted a $15,000.00 holdback if it was requested, and that if Title Insurance was offered as a replacement he would want a letter detailing the coverage.

37. The Member then testified on his own behalf. He has been practicing in the area of residential real estate conveyancing since 1970, and he has experience using holdbacks and Title Insurance. He acknowledged that he had made an undertaking to maintain a $15,000.00 holdback, but believed at the time, and still believed, that the purchase of Title Insurance relieved him of this undertaking.

38. The Member further testified that he also believed that the purchase of Title Insurance relieved him of the obligation to obtain a relaxation for the encroachments. His view was that Mr. McClelland had the responsibility to work towards getting the relaxation, and Title insurance would cover the costs.

39. On questioning, the Member acknowledged that Mr. McClelland was clearly communicating that he thought the holdback was still required, but the Member disagreed with him. On realising that there was a disagreement over the holdback, the Member did not return the funds or call Mr. McClelland to discuss the situation. The Member also did not personally ascertain at the time whether Title Insurance would cover all the cost involved.

Submissions

40. Counsel for the LSA simply submitted that there had been undertakings given to maintain a $15,000.00 holdback, and to use reasonable efforts to obtain a relaxation, and that both of these undertakings were breached. The Member had paid out the funds knowing that Mr. McClelland still expected them held back, and he had not moved forward to get the relaxation.

41. Counsel for the Member argued that the purchase of Title Insurance had been an adequate replacement of the requirement of a holdback. As well, the Title Insurance would cover the costs of getting the relaxation. Further, even if the Title Insurance did not completely relieve the Member of the obligation to apply for the relaxation, the Member could not proceed with the application until the purchasers had taken certain steps, and once these were completed replacement counsel for the Member had diligently moved forward to get the relaxation.

Decisions

Findings - Conduct Deserving of Sanction

42. The Panel finds this to be a case where two essentially upstanding lawyers found themselves dealing with a last-minute rush real estate deal. The Member, James Miles, sent the transfer of land to the purchasers' lawyer, Mr. McClelland, by letter of July 13th, 2004, with undertakings, including that he provide a Real Property Report. The problem arises when the Real Property Report comes in, as it shows some serious encroachment issues, both on a City laneway and on the neighbour's property.

43. By letter of July 14th, Mr. McClelland makes a proposal for a $15,000.00 holdback to protect his clients for the costs of tearing down the addition, or getting and encroachment agreement, or otherwise "making it right". There were some telephone discussions between the two lawyers' offices, and the issue of Title Insurance came up as a possible solution to protect Mr. McClelland's second client, the lender.

44. On July 15th Mr. Miles wrote to Mr. McClelland confirming that he was agreeable to providing Title Insurance at his client's expense. Mr. McClelland replied making it very clear that Title Insurance would protect his client, the lender, but he still wanted the holdback in place to protect the purchasers. The Panel specifically finds that Mr. McClelland took steps to communicate his concerns to Mr. Miles office, and that Mr. Miles lead agreed to hold back the $15,000.00 according to the terms of Mr. McClelland's July 14th letter.

45. The Member testified that the purchase of Title Insurance relieved him of the obligation to hold back the $15,000.00. The panel does not agree. Once Mr. Miles undertook to hold back the funds, this obligation could only be relieved by complying with the requirements of Mr. McClelland's July 14th letter or getting Mr. McClelland to agree to a variation. If there was any confusion regarding the terms of his undertakings, the onus was on Mr. Miles to get it clarified, and he did not.

46. The Member appears to have honestly believed that the purchase of Title Insurance solved the problem, but we find that it did not unilaterally relieve him of his undertaking. We find that the breach of undertaking in Citation 1 is conduct deserving of sanction.

47. On the second Citation Mr. Miles seems to be of the view that the purchase of Title Insurance relieves him of the undertakings to get a relaxation, as set out in his letter of July 13th, 2004. We do not agree.

48. Having said that, we are not satisfied that Mr. Miles failed to make reasonable efforts as required by the undertakings in his letter. Matters have proceeded, if slowly, and some of the delay factors were beyond his control. Counsel for the Member accepts that the costs of completing the application remain with the Member. We decline to find that the Member has really failed to comply with his undertaking, so the second Citation is dismissed.

49. It should be noted that the Panel's decision on both Citations were unanimous.

Sanction and Orders

50. After some consideration, the Panel came to the unanimous decision that the appropriate sanction in this case was a reprimand. This was immediately given to the Member by the chair.

51. Mr. Miles is senior counsel, with over 35 years experience. He came before the Panel with an unblemished record, and didn't need to come before us to be told how to practice real estate. We have no doubt that the Member did not intend to cause any harm, and that he thought that Title Insurance would adequately protect the people involved. None the less, the bottom line is that the Member entered into an undertaking for a $15,000.00 holdback, and he's bound by that until it is varied. The Panel does not expect the Member to find himself before a hearing committee again, and it's a pity his actions brought him before us in the first place.

52. The Committee directs that the Member pay one half of the actual costs, to be paid by May 31 st of 2006.

Concluding Matters

53. The exhibits and proceedings shall be made available to the public, with the exception that the Real Property Report will be kept private. The names and addresses of all individuals, other than the members involved, will be deleted.

54. The Committee finds no need for a Notice to the Profession under Rule 107 in this case. There is also no need for a referral to the Attorney General.

DATED the 3rd of November, 2006.

HUGH D.SOMMERVILLE,Q.C. - Chair

DALE SPACKMAN, Q.C.

STEPHEN RABY, Q.C.