

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF AN APPEAL REGARDING
EDMUND SCHUSTER
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel:

Adam Letourneau, QC – Chair
Sandra Corbett, QC
Dennis Edney, QC
Sarah King D’Souza, QC
Hugh Sommerville, QC
Kent Teskey, QC
Louise Wasylenko

Appearances:

Counsel for the Respondent, the Law Society of Alberta (LSA) – Shanna L. Hunka
Counsel for the Appellant, Edmund Schuster – Ivan J. Derer, QC

Hearing Date:

May 10, 2017 and September 6, 2017

Hearing Location:

LSA office, at 500, 919 – 11th Avenue SW, Calgary, Alberta

APPEAL PANEL DECISION

Jurisdiction, Preliminary Matters and Exhibits

1. On May 10, 2017, an Appeal to the Benchers (Appeal Panel) convened at the office of the LSA to conduct a hearing regarding the appeal of Edmund Schuster. Mr. Schuster and the LSA were asked whether there were any objections to the constitution of the Appeal Panel. There being no objections, the hearing proceeded.

2. Counsel for Mr. Schuster applied for an adjournment to deal with some preliminary matters and that application was granted. The hearing continued on September 6, 2017.
3. All Appeal Panel members, Mr. Schuster, counsel for Mr. Schuster, Mr. Derer, QC, and counsel for the LSA, Ms. Hunka, attended throughout the hearing.
4. The jurisdiction of the Appeal Panel was established by Exhibits 1 - 5 and 7, consisting of the Hearing Committee Reports (Exhibits 1 and 2), the Notice of Appeal and its further amendment (Exhibit 3 and 7), the Letter of Appointment of the Appeal Panel (Exhibit 4), the Notice to Attend the Appeal to the Benchers addressed to Mr. Schuster (Exhibit 5).
5. A private hearing application notice was issued (Exhibit 6). However, as there were no requests for a private hearing received, the application was held in public.
6. During this hearing, the Appeal Panel considered the following materials – the Jurisdictional Documents and Private Hearing Application Notice, the briefs, supplementary briefs and reply briefs from the Appellant and the Respondent, and the hearing record.

Background and Grounds for Appeal

7. Before the Hearing Committee, Mr. Schuster faced six citations. The Hearing Committee issued its Hearing Committee Report on May 4, 2016 (the Merits Decision). Five of the citations were dismissed by the Hearing Committee. The Hearing Committee found that there was conduct deserving of sanction with respect to the sixth citation, that is, Mr. Schuster failed to advise his client, the church, of a material error or omission.
8. The Hearing Committee issued a Hearing Committee Report on sanctions on August 9, 2016 (the Sanction Decision), and issued a reprimand.
9. Mr. Schuster challenged both the Merits Decision and the Sanction decision. He raised the following two grounds in his appeal:
 - 1) That commencing with the initial review and investigation of the subject complaint, a clear breach of procedural fairness and natural justice owed to him is evident thus rendering the entire Conduct proceeding against him void; and
 - 2) The Hearing Committee determination of guilt on citation #6, regardless, cannot be viewed as falling within a range of possible, acceptable outcomes which is defensible in respect of the facts and law.

SUBMISSIONS ON BEHALF OF MR. SCHUSTER

10. In relation to the first ground of appeal, counsel for Mr. Schuster made very lengthy written and oral submissions regarding a breach of natural justice and procedural unfairness in relation to steps taken during the investigation stage. There were

considerable submissions made regarding the bias of the investigator and how that tainted the ongoing matter in later stages.

11. In effect, it was alleged that the investigator's report to the Conduct Committee was biased and, as a result, there was a breach of the principles of natural justice.
12. Regarding the standard of review, counsel for Mr. Schuster argued that the standard of review for issues of procedural fairness is correctness and that the breaches of procedural fairness mean that the Appeal Panel should set aside the Merits Decision and Sanction Decision as being void.
13. Counsel for Mr. Schuster appeared to suggest that the Section 53 investigation report should be considered by the Appeal Panel, and attached it as Tab 21 of his Supplemental Brief (Exhibit 10).
14. With respect to the second ground of appeal, counsel for Mr. Schuster did not take issue with the facts presented to the Hearing Committee, nor the Hearing Committee's findings of fact. Instead, he argued that the actions of Mr. Schuster were reasonable in the circumstances, that they were not egregious, and that nobody was hurt in the end. Accordingly, the Hearing Committee should not have found conduct deserving of sanction nor issued a reprimand.

SUBMISSIONS ON BEHALF OF THE LSA

15. Regarding the first ground of appeal, that there was a breach of procedural fairness, LSA counsel agreed that matters of procedural fairness should be reviewed on a standard of correctness.
16. However, LSA counsel submitted that there was no lack of procedural fairness or breach of natural justice in Mr. Schuster's case at any stage worthy of the extreme remedy of rendering the entire disciplinary process against Mr. Schuster void.
17. On the second ground of appeal, LSA counsel argued that Mr. Schuster did not appear to be alleging that the Hearing Committee came to erroneous factual conclusions based on the evidence that it heard. Therefore, LSA counsel argued that these facts can be accepted as set forth in the Merits Decision and in the Sanction Decision.
18. LSA counsel argued that the Alberta Court of Appeal's decision in *Moll v. College of Alberta Psychologists*, 2011 ABCA 110, at para 20, discussed the appropriate standard of review in cases involving appeals within professional discipline bodies. The court in *Moll* found that on an internal appeal from the disciplinary committee to the Council of the College, a standard of reasonableness should be applied to the question of "what constitutes unskilled practice."

19. LSA counsel submitted that *Moll* was considered by an LSA appeal panel in *Law Society of Alberta v. Pagtakhan*, 2013 ABLS 4, at para 37. In that case, the appeal panel found the standard of reasonableness applied to both the issue of sanction and the mixed fact and law decisions on the “conviction of the appealed citations.”
20. In LSA counsel’s view, a standard of reasonableness should be applied to both the Merits Decision and the Sanction Decision.
21. LSA counsel noted that the Hearing Committee found that the evidence was uncontroverted that Mr. Schuster made an error when he paid funds out of his trust account to a developer when those funds were due to a bank lender. The error was significant and substantial. Mr. Schuster advised the developer client, but not his church client. The Hearing Committee noted that Mr. Schuster took steps to rectify the error. Although those steps were ultimately successful, the Hearing Committee emphasized the importance of reporting errors relating to trust accounts and the need to do so regardless of whether the error could be rectified.
22. LSA counsel argued that given the facts surrounding the non-disclosure of the material error, and what is expected of a member of the LSA, the Hearing Committee could not have come to any other conclusion other than that Mr. Schuster’s conduct was deserving of sanction. Further, the Hearing Committee noted [then] Rule 6.07 of the *Code of Conduct*, which provides that the duty of disclosure is an ethical or fiduciary one, even if the error is capable of correction without expense, delay or prejudice, and that one cannot contract out of this duty.¹
23. Accordingly, LSA counsel submitted that the Hearing Committee was reasonable in finding that Mr. Schuster’s conduct deserved sanction.
24. LSA counsel also maintained that the sanction imposed by the Hearing Committee was reasonable. Having found conduct deserving of sanction, the Hearing Committee could suspend, disbar or reprimand Mr. Schuster. It chose to reprimand Mr. Schuster. The Hearing Committee clearly took the entire circumstances into consideration before delivering the reprimand. The reprimand also expressly acknowledged Mr. Schuster’s long career free from disciplinary sanction. The five brief paragraphs of the reprimand aimed to ensure that Mr. Schuster did not become complacent on these matters. LSA counsel submitted that the Hearing Committee’s Sanction Decision was reasonable.
25. Counsel for the LSA requested that the appeal be dismissed and that the Appeal Panel order payment of the costs of these appeal proceedings, pursuant to section 102(1) of the *Legal Profession Act*.

¹ As a result of the amendment of the Code of Conduct authorized in December 2016, Rule 6.07 is now Rule 7.7.

ANALYSIS

- I. Standard of review on procedural fairness and analysis on the first ground of appeal
26. The Appeal Panel finds that the appropriate standard of review on issues of procedural fairness is correctness, and notes that the Appellant and Respondent appear to be of the same view.
27. However, the Appeal Panel finds that there was no compelling evidence or argument proffered by Mr. Schuster that there was a breach of procedural fairness or natural justice in this case.
28. It is important to understand the purpose of a section 53 investigation report in relation to the Conduct Committee and its issuance of citations. The Conduct Committee's statutory purpose is to review an investigation and to determine whether there is sufficient evidence to issue citations, which then results in the matter being referred to a hearing.
29. The LSA sets the evidentiary burden for the issuance of citations as to whether there is a *reasonable* prospect of conviction. At the citations issuance stage, the question is not whether inferences *would* be drawn from the evidence, but rather whether they reasonably *could* be drawn from the evidence. This is obviously lower than that applied by the Hearing Committee, which is a balance of probabilities
30. The Section 53 investigation report was a tool to assist in the exercise of the Conduct Committee's discretion. The investigator had no decision-making power, and was simply carrying out his work as an investigator. The discretion to issue citations rested with the Conduct Committee.
31. In addition, the Conduct Committee did not have the power to find that there was conduct deserving of sanction – that decision is for the Hearing Committee. Once citations are issued, the LSA has to prove to the Hearing Committee, on a balance of probabilities, that there is conduct deserving of sanction.
32. The Section 53 investigation report was not evidence at the hearing, nor was its author called to give evidence by either the LSA or Mr. Schuster, despite Mr. Schuster having received a copy of the report prior to the hearing.
33. Counsel for Mr. Schuster provided numerous authorities that stood for the requirement of fairness at the investigative phase. The Appeal Panel agrees that such an obligation exists, however, it is the scope of that requirement that is important here. For an investigation to be fair in a professional regulatory context, the member must be made aware of the allegation and have the opportunity to respond to the investigation prior to a decision being made.

34. The Appeal Panel finds that the process and policies of the Law Society regarding investigations were fair and the principles of fairness were complied with in this case. Mr. Schuster was given the opportunity to respond at numerous phases of the investigation, including being allowed to comment on the Section 53 investigation report. Further, this was followed by a five-day hearing in which Mr. Schuster had the opportunity to know the allegations against him and dispute them, through the provision of further evidence and argument before the decision-maker, the Hearing Committee.
35. In light of how the Section 53 investigation report fits into the entire process, as well as the opportunities available to respond to the citations, it was not necessary for that report to have been considered by the Hearing Committee nor this Appeal Panel in order for the process to be procedurally fair. Therefore, while the Section 53 investigation report was included in Mr. Schuster's Supplemental Brief, the Appeal Panel gave it no weight.
36. Accordingly, the Appeal Panel dismisses this ground of appeal.
37. As an aside, the Appeal Panel is concerned about the timing of this allegation in this case. Generally, when a party alleges a breach of natural justice, it should be raised as a question of jurisdiction at the outset of a proceeding. If Mr. Schuster believed that the investigation or the Conduct Committee breached the principle of fairness, that should have been raised at the outset of the hearing before the Hearing Committee. Instead, Mr. Schuster defended the citations on their merits, and chose not to enter the Section 53 investigation report into evidence nor call the author of that report. He now argues that the entire conduct proceeding was void due to breaches of procedural fairness and natural justice arising from the investigative stage and the actions of the Conduct Committee, and without adequate explanation as to why this could not have been addressed earlier before the Hearing Committee.

II. Standard of review on the Merits Decision and the Sanction Decision and analysis of the second ground of appeal

38. The Appeal Panel finds that reasonableness is the appropriate standard of review in considering the Hearing Committee's Merits Decision. According to the LSA's Pre-Appeal Guideline, the determination of whether conduct amounts to conduct deserving of sanction inextricably intertwined findings of fact and questions of law and must be reviewed on a standard of reasonableness. A review of a decision on the deferential standard of reasonableness is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at para. 47).
39. The Appeal Panel has also determined that the standard of review for the Sanction Decision is reasonableness. The standard of review of a sanction in professional disciplinary proceedings is similar to that of an appellate court's review of sentencing in criminal matters. The principles that apply to an appeal of a criminal sentence have been

found to apply to an appeal of a sanction pursuant to section 75 of the *Legal Profession Act*.

40. In assessing the question of whether a sanction imposed by a hearing committee was reasonable, an appeal panel should only intervene where the sanction imposed: (a) was based on application of the wrong principles; or (b) if the sanction was demonstrably unfit (that is, is the sanction “clearly unreasonable”). The test is not whether the appeal panel itself would have imposed a different sanction.
41. After reading all the materials provided by Mr. Schuster, and after hearing the oral submissions of Mr. Schuster’s counsel, the Appeal Panel finds the Merits Decision to be reasonable.
42. The Appeal Panel notes the Hearing Committee’s finding that it was an uncontroverted fact that Mr. Schuster made an error and did not disclose the error to one of his clients. Based on the requirements of the Code as it then was, it was a reasonable conclusion that this was a material error that should have been disclosed to Mr. Schuster’s client and to the LSA. It was also reasonable for the Hearing Committee to determine that Mr. Schuster did not appear to appreciate the significance of his actions – that being the failure to report a material omission or error to a client in accordance with the Rules.
43. The Appeal Panel also finds that Sanction Decision was reasonable under the circumstances. The Hearing Committee took the appropriate principles into consideration, including considering mitigating factors, when coming to its Sanction Decision and constructing the reprimand. The sanction does not fall outside the acceptable range of sanctions available.

DECISION

44. For the reasons set out above, Mr. Schuster’s appeal is dismissed.
45. The Committee directs that Mr. Schuster pay the costs of this appeal.
46. The exhibits tendered at the hearing will be available for inspection and copying by members of the public for a fee, and will be subject to redaction of personal identifying information. Further redactions will be made to preserve the privacy of the parties and to preserve client confidentiality and solicitor-client privilege.

Dated at Calgary, Alberta, December 18, 2017.

Adam Letourneau, QC

Sandra Corbett, QC

Dennis Edney, QC

Sarah King D'Souza, QC

Hugh Sommerville, QC

Kent Teskey, QC

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