



**The Law Society of Alberta
Hearing Committee Report**

**In the matter of the *Legal Profession Act*,
and in the matter of an application to terminate stay of the sanction of Matthew
Merchant,
a member of the Law Society of Alberta.**

Jurisdiction and Preliminary Matters

1. The Hearing Committee of the Law Society of Alberta (LSA) heard an application to terminate stay of the sanction imposed upon Matthew Merchant on June 4, 2009. The committee was comprised of Shirley Jackson, QC, chair and Yvonne Stanford, lay Bencher. The LSA was represented by Garner Groome. The member was represented by James Rooney, QC.
2. Jurisdiction was agreed to and established.
3. There was no objection by the member's counsel, the member or counsel for the LSA regarding the composition of the committee.
4. There was no request to hold the application in private.
5. Counsel for the LSA tendered Exhibit 1 consisting of:

Tab 1 Hearing Committee Report signed November 14, 2008

Tab 2 Supplemental Hearing Committee Report signed November 24, 2008

Tab 3 Copies of seven trust cheques issued between December 31, 2008 and February 23, 2009, T706 – T713 missing T711

Counsel for the Member tendered Exhibit 2 consisting of:

Copies of trust cheques issued T692-T810 with four that are outstanding and one that is void.

Citations

6. The member has been sanctioned on the following citations:

Citation 1: It is alleged that you applied for *ex parte* garnishee orders when you knew the Complainant had been retained to act on behalf of B.F. and J.H., and that such conduct is conduct deserving of sanction.

Citation 2: It is alleged that in applying for *ex parte* garnishee orders, you misled the Court and failed to disclose all of the material facts, and that such conduct is conduct deserving of sanction; this included the particular that the Member misled or attempted to mislead the court when he swore his affidavit that the fact of criminal wrongdoing had arisen in his discussion with an employee of one of the lenders.

Citation 3: It is alleged that in applying for *ex parte* garnishee orders, you lied in your affidavit, and that such conduct is conduct deserving of sanction, and included the particular set out in Citation 2.

Citation 4: It is alleged that you failed to respond to the Complainant on a timely basis, and that such conduct is conduct deserving of sanction.

Citation 5: Not made out

Citation 6: It is alleged that you threatened B.F. and J.H., and that such conduct is conduct deserving of sanction and included the particular that the Member threatened criminal proceedings to induce the Clients to pay money that was paid to them by mistake.

Citation 7: Withdrawn

Citation 8: It is alleged that you failed to render your Statement of Account and trust accounting to your clients B.F. and J.H. on a timely basis, and that such conduct is conduct deserving of sanction.

Citation 9: Dismissed

Citation 10: Was included as a particular in Citation 2 and Citation 3

Citation 11: It is alleged that you lied to B.F. and J.H. that the loan agency was threatening them with criminal charges, and that such conduct is conduct deserving of sanction.

Chronology of Events

7. On January 30, 2007 the member was disbarred as a result of the findings of conduct unbecoming a barrister and solicitor on the above sanctions.
8. Mr. Justice Chrumka of the Court of Queen's Bench of Alberta granted a stay of the disbarment in February 2007 on the basis a three part test:
 - i. the serious issue to be tried which was the reasonable apprehension of bias
 - ii. whether there will be irreparable harm to the Member if the stay is not granted because a notice to the profession announced the disbarment of the Member
 - iii. a balancing of the convenience between the two parties, the Hearing Committee and the member
9. An appeal of the Hearing that resulted in the disbarment was heard in the Court of Queen's Bench of Alberta by Madam Justice Kent where the issue was reasonable apprehension of bias.¹ The Court found that a reasonable apprehension of bias existed and determined that the Hearing Committee decision was a nullity.
10. This matter was appealed to the Alberta Court of Appeal² where it was determined that the appeal to the Court of Queen's Bench of Alberta did not follow the proper procedural route set out in the Legal Profession Act (LPA), RSA 2000, c. L-8 and the appeal was returned to be heard by an Appeal to the Benchers pursuant to s. 75 LPA.
11. The member brought an application to stay the sanction of the disbarment pursuant to s. 75(6) LPA on November 12, 2008. The stay was granted on the basis of the findings leading to the disbarments and very strict conditions were set out that included:
 1. He is to have no direct contact with clients either in person or in writing.
 2. He is to make no appearances or any filing in any Court.
 3. He is to sign no trust cheques or in any way handle trust property
12. The member appealed these conditions to the Alberta Court of Appeal and the conditions were upheld.³

¹ Merchant v Law Society (Alberta) 2007 ABQB 658, ABQB, corrigendum incorporated and Merchant v Law Society (Alberta) 2008 ABQB 144 ABQB

² Merchant v Law Society (Alberta) 2008 ABCA 363 ABCA

³ Merchant v Law Society of Alberta 2009 ABCA 91 ABCA March 12, 2009

13. The Law Society of Alberta now brings an application to terminate the stay granted to the member on the basis that he has breached the strict conditions set out in the stay.

Evidence

14. Counsel for the LSA argued that a *prima facie* case is made out by the seven trust cheques in Exhibit 1 Tab 3 signed by the member and issued and negotiated after the November 12, 2008 strict conditions were imposed. These cheques show that there has been a breach of the stay conditions and the application is that the stay of the sanction should be terminated.
15. Counsel for the member argued that on its face the exhibits in Exhibit 1 Tab 3 make out a *prima facie* case but that Exhibit 2 and the evidence of the witnesses will show that the member did not breach the stay conditions as he did not sign the cheques after the strict conditions were imposed and therefore the application to terminate the stay should not be granted.
16. The LSA called one witness, Mr. Arnston, the manager of audit and investigations for the LSA. There had been a Rule 130 audit of the Calgary office of the Merchant Law Group (MLG) in February 2007 and a number of serious exceptions to the trust rules were found so there was a follow up audit done within the last two weeks, prior to this June 4, 2009 application.
17. During that audit the seven cheques were found that were issued and negotiated after November 12, 2008. It is the position of the LSA that Trust cheques are not to be made payable to cash, must be signed by an active member of the LSA, are not to be signed in blank and must not be post-dated. These trust cheques were issued and negotiated out of sequence of the numbers on the cheques and this is very unusual.
18. When the audit is done the auditor has specimen signatures from each of the lawyers. The member admits that it is his signature on the cheques in Exhibit 1, Tab 3.
19. Rule 124 of the Rules of the LSA states:

Withdrawing and Transferring Trust Money

- 124 (1)** Money shall not be withdrawn from a trust account except where:
- (a) the money is properly required for
 - (i) a payment to the client for whom the money is held, or
 - (ii) a payment to any other person but only if the law firm does so pursuant to the authorization of the client for whom the money is held;
 - (b) the money is properly required for payment of a billing for fees or disbursements, but only if the withdrawal is made in compliance with subrule (2);

- (c) the money is being transferred directly into another trust account of the law firm;
- (d) the money has by inadvertence been paid into a trust account in contravention of these Rules;
- (e) money paid to the law firm has been deposited in a trust account because the payment to the law firm belonged in part to the law firm and in part to another; or
- (f) the money is paid pursuant to a court order.

(2) Money may be withdrawn from a trust account of a law firm pursuant to subrule (1)(b), if not held for a designated purpose, only in accordance with the following conditions:

- (a) money may be paid from the trust account to the law firm to reimburse the firm for a disbursement made by it if the law firm has prepared a billing respecting the disbursement and either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal; and
- (b) money may be paid from the trust account to the law firm to pay for the law firm's fees for services if the law firm has prepared a billing for the services, the billing relates to services actually provided and is not based on an estimate of the services, and the firm either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal.

(3) When money in a law firm's trust account becomes payable to the firm then, subject to subrules (1) and (2), the money must be withdrawn by the firm from the trust account expeditiously.

(4) Except as provided in subrules (5), (5.1) and (6), money may be withdrawn from a trust account only by a cheque which must:

- (a) clearly indicate that it is a cheque drawn on a trust account;
- (b) not be made payable to cash or bearer;
- (c) be dated, but not post-dated;
- (d) be signed in compliance with subrule (7); and
- (e) be completed as to the payee and amount.

(5) Money may be transferred by a law firm:

- (a) from an operating trust account of the law firm to a separate interest-bearing account maintained by the firm in the same branch of the approved depository, or
- (b) from a separate interest-bearing account maintained by the law firm to an operating trust account maintained by the firm in the same branch of the approved depository,

by a document signed in compliance with subrule (7) and showing the amount and date of the transfer, the operating trust account or separate interest-bearing account involved and sufficient information to identify the client.

(5.1) Money may be electronically transferred by a law firm where the withdrawal from trust is greater than twenty-five million dollars, where the law firm has met any conditions set by the Director of Audit of the Society, or designate, or the firm has obtained the prior written approval of the Director of Audit, or designate. The conditions set may include, but are not limited to, the following:

- (a) that the transfer system be able to produce within one banking day of the transfer a confirmation from the financial institution showing the details of the transfer;
- (b) that the confirmation from the financial institution be in hardcopy form and contain the following details: date of transfer, source trust account information, (account name, financial institution and account number) destination account

information, (account name, financial institution and account number) authorizing lawyer reference and amount of the transfer;

(c) that the law firm complete a \$25 Million Non-Cheque Transfer Requisition Form, with the requesting lawyer and authorizing lawyer sections of the Form signed and dated by an active member, the contents of the Form to be determined by the Director of Audit, or designate;

(d) that the law firm obtain the confirmation from the financial institution within one banking day of the transfer, and that within two banking days of the transfer an active member;

- (i) write the name of the client and file number on the confirmation,
- ii) sign and date the confirmation,
- (iii) agree the particulars from the confirmation to the \$25 Million Non-Cheque Transfer Requisition Form,
- (iv) satisfy themselves that the money was properly transferred in accordance with the requisition and,
- (v) sign and date the verifying lawyer section of the Form.

(6) Money may be transferred by a law firm from a trust account maintained by the law firm by means of a wire transfer from an approved depository to the payee upon presentation of a cheque which complies with subrule (4) and a written request signed in compliance with subrule (7), showing the amount of money to be wired, the date of the request to the approved depository, the trust account, the client involved and the intended recipient of the wired money.

(7) A cheque referred to in subrule (4), a transfer made pursuant to subrule (5), or a request to wire money referred to in subrule (6), must bear the signature or counter-signature of an active member authorized by that law firm to sign it, except that, in special circumstances, the Executive Director, on application and with or without conditions, may authorize:

- (a) the withdrawal of money from a trust account by cheques signed by one or more persons who are not active members of the Society and which are not signed by an active member, or
- (b) transfers of money pursuant to subrule (5) or requests to wire money referred to in subrule (6) by documents signed by one or more persons who are not active members of the Society and which are not signed by an active member.

20. Mr. Arnston cannot tell which signature comes first on these cheques, the date the signature was entered and does not know who wrote the second signature.
21. Counsel for the member called four witnesses to testify: Donald Outerbridge, Georgie Bistihas, Cindy Roth and the member.
22. Donald Outerbridge is the executive director of Merchant Law Group (MLG) and is in charge of everything in the firms except the practice of law.
23. Trust cheque T703 is signed by the member and Satnam Aujla in the MLG office in Calgary.
24. Mr EFA (Tony) Merchant, QC lives in Regina and is also a member of LSA. He generally signs the trust cheques. When Mr Merchant, QC is going to be absent he signs blank trust cheques in advance.

25. Donald Outerbridge gave evidence on the basis of what he was told by Georgia Bistihas and Cindy Roth that the member had signed two batches of blank trust cheques as set out in Exhibit 2, not based on any personal knowledge.
26. He was aware of the restrictions placed on the member but he did not instruct his staff with respect to the restrictions on the member and specifically did not instruct his staff that the member was not to sign trust cheques. It did not occur to him and this was his fault. The member did not raise this issue with him to his recollection. Other people do not know MLG's accounting system.
27. He does not know if their offices keep a record of trust cheques that are signed in advance.
28. The payee on a number of the trust cheques of MLG-P5 is the Calgary general account.
29. He explained the cheques were out of sequence and that sometimes cheques would fall on the floor.
30. Georgia Bistihas testified that she is the office manager of MLG in Calgary, the firm where the member practices. She was asked to have a lawyer in the firm sign some trust cheques in case Mr. EFA (Tony) Merchant, QC, who lives in Regina but is a member of the LSA was absent from the Regina office. She had the member sign a number of blank trust cheques around the end of September 2008. She was asked to obtain a lawyer's signature on more trust cheques. She had the member sign a second batch of blank trust cheques. She did not make a record of the number of cheques signed or the numbers of the trust cheques signed by the member but sent them in the courier to Regina.
31. She was later told by the member that he was not to sign trust cheques. She assumed all the trust cheques the member had signed were negotiated before the member was unable to deal with trust cheques. She did have a conversation with Cindy Roth about the member's restriction but does not know when she had the conversation.
32. Cindy Roth is with MLG in Regina and is in charge of the accounting for all the MLG offices. She was the person who asked Georgia Bistihas to obtain these signed blank trust cheques. She likes to have emergency trust cheques on hand for month end in case Mr. EFA (Tony) Merchant, QC is away. She does not recall when she asked for these cheques or when she received these cheques but she thinks it was August or September 2008. She testified that she keeps them in a locked drawer and uses them upon occasion and not in any particular order.

33. The cheques in Exhibit 2 are out of sequence with respect to the date that they were negotiated. Some of the trust cheques that the member signed were negotiated in various months.

T692 October 26, 2008 to MLG-P5
T694 October 28, 2008 to MLG-P5
T695 October 28, 2008 to MLG-P5
T696 October 31, 2008 to MLG-P5
T697 October 31, 2008 to MLG-P5
T698 November 26, 2008 to MLG-P5 *#
T699 December 3, 2008 to MLG-P5 *#
T700 December 8, 2008 to MLG-P5 *#
T701 December 10, 2008 to MLG-P5 *#
T702 does not look like his signature and there is only one signature
T703 September 29, 2008 to S..., with the signature of another Calgary lawyer so to Cindy Roth this trust cheque was signed in Calgary
T704 September 29, 2008 to Helmut Ehms with the signature of another Calgary lawyer so to Cindy Roth this trust cheque was signed in Calgary
T705 voided May 27, 2009-06-06 when this matter came to the attention of Cindy Roth as it was signed by the member and in her drawer
T706 January 28, 2009 to MLG-P5 **
T707 January 26, 2009 to MLG-P5 **
T708 January 22, 2009 to MLG-P5 **
T709 January 15, 2009 to MLG-P5 **
T710 February 23, 2009 to MLG-P5 **
T711 December 15, 2008 to MLG-P5 *
T712 December 31, 2008 to MLG-P5 **
T713 December 31, 2008 to MLG-P5 **
T714 October 31, 2008 to MLG-P5
T715 October 1, 2008 to Helmut Ehms
T721 October 17, 2008 to Mainwood Law Office

T722 October 20, 2008 to W.F. with what appears to be the signature of another Calgary lawyer

T727 October 28, 2008 to Minister of Finance & Enterprise

T728 October 28, 2008 to Minister of Finance & Enterprise

T729 October 28, 2008 to Minister of Finance & Enterprise

T730 October 28, 2008 to Mainwood Legal Services

T731 October 28, 2008 to Mainwood Legal Services

T732 November 3, 2008 to MacLeod Dixon LLP

T734 November 3, 2008 to C...

T735 November 4, 2008 to Helmut Ehms

T736 November 6, 2008 to Mainwood Legal Services in trust.

34. One asterisk denotes a trust cheque with the member's signature that is negotiated during the period with the strict conditions. Two asterisks indicate this cheque is included in the seven cheques in Exhibit 1 Tab 3. In final argument Counsel for the LSA advised that there were other trust cheques in Exhibit 2 that were signed by the member and negotiated after November 12, 2008. They are marked with a # sign.
35. Cindy Roth testified she was aware the member could not sign trust cheques as she was told by Donald Outerbridge but it never crossed her mind that she had cheques signed by him. She does not know when she was told that the member could not sign trust cheques.
36. She randomly uses cheques that she has in her locked drawer. These cheques were for emergency use. She is positive the member did not sign these cheques in November or later but she did not keep any records.
37. The member testified that he was approached by Georgia Bistihas the end of September and signed blank trust cheques and then a few days later he signed another series of cheques. He was told they were to be used straight away and he signed them.
38. Since May 27, 2009 he spoke to both practice advisers for the LSA. One thought it was an irregularity to sign blank trust cheques and the other said he could not see in Rule 124(4) that this was an irregularity but knew the LSA saw signing a blank trust cheque as an irregularity.

39. When the stay with strict conditions was imposed on November 12, 2008 he told pretty well every lawyer and staff person in his office about his restrictions. He told his father, Donald Outerbridge, Georgia Bistihas and Carol Walker.
40. He had signed the cheques in Exhibit 1 Tab 3 on an emergency basis and thought that they would have been negotiated.
41. He has not signed any trust cheques since the strict conditions were imposed.
42. The member thought that there were two batches of trust cheques in blank that he signed and that there were about twenty two cheques.

Findings of Fact

43. The conditions that pertain to this hearing that were imposed on the member pending his appeal of the decision and sanctions were:
 1. He is to have no direct contact with clients either in person or in writing.
 2. He is to make no appearances or any filing in any Court.
 3. He is to sign no trust cheques or in any way handle trust property
44. Counsel for the member argued that the witnesses testified that the trust cheques were signed in blank around the end of September 2008 by the member. The accountant had them and used them after the strict conditions were placed upon the member's practice. Therefore the member did not breach the strict conditions. This is based on the evidence of the witnesses and the fact that the rest of the trust cheques in Exhibit 2 were in order in sequence of cheque numbers and the issued date.
45. Counsel for the LSA argued that there is nothing obvious on the face of the cheques when they were signed by the member and no one kept any records of what trust cheques were signed at the end of September.
46. The trust cheques in Exhibit 2 are not in order with respect to cheque number and the issued dates as will be seen by cheques T801, T791, T768, T766, and T702, T703 and T704.
47. The member testified that he believed that the blank trust cheques that he signed, approximately twenty two of them, were going to be used right away. The evidence in Exhibit 2 shows that there were never twenty two trust cheques issued per month for MLG-P5, the general account for MLG that needed a signature from an Alberta lawyer:
48. The member testified the signed blank trust cheques were for emergency use and he believed that they would all have been negotiated by November 12, 2008.

The trust cheques in Exhibit 2 show that there were not 22 cheques per month or even over two months negotiated to pay the MLG general account.

49. Exhibit 2 indicates that five more cheques were in violation of the conditions, cheques T711, T701, T700, T699 and T698.
50. In the alternative counsel for the LSA argued that the member was only allowed to practice on the strict conditions placed upon him and he did not use due diligence even if he did sign these cheques near the end of September. Without his signature on the cheques, the cheques could not have been negotiated.
51. Counsel for the LSA also argued that Rule 124(4) specifies that members are not to sign blank trust cheques.
52. These cheques were issued and negotiated while he was under strict conditions that he could not handle trust cheques.
53. Counsel for the member replied that all of the cheques in Exhibit 1, Tab 3 are out of order. The blank trust cheques signed by the member were not to be used just in an emergency at the end of the month but when Mr EFA (Tony) Merchant, QC was absent. The witnesses were credible witnesses.
54. Counsel for the member argued that the member could not breach his conditions of his stay when he did not know that the cheques had not been negotiated. He did not sign the cheques after the November 12, 2008 ruling. The LSA mandate is to protect the public and there has been no harm to the public here.

Decision as to Citations

55. The Committee found that there was a *prima facie* case that the member had breached his conditions of the stay as set out in Exhibit 1 Tab 3 and the other cheques in Exhibit 2 that were issued and negotiated after November 12, 2008. The member and his witnesses did give an explanation that trust cheques were signed in blank by the member in two batches in August or September but no one kept a record of the number of trust cheques or the numbers of the trust cheques.
56. The Committee follows **Ringrose v College of Physicians and Surgeons of Alberta**⁴ as to the burden of proof:

'The burden of proof ... is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities.'

⁴ Ringrose v CPS of Alberta [1978] 2 WWR 534 ABCA

'...The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the issue with respect to which that burden must be met.'

'...The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established.'

57. The Committee found that there was a fair and reasonable preponderance of credible testimony that the member knew that he had signed two batches of blank trust cheques. No one kept track of the number of blank trust cheques that he signed or the numbers on the cheques. The member did not write down the numbers on the cheques but he thought that he may have signed 22 blank trust cheques. The Committee found that it was his responsibility to determine the status of these trust cheques that he had signed in blank. He notified various people that he had strict conditions but that did not include the accountant in Regina, Cindy Roth, and he made no inquiries as to the status of the batch of trust cheques that he had signed in blank.
58. The member thought or was told that he was to sign these cheques on an emergency basis yet in September 2008, based on the exhibits, no trust cheques signed by him were used to transfer money from the MLG Calgary trust account to the MLG Calgary general account. In October 2008, 6 trust cheques signed by the member were used to transfer money from the MLG Calgary trust account to the MLG Calgary general account. Even by his recollection there would be 16 outstanding blank trust cheques signed by him by November 2008.
59. The member was not asked and did not testify as to how he signed these blank trust cheques. The trust cheques signed by him in Exhibit 1 Tab 3 all have his signature in second place. The trust cheques signed by him in Exhibit 2 T692 (missing T693) to T701 have his signature in first place.
60. The Committee finds that although some of these trust cheques may have been signed in blank in August or September 2008 and were issued and negotiated after the strict conditions imposed November 12, 2008 that this is a breach of the strict conditions imposed. The Committee finds that the member, knowing that he had signed about 22 blank trust cheques, had a duty to determine the status of these blank trust cheques when the strict conditions were imposed. The member testified he told some people of the strict conditions but he did not inform the accountant who possessed these cheques. There is no evidence that he made any inquiries as to the status of these blank trust cheques that he had signed, he just assumed that they had all been negotiated.

Sanction and Orders

61. The application to terminate the stay is granted and the conditions as set out in the stay application granted November 12, 2008 are no longer in effect. The member is disbarred from the practice of law.

Concluding Matters

62. There will be a Notice of Disbarment to the Profession.
63. An application to stay the termination of the stay pending an expeditious appeal is denied.
64. Costs are to be paid by the member 30 days after the costs are determined and signed.
65. The names of clients will be redacted from the Exhibits.

Dated this 10th day of June, 2009

Shirley Jackson, QC - Chair and Bencher

Yvonne Stanford – Lay Bencher

Decision

This Decision was overturned by the Alberta Court of Appeal on September 1, 2009. Mr. Merchant's disbarment is stayed pending appeal to the Benchers on the conditions imposed by the Hearing Committee on November 12, 2008.