THE LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND IN THE MATTER OF A HEARING
REGARDING THE CONDUCT OF
RUELLEN FORSYTH-NICHOLSON,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE:
W .E. Brett Code, Q.C., Chair
Hugh D. Sommerville, Q.C., Committee Member
Walter Pavlic, Q.C., Committee Member

COUNSEL:
S. Heine, C. A. Ross, and, originally, N. Maggisano, for the Law Society of Alberta
D. M. Castle, J. A. Hegberg, for the Member

MEMBER:
R. Forsyth-Nicholson

HEARING DATES:
December 7, 2015, March 14-15, May 30-31, and October 17-18, 2016

HEARING LOCATION:
Law Society of Alberta, 500, 919 – 11th Avenue, S.W., Calgary, Alberta

HEARING COMMITTEE REPORT:
PUBLIC

Introduction and Summary

1. Over the course of just under a year, on various difficult-to-schedule dates, we presided over a private hearing. A private committee hearing report is being released simultaneously with this public report.

2. Two separate private hearing applications were made before us. We partially granted one, and fully granted the second, with the result that the hearing was held, thereafter, in

private. All of the evidence, written and oral, is private, and none of that evidence is available to the public in any way.

Decision Released

3. On March 2, 2017, we released a decision that dismissed the citations against the Member, stating that a complete hearing committee report would follow. That decision was as follows:

    a) By Notice to Solicitor dated September 28, 2015, the Law Society of Alberta ("LSA") gave notice to Ms. Forsyth-Nicholson that it would hold a hearing to determine whether she was guilty of conduct deserving of sanction on three citations. The LSA alleged that Ms. Forsyth-Nicholson:

        i. failed to treat XY with courtesy and that that conduct was deserving of sanction;

        ii. failed to maintain objectivity in her representation of her client and that that conduct was deserving of sanction; and

        iii. made inappropriate comments about another party and that that conduct was deserving of sanction.

    b) We heard evidence on December 7, 2015, March 14-15, May 30-31, and October 17-18 of 2016. The hearing was held in private, following private hearing applications by the Member's client and an interested party. We received written submissions from the LSA on November 10, 2016, and from the Member's counsel on November 28, 2016. Thereafter, we caucused as a panel and agreed on our decision, unanimously. Our intention was that the written reasons be produced forthwith.

    c) Unfortunately, the writing of the decision is taking some time, and we believe that it is likely in the interests of the parties and particularly in the interests of the Member to know the result. Therefore, we have decided to release the decision today. Our written Hearing Committee Report, including our detailed reasons for decision, will be delivered to the parties in due course pursuant to section 74 of the *Legal Profession Act*.

    d) We are unanimously of the view that the LSA did not meet its burden of proof on any of the citations, such that the three citations are dismissed. The Member is not guilty of conduct deserving of sanction as set out in those citations.

4. The hearing report referred to has been completed and signed. It is private and will not be distributed to the public in any way.

5. This public hearing committee report contains decisions that were made in the public part of the hearing, before it was declared by us to be a private hearing.

Preliminary Applications

6. On December 7, 2015, the parties presented us with several preliminary matters.

Private Hearing Applications

7. Exhibit 5 states that, pursuant to sub-Rules 96(2)(a) and (b) of the Rules of the Law Society of Alberta ("Rules"), the LSA served five people, including the member, with Private Hearing Application Notices. Those documents gave notice to each of those five persons that the hearing would be held in public unless the Hearing Committee decided, on application by one of them or on its own initiative, that all or part of the hearing would be held in private.

8. Two of the people served with the Notice, XX and XXG, made private hearing applications.

9. Ms. Ruellen-Forsyth did not make a private hearing application. She supported the applications of XX and XXG.

10. Both applications were made in public, as neither applicant made an application to have the private hearing applications themselves held in private.

11. The complainant, XY, was not present during any part of either private hearing application, and no submissions were made by or on behalf of XY.

Private Hearing Application of XX

12. XX is the former spouse of the complainant, XY. Custody of their children and access to them is the subject of an acrimonious dispute, and those matters are headed to trial. As of the date of the applications, trial dates had not yet been set. Ms. Forsyth-Nicholson is counsel to XX.

13. In XX's application to have the entire hearing held in private, XX was concerned about two things in particular:

    a) The protection of privilege, as some of the documentation to be tendered in this hearing was subject to solicitor-client privilege, litigation privilege, or both.

b) The potential for misuse by XY at the upcoming trial of information disclosed or evidence tendered during the hearing.

14. Those two different concerns give rise to two quite different applications:

a) The first is an application pursuant to s. 112(2) of the *Legal Profession Act*, RSA 2000, c. L-8 ("LPA") **to require** that all parts of the hearing during which reference will be made to evidence over which XX claims privilege be held in private. Since XX has the statutory ability to require protection of her privilege by private hearing, it is not so much an application as a process through which XX demands that the LSA act to preserve her privilege. Her legal burden is only to prove that a proper claim of privilege exists. This type of private hearing application is unique: once privilege is proved (or conceded by the LSA) over evidence to be tendered in the hearing, the Hearing Committee must grant the application (unless there exists some residual discretion to direct that privileged information be disclosed in a public hearing, an issue that was not before us).

b) The second is a more typical application, brought pursuant to s. 78(2) of the LPA, by which the applicant, XX, bears the burden of demonstrating that her privacy interests are sufficiently compelling to persuade the Hearing Committee to exercise its discretion to direct that all or part of the hearing be held in private.

15. During the application itself, XX's application was not treated as two separate applications, although it likely should have been. Rather, it was treated by both XX and by LSA counsel as a single application for the entire hearing to be held in private on the basis of the two reasons given by XX and recited above.

16. The essence of XX's approach was that the LSA's approach to the use of privileged documents creates real risk to her. Documents that have been part of her solicitor-client communications with her lawyer are set out in binders before us. Her fear is that XY should not be permitted, ever or under any circumstances, to see them. If he sees them, he could use them against her in the upcoming trial, or in ongoing procedural matters, as he has already used the privileged document that was sent to him inadvertently by her counsel. Further, she did not want any member of the public to be able to report back to XY about the content of such privileged documents.

17. Counsel for the LSA opposed the application to have the entire hearing held in private, asserting that the general principle is that LSA conduct hearings are to be held in public and that they are only by exception to be held in private. He suggested that alternative measures were available that would protect the privacy interests of XX: 1) that all privileged documents could be removed from the Exhibit binder during the testimony of

XY; and 2) that all privileged documents could be ordered to be private at the end of the hearing. He also stated that that privacy protection of the privileged information would be permanent.

18. The essence of his submissions were that he conceded the claim of privilege and agreed that privileged documents be protected, but he did not go so far as to concede that those parts of the hearing where the privileged documents are discussed should be held in private, nor did he concede that all or any of the hearing be held in private to protect the privacy interest asserted by XX.

19. Counsel for the member supported the arguments of XX, emphasizing that XY has not hesitated to use, and misuse, privileged documents whenever he had the opportunity in the past. She asserted therefore that there was a very real risk that solicitor-client privilege would be breached and misused if XY were able to look at, hear testimony about, or hear reports from other members of the public about any of the privileged documents that would be part of the record.

20. During the hearing, we made the following decision and rendered it orally:

> We have come to the conclusion that the hearing should be in public, other than during the time of the testimony of XX, and that all documentation over which privilege is claimed should be protected. We have also decided that there is room for challenge on privilege as we proceed through the hearing, but we are putting the onus on counsel, outside of the testimony of XX, to let us know where there is a privilege issue. Our intention would be to rule on any additional claim of privilege as such claims arise through the proceedings. Our objective would be to maximize the protection of the privacy interest and the privilege interest that belong to XX in these proceedings.

21. That decision was rendered moot by the decision we made in response to the Private Hearing Application of XXG. So, while we ruled as above, the decision was not implemented.

22. What follows is our written reasoning and decision on the matter.

23. The Hearing Guide of the LSA, revised and approved by the Benchers in February of 2013, states (at p. 2):

> 9(a) In the interests of transparency, hearings should be open to the public – except to the extent required to protect compelling privacy interests.

The Subsection 112(2) Application to Require the Protection of Solicitor-Client Privilege

24. If the balance in LSA conduct hearings favours transparency and defaults to public hearings, that balance is expressly reversed when it comes to evidence over which a person involved in the hearing claims solicitor-client privilege.

25. Under Part 3 of the LPA, a member being investigated may be asked to disclose his or her client files. Those files are normally subject to solicitor-client privilege. If an investigation were being conducted by the police, by an investigator of, for example, the Alberta Securities Commission, or under FOIP, the member would not deliver the files to those investigators or permit them to be viewed during the investigation. Instead, the lawyer would claim privilege. Other than in certain rare circumstances, Canada's courts would respect and protect that privilege, and those investigations would have to be conducted without reference to whatever privileged information exists on the lawyer's file. The protection of privilege in our society is so important that the law excludes (subject to rare exceptions) the discovery of that information by any means, with the result that investigators and prosecutors must proceed without the benefit of evidence that may well prove the truth of matters in issue.

26. The same is not true in LSA investigations and subsequent prosecutions. Unlike investigations conducted by the state in which suspects and accused persons are entitled to maintain solicitor-client privilege and in which state agents are not entitled to see or obtain privileged documentation, the investigative and prosecutorial functions of the LSA are not so constrained. Members being investigated or prosecuted are not permitted to refuse disclosure to LSA authorities on the basis of privilege. Subsection 112(1) is very clear in that regard. It states:

> **112(1)** A member may not in any proceedings under Part 3 or 4 refuse to give evidence, answer inquiries or produce or make available any records or other property on the ground of solicitor and client privilege if the evidence, inquiry, records or other property is material to the proceedings.

27. That there is an extremely high public interest in the protection of solicitor-client privilege is undeniable. Section 112 requires the disclosure by members of privileged information for the purpose of ensuring that the LSA is able to investigate and prosecute its members based on full information and is not thwarted in its desire to regulate member conduct by client claims of privilege. The client does not thereby lose his or her

privilege; it is maintained by way of the process created in subsection 112(2) for the benefit of those claiming privilege.

> **112(2)** If a member is required under subsection (1) to give evidence, answer inquiries or produce or make available any records or other property pursuant to subsection (1) and the member may claim solicitor and client privilege in respect of the evidence, answers, records or other property, the member **or any other person who may claim the solicitor and client privilege <u>may require</u>** that
>
> (a) all or part of any proceedings under Part 3 or 4 in which the evidence, answers, records or other property is dealt with be held in private, and
>
> (b) the public be refused access to the records and other property and to any other document containing the evidence or answers.
>
> [Emphasis added]

28. Section 112 thus permits the LSA to investigate and, if necessary, to prosecute its members on the basis of evidence that is subject to privilege, but section 112 does not override or eliminate the privilege. To the contrary, it creates a process by which the person whose privilege it is may require that those parts of a hearing during which privileged information is being tendered as evidence be held in private.

29. An application pursuant to subsection 112(2) is not a request for the exercise of a discretion by the Hearing Committee, it is a demand that the Hearing Committee protect the applicant's privilege.

30. The Hearing Guide states that privilege is a compelling privacy interest, as follows (at p. 2):

> 9(c) Protection of legal privilege and solicitor-client confidentiality are compelling privacy interests which must be protected unless they are expressly waived by the appropriate person(s). Neither the making of a complaint to the LSA, nor failure to respond to a Private Hearing Application Notice constitutes an express waiver.

31. That statement is correct. Failure to respond to a Private Hearing Application Notice is not waiver by the member's client of the client's privilege. As such, no formal application for a private hearing should even be necessary, in principle. By requiring that a person

who properly claims privilege make an application and demonstrate a compelling privacy interest, the notice and application process set out by Rule 98 may well create an inappropriate reverse onus, as though it is the privilege-holder's burden to demonstrate that his or her privilege be maintained.

32. Understood with an eye to properly protecting solicitor-client privilege, all conduct hearings should likely be conducted on the basis that those parts of the hearing involving privileged information must be conducted in private unless the member's client expressly waives the privilege. If it wishes to use privileged information and to use it in a public, rather than a private hearing, the LSA likely should have the obligation of seeking and obtaining waiver from the privilege holder. If any application were to occur it would therefore be an application by the LSA to have privileged evidence tendered in a public hearing, and the LSA would bear the burden of demonstrating that privilege had been waived.

33. Before this Hearing Committee, XX applied to have us exercise our discretion to protect her privilege. Such an application is not required, other than to prove the existence of a privilege over evidence to be tendered at the hearing. The LSA conceded the existence of the privilege. The only issue actually before us therefore was what should be done to protect it.

34. LSA counsel advised us that he had removed privileged documents from the Exhibit binder in anticipation of the testimony of XY. He also suggested that privilege could be further protected by a declaration at the end of the hearing that documents or Exhibits be held in private and not released to the public. We agreed with those ideas.

35. Our decision on the second part of XX's application as well as our decision with regard to the application of XXG obviated the need to go further. So, for example, those parts of XY's testimony during which he referred to information over which privilege was claimed would have been held in private while the remainder of the testimony would have been in public. Our declaration, described below, that the entire hearing would proceed in private obviated the need to deal with that difficult parsing exercise.

The Subsection 78(2) Application for the Protection of a Compelling Privacy Interest

36. As stated in paragraph 9(a) of the Hearing Guide, quoted above, hearings "should" be held in public except to the extent required to protect a compelling privacy interest. In the application for a private hearing pursuant to section 78(2) of the LPA, it is therefore our role to weigh two potentially competing public interests, namely:

    a) the public interest in the transparency to the public and to the profession of LSA disciplinary and conduct hearings; and

b) the public interest in having the LSA protect compelling privacy interests in those same disciplinary and conduct hearings.

37. There may be a tendency to overstate the public interest in holding conduct hearings at the LSA in public. Reference to the need for transparency in LSA proceedings is often understood and spoken of by analogy to the fundamental principle of justice underlying the expectation that trials be held in public in Canada's courts. In addition to various other sources, including the requirements of natural law, it is worth remembering that the *Canadian Charter of Rights and Freedoms* enshrines the right to a **public** trial. Section 11(d) provides that:

> 11. Any person charged with an offence has the right …
>
> (d) to be presumed innocent until proven guilty according to law in a fair **and public hearing** by an independent and impartial tribunal.

38. While the interest in transparency expressed in the Hearing Guide finds its source in our legal system's appreciation of the importance of public hearings, it is not obvious that that interest is the same as that demanded or expected in the public judicial and court system. For that reason, the Hearing Guide uses the word "should" rather than "must" and appears to treat the holding of a public hearing as a preference rather than as a right. The language used in section 78 of the LPA also appears to demonstrate that the holding of a public hearing is much less than the "right" that it is in the courts. That section states, in part:

> **78(1)** The public may attend and observe a hearing before a Hearing Committee or an application under section 61 or an appeal under section 76 except to the extent that the hearing is directed to be held in private under subsection (2).
>
> **(2)** The Hearing Committee or the Benchers, as the case may be, on their own motion or on the application of the member concerned, the complainant, any person expected to be a witness at the hearing or any other interested party at any time before or during the proceedings, may, subject to the rules, direct that all or part of the hearing is to be held in private.
>
> **(3)** Proceedings under this Division, other than hearings referred to in subsection (1) and hearings before the Court of Appeal, shall be held in private.

39. Subsection 78(3) makes most of the conduct process private. Public proceedings are the exception, being hearings like this one and hearings in one of our courts, the Court of Appeal. The public parts of the LSA's conduct process are more an exception than a rule, meaning that LSA conduct matters are in some important sense the opposite of the public court process enshrined in the *Charter*. One easy, but not complete, explanation for that is that so much in a LSA investigation and prosecution may depend upon privileged information obtained from a member's client files.

40. The consequence of the rather exceptional nature of public conduct proceedings means that the discretion exercised by a Hearing Committee set out in section 78(2) of the LPA is an open discretion, that is, an open invitation to weigh two important public interests and to determine on a case-by-case basis whether all or part of the hearing should be held in private or in public. It is not constrained by some kind of default preference for public transparency at the expense of privacy interests.

41. XX applied to have the entire hearing conducted in private as the result of some notion of potential misuse of evidence at the forthcoming custody and access trial between XX and XY. LSA counsel opposed the application, essentially on the basis that the protection of her privilege was sufficient. The member's counsel supported her application.

42. We had no evidence that would demonstrate the potential for harm, only assertions by the applicant. We were provided with no authority.

43. We concluded that it was unlikely that any of the testimony of XY, for example, would fit that description or create the potential for misuse whether his evidence was given in public or in private. We could not be sure of the evidence of other witnesses, if any, for we were given no indication of the kind of evidence that might arise or how it might affect XX's privacy interest. We were therefore unwilling to declare that the entire hearing be held in private.

44. On the basis that XX likely knew what she was going to say in her testimony and that she might well not wish for any of that to be used in the upcoming trial between XX and XY, we were prepared to accede to her request with regard to her own testimony. We directed that the part of the hearing during which XX testified would be held in private. What that meant is that the only people permitted to be present in the hearing room during her testimony would be the member, the member's counsel, and XX, subject to specific authorization by the Hearing Committee for the presence of any others (Rule 98(2)).

The Private Hearing Application of XXG

45. XXG is the father of XX. Holding no privilege of any kind, his application was pursuant to subsection 78(2) for a direction that the entire hearing be held in private.

46. Part of his application paralleled the subsection 78(2) application of XX. He repeated XX's concerns that there may be hearing evidence that could be misused in the trial, and he expressed a concern for what might happen if XY were to obtain documents to be tendered at the hearing.

47. As was the case in XX's subsection 78(2) application, no evidence was provided, no examples of potentially harmful evidence or documents were provided, and no authority was provided. Had that been the extent of XXG's application, we would have dismissed it.

48. XXG however also made reference to protection of the children of the marriage, the two being under the age of 10. He described the attempts that had been made to date to protect them from the more difficult details of the relationship between XX and XY, including the keeping from them of the fact of XY's conviction and incarceration for sexual assault of XX. The emphasis of his application was that it was in the best interests of the children that the hearing be held in private.

49. Counsel for the LSA opposed the application. His argument was that the privacy interest described was not the equivalent of or as important as the protection of solicitor-client privilege. He proposed that the privacy interests could be protected by redaction from the public record of names, which would be replaced by initials, and by careful drafting of the Hearing Committee Report with an eye to the potential privacy interests of all involved.

50. Counsel for the member strongly supported the idea of the protection of the best interests of the children and agreed that if these matters could be kept private it would be in the interests of the children.

51. We asked whether the children ought to have been given notice that they could make an application for a private hearing and were told that XX and XY were the guardians of the children, such that effective notice had been given. The member's counsel then advised that the degree of acrimony as between XX and XY rendered unlikely any joint decision, even in the best interests of the children, such that the notional notice given to the children through their joint guardians was essentially a fiction.

52. We wondered whether XXG could be accepted by us as the agent of the children or whether an agent or an *amicus curiae* could or should be appointed to represent the

interests of the children. After hearing submissions on those questions, it became clear to us that we were going to have to make our own decision. The application was being made by XXG, but it may well be that he has no standing to make an application for the protection of someone else's privacy interests. Knowing that subsection 78(2) permits a Hearing Committee on its own motion to direct the holding of a private hearing, we concluded that that is the approach we should take, and we did so.

53. As stated above, the decision of a Hearing Committee whether to direct a private hearing is an open discretion, determined by weighing the public interests in public conduct hearings and in protecting compelling privacy interests.

54. LSA counsel took the view that we should not, in LSA conduct proceedings, take an approach that is not generally taken in the Court of Queen's Bench. We asked whether any application had yet been made to have the trial between XX and XY held in camera. The answer was incomplete. No such application has yet been made.

55. On this application as on the prior one, we were provided with no authority. We note that other legislative provisions exist that permit both the Alberta Court of Queen's Bench and the Provincial Court of Alberta to override the open-court, public-hearing principle if it is in the best interests of the children to do so. We note the following two examples.

56. Section 99 of the *Family Law Act*, S.A. 2003, c. F-4.5, states the following:

> **Private hearing**
>
> **99** The court may, if it is in the best interests of the child or would promote the proper administration of justice, exclude from any proceeding under this Act
>
> (a) any person except the parties to the proceeding and their lawyers, and
>
> (b) a child, whether or not the child is a party, but not the child's lawyer.

57. The *Provincial Court Act*, RSA 2000, c. P-31, states the following:

> Part 3
> Family Matters
>
> **Private Hearing**
>
> **20** Any case arising under this Part may, in the discretion of the Court, be heard in private.

58. On the application before us, we had incomplete submissions and incomplete evidence. The children were not represented independently of their parents. We were left to make our own determination on the basis of what we did have.

59. It was important to us that efforts had been made to protect the children from the acrimony of the divorce, of the custody and access issues, and, in particular, from the fact of the conviction and incarceration of their father for sexual assault of their mother. Their grandfather's submissions were compelling when he stated that, in his belief, the children's best interests included protection from a public airing of whatever evidence was to be tendered at this hearing. We also considered the ability of our public courts to override the public hearing principle when the interests of children are concerned. There were no submissions which identified a positive public interest in having a public hearing in this particular case and on these particular facts. For these reasons, the Committee directed that the entire hearing would proceed in private.

Application by the LSA to have an Education Consultant Attend the Private Hearing

60. Rule 98(2) limits the persons who can attend a private hearing. The LSA had retained an educator to watch our process and to use what she learned as part of a program to educate Benchers and others in a continuing education program designed to improve our hearings and hearing processes.

61. We were advised that she is subject to the same duty of confidentiality as are all LSA employees.

62. Member's counsel did not oppose the application.

63. We granted it.

Application for Further Disclosure of the Member's File Related to her Retainer by XX

64. The member's counsel advised us that the LSA's disclosure and the Exhibit Binder contained only a few excerpts from what was described as the large file of the member in relation to her ongoing representation of XX.

65. We learned that the LSA had, very reasonably, assumed that the member's counsel had had access to that file. The file being otherwise privileged, it turned out that she had not had access to that file, and LSA counsel was advised on the first day of the hearing. The LSA's disclosure was made on the basis of his very reasonable assumption that she had seen it. She felt that she was at a disadvantage and wanted disclosure from the LSA of the file.

66. During an adjournment, counsel discussed the matter, and LSA counsel agreed to provide a copy of the material in the LSA's possession to the member's counsel. Fortunately, the hearing was to be adjourned in any event to dates that were many weeks in the future, so it was not necessary to consider any adjournment application.

Signed as of the 20th day of March, 2017.

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W. E. Brett Code, Q.C. (Chair)

_____
Hugh D. Sommerville, Q.C.

_____
Walter Pavlic, Q.C.