

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF ALLAN GARBER
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

[Editor's note: additional clarifying reasons following Schedule A]

Single Benchers Hearing Committee

Nancy Dilts, QC – Chair

Appearances

Sharon Heine – Counsel for the Law Society of Alberta (LSA)

Jon Faulds, QC – Counsel for Allan Garber

Hearing Date

March 1, 2018

Hearing Location

800,10104 - 103 Avenue, Edmonton, Alberta and
500, 919 11th Avenue SW Calgary, Alberta, by teleconference.

HEARING COMMITTEE REPORT

Overview

1. Mr. Garber is a senior member of the LSA who practiced for over 30 years in a well-regarded Alberta law firm before leaving to commence sole practice. Within that very different context for practice, Mr. Garber engaged in business with a colleague at the same time as providing legal services to their venture, which gave rise to these citations.
2. The LSA and Mr. Garber entered into an Agreed Statement of Facts and Admission of Guilt (the Agreed Statement) in relation to Mr. Garber's conduct. The Conduct Committee found the Agreed Statement acceptable. The Agreed Statement is appended to this Report, as 'Schedule A', for reference.
3. Pursuant to subsection 60(4) of the *Legal Profession Act* (the *Act*), it is deemed to be a finding of the Committee that Mr. Garber's conduct is deserving of sanction in relation to the following citations arising from two complaints:

- 1) It is alleged that Allan Garber acted in a potential conflict of interest without obtaining his clients' consent or in circumstances where it was not in the best interests of his clients, and that such conduct is conduct deserving of sanction;
 - 2) It is alleged that Allan Garber engaged in a business transaction with his client(s) without recommending independent legal advice and that such conduct is deserving of sanction;
 - 3) It is alleged that Allan Garber failed to comply with trust conditions and that such conduct is deserving of sanction;
 - 4) It is alleged that Allan Garber breached the accounting rules of the Law Society and that such conduct is deserving of sanction; and
 - 5) It is alleged that Allan Garber failed to discharge his duties as the responsible lawyer of his trust account and that such conduct is deserving of sanction.
4. On March 1, 2018, the Hearing Committee (Committee) convened a hearing into the appropriate sanction related to the conduct of Mr. Garber.
5. After reviewing all of the evidence and exhibits, and hearing the submissions of the LSA and counsel for Mr. Garber, for the reasons set out below, the Committee has determined that the following sanction is appropriate. Mr. Garber is to receive a reprimand from the Committee and is ordered to pay costs in the amount of \$5,000.00 payable within 18 months of the Hearing Date.

Preliminary Matters

6. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested, so a public hearing into the appropriate sanction proceeded.

Statement of Facts/Background

7. In this case, five citations were issued respecting Mr. Garber's conduct. After the commencement of proceedings in relation to the citations, Mr. Garber submitted the Agreed Statement. The Conduct Committee found the Agreed Statement acceptable on February 20, 2018. Pursuant to subsection 60(4) of the *Act*, each admission of guilt in the Agreed Statement is deemed to be a finding by this Committee that Mr. Garber's conduct is deserving of sanction under section 49 of the *Act*.
8. As provided by subsection 60(3) of the *Act*, once the Agreed Statement was accepted by the Conduct Committee, the hearing into the appropriate sanction could be conducted by a single Bencher. I was appointed to conduct the sanction hearing.

Submissions on Sanction

9. Counsel for Mr. Garber and counsel for the LSA jointly sought a reprimand and costs, although were not in agreement on the amount of costs to be ordered.
10. Ms. Heine observed that ordinarily citations of the nature that Mr. Garber faced would be considered quite serious, but maintained that in the circumstances, a reprimand was an appropriate outcome. In support of her position, Ms. Heine pointed out that Mr. Garber had practiced over 30 years without any disciplinary record, had engaged thoroughly and willingly with Practice Management and that he expressed true remorse for his conduct. The Practice Review assessor reported that Mr. Garber had worked to create better systems and practice and demonstrated a willingness to take advice and implement change.
11. Moreover, Ms. Heine observed that Mr. Garber did not benefit in any way from the conduct giving rise to the complaints and no party suffered any financial loss.
12. Counsel for Mr. Garber pointed not only to Mr. Garber's cooperation in bringing these matters before a single Benchers and with an Agreed Statement, but that Mr. Garber takes very seriously the proceedings. Mr. Faulds reiterated that the citations arose in the context of a material transition in practice environment and that Mr. Garber has made material contributions to the administration of justice in Alberta for which he has been recognized by being nominated for an award.

Decision on Sanction

13. This Committee is not bound by a Joint Submission on Sanction. However, a Committee is required to give serious consideration to a Joint Submission, should not lightly disregard it and should accept it unless it is unfit or unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting it. Given the nature of the conduct forming the basis for the complaints and given Mr. Garber's clear acceptance of responsibility, his long service and unblemished record, his genuine remorse and demonstrated desire to improve his practice management, this Committee agrees that the appropriate sanction is a reprimand. In reaching this conclusion, the Committee is most influenced by Mr. Garber's lengthy career, the absence of a disciplinary history, and the fact that the citations arose in the context of a transition in practice which, by its very nature, is fraught with pitfalls.
14. The approach taken by both Mr. Garber and the LSA in dealing with this matter through a Single Benchers hearing also avoided an unnecessary contested hearing, witness inconvenience, and process costs.

15. The following reprimand was delivered at the conclusion of the Hearing.

The Hearing Guide of the Law Society requires that Hearing Committees take a purposeful approach to sanctioning a member who has been found guilty of conduct deserving of sanction. The fundamental purpose of sanctioning is the protection of the best interests of the public and the protection of the reputation and standing of the legal profession generally. Mr. Garber, I acknowledge your co-operation with the Law Society leading up to today and resolving these complaints by admitting guilt and by proceeding with a single Benchers hearing. Your admissions have permitted these citations to be resolved on a more efficient basis, which is not just a benefit to you, but is a benefit to the public and to the Law Society.

Mr. Garber, you are an experienced lawyer, having practiced for over 33 years. It is clear to me that you have a long and principled career having made significant contributions to the administration of justice in Alberta. Your career has been exemplary until these citations. I have noted the positive comments of the Practice Management report which indicates that you were cooperative and receptive to their involvement. I also note that these citations arose following a major transition in your practice. I expect that facing these citations now, at this stage of your career, is an enormous disappointment. You have admitted guilt on five citations. Those citations are serious and have the potential for serious consequences. While there were no serious consequences to the public and there was no loss, there was litigation, a complaint and a significant investigation.

In these matters, you put your professional reputation and integrity at risk and your clients' interests at risk. In making these comments today and in expressing this reprimand today, I urge you to constantly have at the forefront of your mind and your practice the integrity required of all of us as members of this profession and the diligence that we all must demonstrate to protect our clients' interests and to maintain our reputation and the reputation of this profession.

In concluding, I wish you the best as you move forward from these very difficult circumstances and thank you for your attendance today.

Concluding Matters

16. Counsel for the LSA and Counsel for Mr. Garber were unable to reach agreement on costs prior to the Hearing. Counsel for the LSA noted that the LSA had conducted a full investigation into both complaints, resulting in significant costs. She requested that at a minimum, the LSA recover its actual disbursements relating to the proceedings in the amount of \$5,000.

17. Counsel for Mr. Garber noted that the investigation costs relate to a larger number of potential citations on which the LSA acted only on five. He noted that Mr. Garber's cooperation has been constant throughout.
18. The Committee ordered that costs of \$5,000 be paid and that Mr. Garber be permitted 18 months' time to pay those costs.
19. The exhibits and other hearing materials, transcripts, and this report will be available for public inspection, including providing copies of exhibits for a reasonable copy fee, although redactions will be made to preserve personal information, client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at Calgary, Alberta, March 19, 2018.

Nancy Dilts, QC

SCHEDULE A

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF ALLAN A. GARBER A MEMBER OF THE LAW SOCIETY OF ALBERTA

LAW SOCIETY HEARING FILE HE20170138

AGREED STATEMENT OF FACTS AND ADMISSIONS OF CONDUCT DESERVING OF SANCTION

BACKGROUND

1. Allan A. Garber (“Mr. Garber”) was admitted as a member of the Law Society of Alberta (the “Law Society”) on July 3, 1985.
2. Mr. Garber joined Parlee McLaws LLP and became a partner of the firm in 1990. He was a litigator practising mainly in the area of large, class action law suits.
3. In January 2013, Mr. Garber left Parlee McLaws LLP and became a sole practitioner with a general practice of 30% litigation, 30% real estate, 10% labour and employment, 20% corporate and 10% administrative law.
4. Mr. Garber was referred to Practice Management in October 2016. A Practice Assessment found that Mr. Garber “struggled with the practical and financial realities of moving from a firm practice to a sole practice”. His Practice Management file was closed after a Follow Up Practice Assessment in October 2017.
5. In her final report, the assessor stated that in her opinion, Mr. Garber was “genuinely remorseful” and that he had “worked to create better systems and practices”. She stated further that Mr. Garber had been “engaged, friendly, willing to take advice, and implement change. He and his assistant [A] are a good team, and seem truly committed to running a strong practice”.

CITATIONS

6. Mr. Garber faces 5 citations arising out of two complaints, as follows:
CO20153061

1. It is alleged that Allan Garber acted in a potential conflict of interest without obtaining his clients' consent or in circumstances where it was not in the best interests of his clients, and that such conduct is deserving of sanction.
2. It is alleged that Allan Garber engaged in a business transaction with this client(s) without recommending independent legal advice and that such conduct is deserving of sanction.

CO20161026

3. It is alleged that Allan Garber failed to comply with trust conditions and that such conduct is deserving of sanction.
4. It is alleged that Allan Garber breached the accounting rules of the Law Society and that such conduct is deserving of sanction.
5. It is alleged that Allan Garber failed to discharge his duties as the responsible lawyer of his trust account and that such conduct is deserving of sanction.

AGREED FACTS

CO20153061

7. In 2014, Mr. Garber was providing legal services to various partnerships and corporations operated by D.P., including a real estate development business (the "Development Co."). The shareholder of the Development Co. was D.P.'s wife, S.P., a realtor. The Development Co. was developing a 31-lot subdivision in Cold Lake, Alberta.
8. The complainant, O.R., is an accountant who was providing accounting services to the Development Co. and other companies operated by D.P. O.R. also provided accounting services to Mr. Garber as well as the services of her bookkeeper.
9. On October 1, 2014, Mr. Garber, O.R. and S.P. formed a partnership for the purpose of constructing and selling six houses in the Cold Lake subdivision (the "Project").
10. Mr. Garber did the legal work for the Project. He prepared the partnership agreement, a bare trustee agreement and did some of the legal work related to obtaining mortgages and transferring titles. There were no retainer agreements and Mr. Garber was not paid for his legal services.
11. O.R. provided accounting services for the Project, with primary responsibility for tracking and payment of the contractors. S.P. provided realtor services for the Project. Neither O.R. nor S.P. received any payment for their services in respect of the Project. The Development Co. was responsible for overseeing the construction of the Project.

12. Mr. Garber did not obtain O.R.'s consent with respect to any potential conflict of interest that might arise from their partnership and did not recommend she obtain independent legal advice before entering into the business transaction with her.
13. \$1.5M was invested into the Project, however the partnership interests did not match each partner's financial investment. Mr. Garber invested 49% of the funds but held a 30% partnership and title to two lots. S.P. invested 33% and held a 46% interest and title to three lots. O.R. invested 18% and held a 24% interest and title to one lot.
14. Construction on the Project started in early 2015. Cash investments and mortgage proceeds from the partners were pooled and used to construct the six houses.
15. Soon after construction commenced, the Project developed cash flow problems, which were compounded by the downturn in the real estate market in Cold Lake in 2015. The cash flow problems resulted in the registration of builders' liens against title to the lots.
16. Conflict arose between the partners. On October 28, 2015, Mr. Garber prepared a resolution to dissolve the partnership. It was signed by Mr. Garber and S.P. but not O.R. The resolution stated that all revenues and expenses would be reconciled as of the date of the resolution "on a house by house and partner by partner" basis.
17. On December 21, 2015, O.R. filed a Statement of Claim against Mr. Garber, S.P. and the Development Co. alleging breach of contract, negligence and unjust enrichment. Mr. Garber and S.P. counterclaimed alleging breach of contract, negligence, unjust enrichment and defamation.
18. As of March 2016, the construction of two of the houses was complete, two of the houses were nearly complete and two were partially complete. One house, owned by Mr. Garber, was sold on October 27, 2015 at a loss of just under \$10,000.
19. The claim and counterclaim were discontinued without costs on June 19, 2017 by written agreement of the parties. O.R. obtained independent legal advice and provided Mr. Garber with a full release of her claims against him.

CO20161026

20. In 2014, Mr. Garber was providing legal services to another real estate development company operated by D.P. ("Development Co. 2").
21. The CRA registered writs against title on 22 properties in Cold Lake owned by Development Co. 2.
22. Development Co. 2 needed the writs discharged in order to sell the properties.

23. Counsel for Justice Canada agreed to remove the writs so as not to impede the sales, and the discharges were sent to Mr. Garber on trust conditions, which required Mr. Garber to hold proceeds sufficient to pay off the writs (approx. \$83,500) in trust until an agreement was reached or a Court Order was obtained.
24. Mr. Garber allowed his firm trust account to be used as an operating account for Development Co. 2 and did not adequately monitor trust account transactions or review trust reconciliations. Trust transfers were made without Mr. Garber's authorization, resulting in trust shortages and, ultimately, his breach of the trust condition he accepted from Justice Canada. Mr. Garber did not immediately report the trust shortage that resulted in the breach of trust conditions to the Law Society.
25. On December 15, 2015, in response to a letter from Counsel for Justice Canada in relation to the funds, Mr. Garber advised that he no longer acted for Development Co. 2, had no funds in his trust account, and had reported himself to his insurer.

ADMISSION OF FACTS

26. I, Allan A. Garber, admit as facts the statements contained in this Agreed Statement of Facts for the purposes of these proceedings.

ADMISSIONS OF CONDUCT DESERVING OF SANCTION

Citation 1: It is alleged that Allan Garber acted in a potential conflict of interest without obtaining his clients' consent or in circumstances where it was not in the best interests of his clients, and that such conduct is deserving of sanction.

27. For the purposes of s. 60 of the *Legal Profession Act*, I, Allan A. Garber, admit that I acted in a potential conflict of interest without obtaining my clients' consent or in circumstances where it was not in the best interests of my clients and that such conduct is deserving of sanction.

Citation 2: It is alleged that Allan Garber engaged in a business transaction with this client(s) without recommending independent legal advice and that such conduct is deserving of sanction.

28. For the purposes of s. 60 of the *Legal Profession Act*, I, Allan A. Garber, admit that I engaged in a business transaction with my clients without recommending independent legal advice and that such conduct is deserving of sanction.

Citation 3: It is alleged that Allan Garber failed to comply with trust conditions and that such conduct is deserving of sanction.

29. For the purposes of s. 60 of the *Legal Profession Act*, I, Allan A. Garber, admit that I failed to comply with trust conditions and that such conduct is deserving of sanction.

Citation 4: It is alleged that Allan Garber breached the accounting rules of the Law Society and that such conduct is deserving of sanction.

30. For the purposes of s. 60 of the *Legal Profession Act*, I, Allan A. Garber, admit that I breached the accounting rules of the Law Society and that such conduct is deserving of sanction.

Citation 5: It is alleged that Allan Garber failed to discharge his duties as the responsible lawyer of his trust account and that such conduct is deserving of sanction

31. For the purposes of s. 60 of the *Legal Profession Act*, I, Allan A. Garber, admit that I failed to discharge my duties as the responsible lawyer of my trust account and that such conduct is deserving of sanction.

This Agreed Statement of Facts and Admissions of Conduct Deserving of Sanction is dated the 6th day of February, 2018.

“*Allan Garber*” (original executed copy to be provided prior to hearing”

Witness

Allan A. Garber

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF ALLAN GARBER
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Single Bench Hearing Committee

Nancy Dilts, QC – Chair

Appearances

Sharon Heine – Counsel for the Law Society of Alberta (LSA)

Jon Faulds, QC – Counsel for Allan Garber

Hearing Date

April 23, 2018

Hearing Location

800,10104 - 103 Avenue, Edmonton, Alberta and
500, 919 11th Avenue SW Calgary, Alberta, by teleconference.

HEARING COMMITTEE REPORT - Clarification of Decision

1. Mr. Garber is a senior member of the LSA who practiced for over 30 years in a well-regarded Alberta law firm before leaving to commence sole practice. Within that very different context for practice, Mr. Garber engaged in business with a colleague at the same time as providing legal services to their venture, which gave rise to citations.
2. On March 1, 2018, the Hearing Committee (Committee) convened a hearing into the appropriate sanction related to the conduct of Mr. Garber. That hearing proceeded in public. Having received a joint submission on sanction, the Committee ordered a reprimand and costs in the amount of \$5,000.00 payable within 18 months of the Hearing Date. The Committee's written Hearing Committee Report (Report) was issued to the parties on March 19, 2018.
3. After the hearing and the issuance of the Report, the parties raised an issue with respect to the LSA's publication of both the disposition of the citations and Mr. Garber's disciplinary record on the LSA's online Lawyer Directory portal. The parties disagreed on the implications of a comment made by the Committee during the course of the hearing, and what was intended by the Committee.

4. Accordingly, I am issuing these reasons to clarify my intention during the oral proceeding and my decision regarding publication. My authority to do so is based upon the common law exception to the general rule that the Committee is *functus officio*, as described in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.
5. In that case, the majority of the Supreme Court of Canada noted that, as a general rule, once an administrative tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within its jurisdiction or because there has been a change of circumstances. *It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal.* [emphasis added]
6. After submissions at the hearing in March and just prior to orally delivering the reprimand to Mr. Garber, the transcript indicates that I said the following:

There will be no publication required in this instance, no referral to the Attorney General, and I presume all of the documents and exhibits will be redacted, as per the Law Society's publication guidelines.
7. My choice of language was unclear when I said “publication” in that instance. To clarify, I meant to say that there will be no publication of a “Notice to the Profession” required in this instance. As can be seen from a review of other LSA disciplinary decisions ordering a reprimand, it is fairly typical to not issue a Notice to the Profession and to not to have a referral to the Attorney General where a reprimand had been ordered.
8. The following circumstances demonstrate that my intention was clear:
 - At the outset of the hearing, I confirmed that the hearing would be conducted in public and that no application had been received for a private hearing;
 - the written Report indicates that it is “For Public Distribution”;
 - the Publication and Redaction Guidelines for Adjudicators, which were approved by the Benchers in September 2017, make it clear that the general rule is that decisions are public and published to online legal research service providers (e.g., Canadian Legal Information Institute (CanLii)) and to the LSA website;
 - I did not invoke the procedure that I would have been required to employ under Rule 107(7) and (8) had I contemplated issuing specific directions; and
 - had I intended to make a specific direction that the disposition of the citations and the Hearing Report would not be published, which is contrary to the Law Society’s usual practices, submissions would have been sought from both parties prior to doing so and a reasonable person would expect that a portion of the written decision would have been dedicated to providing reasons for that exceptional decision.

9. It would be extremely rare for there not to be publication of the Hearing Committee Report, particularly when there has been a public hearing, as was the case here. I am not aware of any instance in where, for a public disciplinary hearing at the LSA, the written decision was not also public.
10. I would also note that, despite the impacts to Mr. Garber's reputation and professional livelihood, it is in the public interest that the public has access to information whether the lawyers they seek to hire are or have been subject to disciplinary proceedings, including disciplinary proceedings resulting a reprimand. This is clear from a review of the *Legal Profession Act* (Act) and the *Rules of the Law Society of Alberta* (Rules) as a whole, and is essential to the Law Society's role in protecting the public interest and the standing of the legal profession.

Additional Comments

11. The parties before me both provided significant submissions, most of which relate to whether the citations or decision should or should not be published. Given my clarification above, it is not necessary for me to consider the merits of those submissions in detail.
12. As a Hearing Committee established under the *Act*, once I have issued my decision, which I did on March 19, 2018, I am *functus officio*. I have already made a direction with respect to publication, and while there is a limited exception that allows me to *clarify* my intention and decision, I do not have authority under the *Act* to *change* that decision.
13. Nor do I have authority to reopen the hearing, hear additional submissions, and to make new specific order restricting publication of Mr. Garber's citations or the Report. These actions do not fall within the limited exceptions to the *functus officio* principle, set out above. As a result, it would be inappropriate for me to consider these submissions as a new application for specific directions on publication, or to establish a further process to consider these or additional submissions.
14. Mr. Faulds raised the broader issue of whether the LSA's policy on publishing citations and decisions is in compliance with the *Act* and the Rules. A challenge of that nature would be more appropriate to a judicial review application. Even if the Committee had not been *functus*, it would not fall within the mandate of this Committee to adjudicate on those matters.

Concluding Matters

15. For proceedings resulting in reprimands, a written Hearing Committee Report is published to the LSA website and sent to CanLii 30 days after it is issued to the parties, provided no appeal has been filed (Rule 107(4)).
16. In this case, the 30-day period elapsed April 19, 2018, although the publication of the decision on the website was delayed until the current issue could be addressed.
17. With this clarification of my intention and decision, publication of the decision on the LSA website and to CanLii can proceed in the normal course.

Dated at Calgary, Alberta, April 25, 2018.

Nancy Dilts, QC