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 NAEEM RAUF
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee

W. E. Brett Code, QC – Chair and Former Elected Bencher
Catherine A. Workun, QC – Committee Member and Lawyer Adjudicator
Dr. John S. J. Bradley – Committee Member and Public Adjudicator

Appearances

Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Shirish Chotalia, QC, and Ian Wachowicz – Counsel for Naeem Rauf

Hearing Date

November 19, 2018

Hearing Location

800, 10104 - 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT – SANCTION

Overview

1. The Law Society of Alberta (LSA) alleged among other things that, in criticizing an appointment to the Court of Queen's Bench, by way of a letter written and disseminated publicly by him, Mr. Rauf breached the Code of Conduct and that such conduct was conduct deserving of sanction. After a hearing, the Hearing Committee (Committee) concluded, for the reasons set out in its decision dated May 31, 2018 (2018 ABLS 13 (CanLII)), that Mr. Rauf was guilty of conduct deserving of sanction (Decision on Guilt).

2. A hearing was set to consider the appropriate sanction in this case. At the convenience of Mr. Rauf, the hearing on sanction was set for September 24 and 25, 2018. In July of 2018, Mr. Rauf retained counsel and, on his behalf, his counsel requested that the sanction hearing be rescheduled. The hearing was then set for only one day, November 19, 2018. The hearing proceeded on November 19, 2018.

3. Prior to the hearing, by joint email communication dated November 1, 2018, the parties advised the Committee that they would be making a joint submission on sanction at the sanction hearing.

4. The Committee was also advised on November 1, 2018, that Mr. Rauf intends to appeal the Decision on Guilt to the Benchers and that, once the decision on sanction is communicated to him, Mr. Rauf would be applying for a stay of proceedings pending appeal, pursuant to section 75(6) of the *Legal Profession Act*.

Preliminary Matters

5. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing for the sanction hearing was not requested, so a public hearing into the appropriate sanction for Mr. Rauf's conduct proceeded.

Joint Submission on Sanction

6. The parties presented a joint submission on sanction, containing 3 parts:

    1) That Mr. Rauf be suspended for seven days;
    2) That Mr. Rauf pay costs of $15,000 in accordance with an agreed payment plan; and
    3) That the LSA consent to Mr. Rauf's application for a stay of the operation of the Committee's order pending appeal to the Benchers.

7. Counsel to the LSA, on behalf of both parties, presented the arguments demonstrating that the joint submission was a fit sanction well within the range of the available sanctions for misconduct of the type that Mr. Rauf was found guilty.

8. Counsel for Mr. Rauf agreed with those submissions.

Evidence

9. The parties provided some written material to the Committee prior to the hearing, some of which was spoken to at the hearing itself. The following documents were made Exhibits, by consent of both parties:

    20 – The Notice to Attend issued to Mr. Rauf requiring him to attend the sanction hearing;
    21 – Mr. Rauf's Discipline Record;
    22 – Estimated Statement of Costs;

23 – CBC News Report, dated June 4, 2018: "Edmonton defence lawyer found guilty of breaking Law Society of Alberta Rules;" and
24 – Letter, dated November 7, 2018, signed by Edmond O'Neill.

No specific reference was made by either party to any of these Exhibits, including the letter that is Exhibit 24.

10. Mr. Rauf sought to enter a number of additional letters onto the record. In written submissions, Mr. Rauf asserted that the letters should be admitted on the following basis:

> The 12 letters from various lawyers confirm that they have read the Member's criticisms of the judicial appointment and that his criticisms have not undermined their view of the administration of justice, including the judicial appointment process. Nor have his criticisms undermined their views of Mr. Rauf's character. Indeed, while the Panel has found that Mr. Rauf has breached the code of conduct, the letters assist the Panel in taking a *context-specific approach* to the appropriate discipline. Indeed, the Panel itself indicated that the letters Mr. Rauf had already submitted did not confirm that the authors had read his criticisms. These letters confirm the same. Neither do the authors necessarily agree with Mr. Rauf. Rather, they invite the Panel to consider Mr. Rauf's history and interest in advocating for the legal system and his years of positive contribution to the administration of justice.

11. In its written submissions on this issue, the LSA took the position that the letters are inadmissible, as they constitute unnecessary and irrelevant character evidence and inadmissible opinion evidence. The written submission from the LSA said the following:

> 1) The Committee will recall that the parties and the Hearing Committee expended much time and effort in dealing with the issue of Mr. Rauf's character, all of which was at Mr. Rauf's insistence. The LSA took the position from the very start of proceedings that Mr. Rauf's character had nothing to do with whether his letter was contrary to the Code of Conduct. All that was needed was the letter, the Code of Conduct, the *Doré* case (or any other case that Mr. Rauf wanted to put to the Committee), and oral arguments. As noted in the Hearing Report, an agreement did emerge after the first day of the hearing that Mr. Rauf would be able to enter the character letters (31 of them eventually), 6 transcripts, and 5 to 10 *viva voce* witnesses. However, it is important to recall that Mr. Rauf's opening position on November 3, 2017 was that he would need at least 5 hearing days to deal with *viva voce* character witnesses. After all of the time and effort and promises of witnesses, Mr. Rauf chose to call a total of 4 character witnesses during the hearing, although there was ample written character evidence.

Objections

2) Section 68 of the *Legal Profession Act* gives wide latitude for the Hearing Committee to hear, receive and examine evidence, because it is not bound by any rules of law in judicial proceedings. That does not mean, however, that the Hearing Committee must accept all evidence that is tendered regardless of the value of that evidence. There is still a discretion that can be exercised. In other words, there can be limits on what type of evidence should be admitted, limits which the LSA submits have been reached in this matter.

Improper Opinion Evidence

3) All but one of the letters constitute opinion evidence that goes to the heart of the issue that has already been decided by the Hearing Committee. The one exception has been entered as proposed exhibit 24. Not only are the remaining eleven letters inadmissible during the sanction phase of the hearing, they would be inadmissible during any phase of the hearing as improper opinion evidence.

4) The brief submitted on behalf of Mr. Rauf makes it clear that the reason the eleven letters are being submitted is to convey legal opinions to the Hearing Committee:

> 12. The 12 letters from various lawyers confirm that they have read the Member's criticisms of the judicial appointment and that his criticisms have not undermined their view of the administration of justice, including the judicial appointment process. …

5) One of the letters is written explicitly as a legal analysis of the legal implications of Mr. Rauf's letter, complete with a copy of a CV and a "list of awards to give the Hearing Panel confidence in accepting this submission." The letters all use the same type of language because Mr. Rauf explicitly asked the letter writers to express their personal opinions about the effect of the letters their views of the administration of justice. However, the views of Mr. Rauf's friends and colleagues about whether he acted contrary to the Code of Conduct, or whether he undermined their view of the administration of justice, is irrelevant to guilt and to sanction. This Hearing Committee heard the evidence and made a decision. No experts were called or qualified to provide an opinion, and objections would have been made had such qualifications been sought because their opinions go to the ultimate issue. Consequently, the LSA submits that the letters should be rejected on the ground that they constitute improper opinion evidence.

Joint Submission on Sanction

6) At Mr. Rauf's insistence, the Hearing Committee dealt with the issue of his character at length during the guilt phase of the hearing. Mr. Rauf submitted 31 letters of support, 6 transcripts of evidence, and evidence from 4 *viva voce* witnesses. Despite the hours being spent on briefs, in oral arguments, and during the hearing, the Hearing Committee is again being asked to spend more time to judge Mr. Rauf's character based on the opinions of his friends and colleagues. Having elected to deal with this issue during the guilt phase of the hearing, Mr. Rauf should not be permitted to spend any more time on this issue during sanction, particularly where the parties are making a joint submission on sanction and costs. What possible purpose do these letters now serve in the face of that joint submission? The answer is: none.

Splitting the Case

7) By way of follow up to the above-noted point, having failed to prepare his *viva voce* character witnesses properly when he had the chance to put in his case in chief, Mr. Rauf is now explicitly trying to enter additional character evidence by splitting his case. The brief submitted on behalf of Mr. Rauf makes it clear that another reason for submitting these letters is because Mr. Rauf failed to have his *viva voce* witnesses read the letter before giving their evidence about his character:

> 12. … Indeed, the Panel itself indicated that the letters Mr. Rauf had already submitted did not confirm that the authors had read his criticisms. These letters confirm the same. …

8) Even in LSA proceedings, that is an impermissible tactic. Parties are expected to put their best foot forward during the hearing and not do so piecemeal thereafter. With respect, the time is over to fix Mr. Rauf's evidentiary mistakes. The Hearing Committee gave him ample latitude to present character evidence. He did so. He closed his case after presenting only four witnesses. He should have asked them to read his letter. He did not. It is now time to move on.

Sanction is not a Plebiscite

9) Paragraph 13 of the brief misinterprets factor 12 from the *Jaswal* case ("*the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct*"). This factor is not an invitation for Mr. Rauf to submit letters *ex post facto*

explaining to the Hearing Committee that there is a consensus among his friends and colleagues that, in their respective views, the Hearing Committee got it wrong. Rather, this factor merely states the obvious: the degree to which Mr. Rauf acted contrary the Code of Conduct is a guide to the severity of the sanction. Any other interpretation leads to the absurd result that each party would seek to obtain as many letters as possible to show that there is a consensus that Mr. Rauf was guilty or not guilty. In other words, it turns the sanction phase into a plebiscite about a decision that has already been made.

Summary

10) In summary, even in LSA proceedings where the bar for admissibility is low, there is nevertheless a bar to clear and these letters serve no purpose at this stage of the proceedings, or, for that matter, at any stage of the proceedings given their stated purpose. Consequently, the LSA submits that this is an appropriate case for the Hearing Committee to find that these letters are inadmissible.

12. After considering fully the submissions of both counsel and the responses to the various questions asked by the Committee, and after considering the issue to be determined during this particular sanctioning phase, including the fact that the parties had agreed to a joint submission on sanction, the Committee concluded that the letters were inadmissible and that they would not be read by the Committee.

13. The Committee agrees with the submissions of LSA counsel, and disagrees with the submissions of Mr. Rauf. When presented with a joint submission, fully supported by both parties as being properly within the range of fit and proper sanction, the only issue before the Committee is whether there is a reason not to defer to the joint submission. None of the letters, including the letter of Mr. O'Neill, which was admitted by consent, is relevant to that issue. Counsel to Mr. Rauf made no mention of the contents of the letter of Mr. O'Neill and did not use that letter in any way to support the joint submission on sanction.

Sanction

14. The Hearing Guide and the case law provided by LSA counsel on behalf of both parties suggests that the Committee should give serious consideration to a jointly tendered submission on sanction, 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. In this case, counsel to the parties easily persuaded us that the sanction jointly suggested is fit and serves the public interest. We were persuaded by

counsel to both parties that there are no reasons for rejecting it. We accepted it, and we imposed the following sanction on Mr. Rauf:

1) That Mr. Rauf be suspended from membership in the Law Society of Alberta for seven days; and
2) That Mr. Rauf pay costs of $15,000 in accordance with a payment plan previously agreed to by the LSA and Mr. Rauf.

15. The Committee discussed with counsel the need for further conditions, such as the need for conditions on reinstatement. Counsel persuaded the Committee that it did not have the jurisdiction to impose conditions on reinstatement.

16. If it did have the power to impose conditions, the Committee would require that Mr. Rauf read the Code of Conduct and give an undertaking that he would comply with the Code of Conduct.

17. Throughout his testimony during the guilt phase of the hearing, and throughout the submissions made on behalf of himself during the guilt phase of the hearing, Mr. Rauf demonstrated disdain for the LSA, for the LSA's rules, and for the Code of Conduct itself. He went further and admitted that he had never read the Code of Conduct.

18. Exhibit 23, the CBC news report dated June 4, 2018, submitted jointly by Mr. Rauf and the LSA as an exhibit indicates that, after reading the Decision on Guilt, Mr. Rauf stated to a reporter, knowing therefore that the statement might be quoted publicly, that he has "nothing but contempt for the law society." He remained unapologetic, insisting, also publicly, that he is proud of the fact that he wrote the letter.

19. During the hearing, the Committee was troubled by Mr. Rauf's contempt for the Committee members and for LSA counsel. The Committee was also troubled by Mr. Rauf's disdain for the Code of Conduct and for the role of the LSA as the regulatory body that governs his conduct and the conduct of all other lawyers. On at least one occasion through the evidence portion of the hearing, the Committee raised the issue as to whether Mr. Rauf was governable.

20. Consequently, while the Committee does not have jurisdiction to create conditions to reinstatement, the Committee wishes it to be known that such conditions ought to be considered by those at the LSA who are responsible for Mr. Rauf's reinstatement after the expiry of his suspension. We do not believe that that reinstatement should be either automatic or unconditional.

Application for a Stay of the Order

21. Mr. Rauf's counsel made a very brief oral application for a stay of the operation of the order. LSA counsel agreed to it. Neither the application or the consent included conditions.

22. The Committee wanted to ensure that the stay was not indefinite, that an appeal would actually be commenced, and that, once commenced it would be moved forward expeditiously.

23. In response, counsel for Mr. Rauf suggested that a Notice of Appeal could be filed in early December. Cautioned by LSA counsel that an appeal cannot be launched until written reasons for decision are delivered to the parties, we have not included in our decision an early December deadline for the filing of the Notice of Appeal. LSA counsel took Mr. Rauf's counsel's words as an undertaking that the appeal would be proceeded with expeditiously.

24. The Committee agreed that that was the correct approach and granted a stay on the following conditions:

    1) That the LSA immediately direct the preparation of an appeal record for the appeal from the Decision on Guilt; and
    2) That Mr. Rauf undertake to proceed diligently with the appeal and to cooperate with the LSA to allow for the appeal to be heard in a timely way.

Dated at Edmonton, Alberta, November 23, 2018.

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W. E. Brett Code, QC

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Catherine A. Workun, QC

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Dr. John S. J. Bradley