

Law Society of Alberta Hearing Committee Report

In The Matter of the *Legal Profession Act*

And In the Matter of A Hearing Regarding The Conduct of Tracey Lynn Bristow A Member of the Law Society of Alberta

JURISDICTION AND PRELIMINARY MATTERS

1. A Hearing Committee of the Law Society of Alberta (“LSA”) conducted a hearing into the conduct of Tracey Lynn Bristow (“the Member”) on February 18, 2009, at the Law Society offices in Edmonton, Alberta.
2. The committee was composed of Ronald J. Everard, Q.C. (Chair), James T. Eamon, Q.C., and Frederica Schutz.
3. The LSA was represented by Ms. Lois MacLean and the Member was represented by Mr. James Moffatt.
4. Exhibits 1 – 5, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor with acknowledgement of service, Notice to Attend with acknowledgement of service, Certificate of Status, and Certificate of Exercise of Discretion, established the jurisdiction of the Committee.
5. There was no objection to the composition of the Hearing Committee or to jurisdiction, and the hearing was held in public.

CITATIONS

6. The Member faced the following citations:
 1. It is alleged that you failed to respond in a timely manner to communications from another lawyer that contemplated a reply, and that such conduct is deserving of sanction.
 2. It is alleged that you breached an undertaking to discharge a Caveat which was a non-permitted registration, and that such conduct is deserving of sanction.
 3. It is alleged that you failed to respond to the Law Society of Alberta on a timely basis and in a complete and appropriate manner, and that such conduct is deserving of sanction.
7. During the course of the Hearing, application was made by the LSA, and consented to by the Member and her counsel, to amend Citation 2 above, to read as follows:

It is alleged that you failed to comply with your obligation to remedy and return a defective document within a reasonable period of time.

SUMMARY OF RESULT

8. The Member signed an Agreed Statement of Facts, and plead guilty to Citation 1 and the Amended Citation 2, and agreed that the conduct alleged was conduct deserving of sanction.
9. The Member received a reprimand and was ordered to pay 1/3 of the actual costs of the Hearing within 30 days of her counsel being advised as to the amount owing.
10. The Hearing Committee found that there was insufficient evidence to establish guilt on Citation 3 and it was dismissed.

FACTS

11. The Member and her counsel co-operated fully and completely with the LSA and, as a result, the parties were able to agree to numerous facts which were incorporated into an Agreed Statement of Facts and which was marked as Exhibit 23 at the Hearing. An Exhibit Book, containing 25 Exhibits in total, was also available and was referred to in evidence.
12. Exhibit 23 included the following facts:
 - The Member acted for Mrs. L.C., an elderly woman, who was the vendor in a residential real estate transaction.
 - The complainant, Mr. Anthony Richard, is a solicitor who acted for M1D and M2D, who were the purchasers of Mrs. L.C.'s property.
 - The vendor and purchasers entered into a Purchase Agreement dated August 8, 2006 (the actual Agreement was not produced to the LSA, was not in evidence, and the Hearing Committee determined that no issue was taken by LSA counsel that the Agreement was not produced).
 - On November 27, 2006, Mr. Richard wrote to the Member advising that only M1D would be a purchaser and requesting a change of the possession date to December 22, 2006.
 - On December 5, 2006, the Member wrote to Mr. Richard forwarding transfer documentation in trust and confirming that the vendor was prepared to accept a closing date of December 22, 2006.
 - The Member then undertook as follows:

“We undertake to pay the City of Edmonton taxes and provide your office with a receipt evidencing the same in due course.”
 - On December 6, 2006, the purchaser's solicitor forwarded his \$5,000.00 trust cheque (representing the deposit) to the Member and requested that the Member provide him with the standard real estate protocol trust letter.

- On December 13, 2006, the Member provided the standard protocol trust letter and also provided the following undertakings:

6. That if the Transfer and mortgage are held up or rejected by the Land Titles Office due to a defect in the Transfer which is remediable by our office using all reasonable efforts, we undertake to take such steps as may be prescribed by the Land Titles Office in order to remedy such defect, and to return the documents to your office for re-submission of registration. In the alternative, our office may authorize your office to correct the documents if appropriate under the circumstances.

.....

Provided that you accept and have met these trust conditions, upon release of the balance due on the Closing Date, we undertake to payout and discharge all Non-Permitted Registrations and, within a reasonable period of time, provide your office with a Certified Copy of Title evidencing the same.

- On December 14, 2006, the Member wrote to the purchaser’s solicitor, amending the undertakings so as to include an undertaking by the purchaser’s solicitor to pay out the 2006 property taxes.
- On December 22, 2006, the purchaser’s solicitor forwarded his trust cheque in the sum of \$130,016.14, representing the cash to close, pursuant to the undertakings which had previously been given by the vendor’s solicitor.
- On February 1, 2007 the purchaser’s solicitor wrote to the Member and *inter alia* forwarded a document rejection notice from the Land Titles Office which indicated that the Statutory Declaration of Surviving Joint Tenant had been rejected as a result of a typographical error (a document contained the number “zero” rather than the letter “o”) and requesting that the Member’s office correct the Land Titles document and return it to the purchaser’s solicitor so that he could proceed with registration. Both parties proceeded at the Hearing on the basis that it was in the Member’s power to correct the deficient Statutory Declaration by initialling the correction.
- The purchaser’s lawyer did not receive a response from the Member, and, on February 5, 2007, an assistant to the purchaser’s lawyer left a message with the assistant to the vendor’s solicitor requesting return of the Statutory Declaration. No response was received to this telephone request.
- The solicitor for the purchaser, or his assistant, left messages for the Member on the following dates in 2007:

February 8, February 22, March 6, March 7, and April 5.
- Neither the Member or anyone at her office provided a response to the purchaser’s solicitor or anyone in the office of the purchaser’s solicitor.

- On April 14, 2007, the Member returned the rectified Statutory Declaration to the purchaser's solicitor.
- The rectified documents were registered at the Land Titles Office on April 17, 2007.
- Although it was ultimately the responsibility of the vendor, rather than the solicitor for the vendor, there were several communications from Mr. Richard's office to the Member's office in which the Member was asked to respond to a request for a holdback for a non-compliant patio, and also with respect to a subsequent Caveat which was filed by a putative second purchaser. The dates of these further correspondences, also in 2007, were as follows:

April 18, April 26, August 29, September 12, and September 26.

- No response was provided by the Member.
- In his September 26, 2007 correspondence, Mr. Richard wrote to the Member as follows:

I am astounded at the ongoing lack of response to my numerous letters on this file. It should have been a straightforward real estate file and even with the problems that arose could have been handled easily with the cooperation of both counsel.

I require immediate confirmation that you continue to hold the sum of \$5,000 in trust as you undertook to do in your letter dated December 5, 2006.

I have made clear offers to resolve this and received no response at all. It isn't just going to go away. I do not intend to continue to write letters and will take whatever steps are necessary to get this resolved with, or without, your assistance.

May I please hear from you by October 4, 2007.

- On October 29, 2007, Mr. Richard wrote to the LSA making a complaint against the Member. His complaint focussed on 3 matters:
 1. The \$5,000.00 undertaking re: the building and development permits (the RPR),
 2. The Caveat filed by the second purchaser, and
 3. The delay in obtaining the corrected Statutory Declaration of the Surviving Joint Tenant.
- There was additional correspondence from Mr. Richard to other parties, and from the LSA to the Member, and on December 11, 2007, the Member responded to the LSA as follows:

With respect to this matter, I wish to offer my apologies to Mr. Richard for not responding to his correspondence. This neglect was not intentional but a result of a number of factors including a significant work load, my office moving earlier this year and the assistant responsible for the file leaving this firm. I regret that

Mr. Richard was put into a difficult situation because of my failure to respond to him sooner.

I can confirm that the \$5,000 holdback remains in our trust account and has not been released. We have attempted to contact our client in response to the \$1,500 settlement proposal made by the purchaser of this property, but our mail has been returned. We have been slightly hampered by the fact that Mrs. L.C. is an elderly woman and her family had been assisting her in completion of this sale. There have been conflicting instructions from various family members and I have been unable to reach Mrs. C. herself for instructions.

I will renew my efforts to try and obtain instructions from my client so I can respond to the proposal made by Mr. Richard to settle the compliance issue.

- There was additional correspondence between Mr. Richard and the LSA, and between the LSA and the Member, and in response to a Section 53 demand sent to the Member by the LSA on February 21, 2008, the Member responded by saying that she owed Mr. Richard her sincere apologies for not responding to his letters in the Summer and Fall of 2007, and then continuing as follows:

I understand the frustration this caused and I regret that I did not deal with his concerns in a timely fashion. However, the causes of the delay were outlined in my previous correspondence, and I am not sure what additional details Mr. Richard wishes to have clarified.

With respect to the Real Property Report issue, I advised Mr. Richard in my letter of December 6, 2006 as follows:

With respect to the building and development permit the seller is in the process of applying for them. We undertake to holdback \$5,000 pending issuance of the permits, agreement between the parties or court order. We will also submit the RPR for an updated compliance letter once permits are granted. We also undertake to discharge the mortgage on title and provide your office with a Certified Copy of Title evidencing same.

I believe I have complied with my responsibilities as set out therein as I continue to maintain the \$5,000 holdback. I gave no undertaking that my office would obtain permits or compliance, as that was the seller's contractual obligation, not the solicitors.

My office has lost contact with Mrs. C. as the documents mailed to the forwarding address she provided were returned. I have no instructions from my client at this time regarding Mr. Richard's proposal as a result.

- On August 1, 2008, Mr. Richard wrote to the Member requesting confirmation of the issue of the proposed holdback, and asking for a copy of the ledger card confirming that the holdback had been maintained.

- Mr. Richard followed up with the Member on September 23, 2008, and on December 15, 2008, the Member wrote to Mr. Richard advising that she had received instructions from her client to accept his most recent proposal regarding the holdback and enclosing her trust cheque in the sum of \$1,821.68.
- On December 17, 2008, Mr. Richard confirmed his client's acceptance of the settlement [with respect to the holdback on the patio], and authorized a release of the balance of the holdback funds and this concluded the real estate transaction.

FINDINGS

13. The Hearing Committee was of the view that the long delay between January 31, 2007, when Mr. Richard first wrote to the Member, and which delay included several follow up efforts, and the Member's provision of the rectified Land Titles documents on April 14, 2007, and the second period of delay between April 18 – December 11, 2007, when the Member finally responded to Mr. Richard's enquiries with respect to the holdback and Caveat, did establish a failure to respond in a timely manner to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction. Chapter 4, Rule 5 of the Code of Professional Conduct obliges a lawyer to be punctual in fulfilling commitments made to other lawyers and also obliges a lawyer to respond on a timely basis to all communications from other lawyers that contemplate a reply. The Member's conduct in responding to communications generally from Mr. Richard fell below the standard required by Chapter 4, Rule 5, and the Member's tardiness in rectifying the documents from the Land Titles Office and returning them to Mr. Richard in a timely fashion also amounted to a breach of the Rule.
14. With respect to Amended Citation 2, the Member had in her December 13, 2006 correspondence to Mr. Richard, undertaken to remedy defects in the Land Titles document using all reasonable efforts which, in this case, simply amounted to initialling a change in the Statutory Declaration. Numerous requests were made by Mr. Richard or his office before the Member finally complied with her undertaking on April 14, 2007, and only after 6 additional requests had been made, and the Hearing Committee was of the view that the Member's response was not timely, nor punctual, and there was a further contravention of Chapter 4, Rule 5.
15. With respect to the 3rd Citation, the Hearing Committee was of the view that the Member's response was timely, complete, and appropriate, and that there was no contravention of Chapter 3, Rule 3, which obliges a lawyer to respond to any communication from the LSA that contemplates a reply. The LSA's correspondence dated November 14, 2007 (received November 16, 2007), stated:

When you have had an opportunity to review it, I look forward to your response within a reasonable time . . .
16. The LSA sent a further request dated December 5, 2007 requiring a response by December 14, 2007. The Member provided her complete response on December 11, 2007.

17. For the reasons given, Citation 3 was dismissed.

EVIDENCE ON SANCTION

18. The Member was called as a witness by counsel for the LSA and testified as follows:

- Her delay in responding to communications from another lawyer, and in satisfying her undertaking to rectify the defect in the Land Titles document, arose as a result of several factors, including the following:
 - a. The real estate transaction in question occurred during a very busy time in the real estate market in Alberta.
 - b. The Member was a partner in a 2-person firm, and her partner had taken compassionate leave, and the Member was saddled with additional management duties as a result of her partner's absence.
 - c. The legal assistant responsible for the file was junior, and left the firm part way through the transaction, without alerting other staff or the Member of items which needed to be completed on the file.
 - d. The firm was in the midst of moving premises while the transaction was still ongoing. The planning and implementation of the move imposed additional administrative and managerial burdens on the Member during her law partner's absence.

19. The Member testified that as a result of the complaint from Mr. Richard, and the LSA involvement, she had instituted a number of remedial practices in her firm including the following:

- As a result of this transaction, she had one of her staff do a physical audit of all real estate files to flag any outstanding issues to be dealt with.
- Policies and procedures were implemented to diarize all files. Also, problem files were identified and brought to the attention of the Member and added to her list of diarized files in order that they could be dealt with in a timely fashion.

20. Counsel for the Member indicated that the Member had been admitted to the Alberta Bar in 1991, had no record, and had demonstrated many years of exemplary service to the public, and he further advocated that as a result of the divided success on the Citations, and given the full and unequivocal cooperation that the Member had demonstrated to the LSA, each side should bear their own costs.

SANCTION

21. The Hearing Committee agreed with many of the submissions made on behalf of the Member. The Hearing Committee noted that the Member has been fully cooperative, and was forthright and candid before it. The Hearing Committee noted the Member has provided good service to the public since 1991, had no prior record, and that the Member had put procedures in place to rectify file management problems.

22. The Hearing Committee concluded that the conduct in question arose during what was referred to by both counsel as a “perfect storm,” i.e. during a busy real estate market, a tight labour market, a time when one partner was off on compassionate leave, a staff member leaving, and the Member’s firm moving premises.
23. Nevertheless, the Hearing Committee was of the view that the public interest must prevail and in light of the obvious and lengthy delay between when Mr. Richard first sent the letters to the Member which contemplated a reply, and the ultimate resolution of the matters identified by Mr. Richard (the rectification of the Land Titles document), and the Member’s admission that there had been delay and it was inordinate, that the conviction on Citations 1 and 2 necessitated the imposition of a reprimand and an order directing the Member to pay 1/3 of the actual costs of the Hearing within 30 days of her counsel being advised of the amount due and owing.

CONCLUDING MATTERS

24. As the matter proceeded as a public hearing, the Exhibits may be open for inspection, subject to the following conditions:
 - a. All clients’ names and the names of any third parties (other than counsel) shall be redacted from the documents;
 - b. With respect to the documentation from the Land Titles Office, the name of the owner, the description of the lands in question, and the Registration Number shall be redacted from any documents which contain those items.
25. There shall be no publication of these proceedings.
26. There shall be no referral to the Attorney General of Alberta.

DATED this 26th day of February, 2009.

Ronald J. Everard, Q.C., Chair

James T. Eamon, Q.C., Member of Panel

Frederica Schutz, Member of Panel