



THE 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 TOM STEPPER  
a Member of The Law Society of Alberta

**INTRODUCTION**

1. A Hearing Committee of the Law Society of Alberta (“LSA”) convened at the Law Society offices in Calgary to inquire into the conduct of Tom Stepper (the “Member”). The Committee was originally comprised of John Prowse, Q.C., Chair, Shirley Jackson, Q.C., and Wayne Jacques. The Hearing dates were October 22, 23, 24 and 25, 2007, November 5, 2007, December 18, 2007, February 26, 2008 and then April 17, 2008. John Prowse was appointed Master of the Court of Queen’s Bench in June 2008. When the Committee reconvened on July 21, 2008 Shirley Jackson, QC, became chair and the Hearing continued with two Benchers pursuant to s. 66 Legal Profession Act (LPA). There were further hearing dates of July 21-24, October 27-28, 2008. The LSA was represented by Garner Groome. The Member was present for the hearing. The Member represented himself until he testified, at which time he was represented by his counsel, Dana Schindelka, who continued to represent the Member until the end of the Hearing.

**JURISDICTION AND PRELIMINARY MATTERS**

2. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, establish the jurisdiction of the Committee.

3. There was no objection by the Member or counsel for the LSA regarding the composition of the Hearing Committee.
4. The Certificate of Exercise of Discretion and an Affidavit of Service were entered as Exhibit 5.

## **EXHIBITS**

5. The Exhibit Book with Exhibits 1-44 was entered by consent.

Further Exhibits were entered:

Exhibit 45: April 30, 2004 letter from the Member's counsel RT to DO

Exhibit 46: Client trust ledger card, deposit slip from the bank book and copy of the trust deposit ledger with the highlighted entry for D

Exhibit 47: May 7, 2004 Transcript of voice mail message from GH to RT

Exhibit 48: May 14, 2004 letter from RT to GH

Exhibit 49: Note of GH no date

Exhibit 50: November 19, 2002 cheque from JS or DS to MLG for \$500 made out to MLG by the Member

Exhibit 51: May 20, 2005 letter from GH to RT

Exhibit 52: GH's notes of the Member's interview of February 7, 2005 pages 7 & 8

Exhibit 53: copy of Scotia Bank Business Account Deposit for MLG for April 3, 2003

Exhibit 54: copy of MLG billing for JN

Exhibit 55: June 13, 2007 e-mail from CT to PB

Exhibit 56: Information re: criminal charges against JN

Exhibit 57: CT Telephone Contact Record for JN

Exhibit 58: November 2, 2007 Summary by RJT, what documents he has seen and what further documents are required to do a forensic analysis

Exhibit 59: November 5, 2007 letter from LSA counsel to DO and direction of Hearing Committee for production of certain documents by November 19, 2007

Exhibit 60: December 12, 2007 letter from DO to LSA counsel re: documents and accompanying box of available documents

Exhibit 61: copy of front of NSF cheque dated November 22, 2003 from BP to MLG

Exhibit 62: No date letter from LSA Manager Complaints to RT, counsel for the Member re: s. 53 demand with a copy of GH's 24 page report requesting a reply in 14 days of receipt

Exhibit 63: Section 53 report from LSA Manager of Complaints to Conduct Committee Panel dated December 10, 2003

Exhibit 64: January 13, 2004 Conduct Committee Panel directed an investigation into the MLG practice or procedure when receiving retainers from clients.

Exhibit 65: October 20, 2007 letter To Whom It May Concern from CPH

Exhibit 66: Originating Notice of April 10, 2008 for Service *Ex Juris* for EFAM, DO, TT and MM and Affidavit of the Member and a further Affidavit of the Member re: documents to be provided and Order for Service *Ex-Juris*

Exhibit 67: CV of RJT

Exhibit 68: Documents that were missing and that RJT required

Exhibit 69: Addendum to August 11, 2005 Investigation Report by GH (in particular more information regarding the Member's bank statement in Exhibit 42)

## **BACKGROUND AND CITATIONS**

6. At the time of the hearing the Member was under an administrative suspension that had occurred on March 31, 2003, as a result of the non-payment of fees to the LSA.

7. By the end of the hearing the citations which remained outstanding against the Member were that he had, in essence, stolen funds entrusted to him as retainer fees by five different clients. Specifically, the Member faced the following citations:

**Citation 1: IT IS ALLEGED** that you failed to deposit funds in trust to the credit of clients B.P, B.M., J.N., C.M. or D.T., thereby breaching the Rules of the Law Society of Alberta, and that such conduct is deserving of sanction.

**Citation 2: IT IS ALLEGED** you committed a theft of funds entrusted to you by clients B.P., B.M., J.N., C.M. or D.T. and that such conduct is conduct deserving of sanction.

8. The Member's defence involving client JN, is that he never received funds from that client. The Member's defence in the other four cases is that, while the funds were received by him, he turned the funds over to the MLG for whom he worked, and the funds went missing or unaccounted for after he had properly turned them over to the MLG.

## **EVIDENCE**

9. In the end, 69 exhibits were entered and the Committee heard testimony from the following witnesses:
  - (a) Clients JN and BM
  - (b) Three staff and three lawyers who worked for the firm where the incidents were alleged to occur, Merchant Law Group (MLG) as well as the Executive Director, DO. [ CW, JC, JC, ML, CT, JAS]
  - (c) LSA investigator [GH]
  - (d) One expert accounting witness concerning the production of documents by MLG [RJT]

- (e) The Member.
  - (f) The Member then called three lawyers from the Saskatchewan offices of MLG ( MM, TT, EFAM, QC) and recalled DO of the MLG
  - (g) TD, formerly a lawyer with MLG
10. Throughout the hearing a number of applications were made:
- 1. for further disclosure of financial records of the MLG
  - 2. to determine compellability of the Member before a stay application could be made
  - 3. for two stay applications
11. The allegations involved the theft of monies from five clients, which occurred over a period of time from the beginning of December 2002 to the end of April 2003, at a value of approximately \$7,000.
12. The LSA called no evidence involving the sixth client, YZ, and that matter was dismissed.
13. When the Member was suspended all of his files were distributed throughout MLG and ML received the five files that were the subject matter of this Hearing. It came to ML's attention that the clients (excluding DT) had paid money in trust to the Member but there was no money in the trust account or noted on the trust ledger for these clients. CM provided a photocopy of the 2 receipts that made up the \$1,000 he paid which were written on paper in the Member's handwriting. (Ex 20 &21) BM provided a copy of the receipt for the \$500 paid by him to the Member written on paper in the Member's handwriting. (Ex 16)
14. The Complaint was filed by DO, BA, BComm, Executive Director, on behalf of the MLG on July 23, 2003. MLG has a trust account in Calgary, Alberta but the general account for all the MLG offices is in Regina, Saskatchewan. At the time

of these events MLG had two offices in Calgary, Alberta. MLG was under a duty to report matters to the LSA as the Code of Professional Conduct Chapter 3, Rule 4 states: 'A lawyer must report to the Law Society any conduct of which the lawyer has personal knowledge and which in the lawyer's reasonable opinion, acting in good faith, raises a serious question about the competence, honesty or trustworthiness of another lawyer, or is likely to harm any person.'

### **ALLEGATION REGARDING CLIENT JN**

15. The client JN was charged with a criminal offence, and initially made contact with a lawyer named CT, who along with the Member were associates at the law firm MLG.
16. JN asserted that:
  - (a) he met CT at the MLG offices on February 21, 2003.
  - (b) he provided a \$1,000 cash retainer to CT but did not obtain a receipt. He had \$500 cash on him and debited his account \$500. His bank records show his account was debited \$500 on that date.
  - (c) the file was then transferred to the Member who requested a \$500 retainer on March 25, 2003 (Ex 29). When the Member was told that JN had already given CT a \$1000 cash retainer he advised JN that there was no record of the \$1,000 retainer in the file. The trust ledger card on the file was blank.
  - (d) JN was uncertain whether he gave the Member a further \$500 retainer and there was no receipt or entry on the trust ledger.
17. The Member testified that he had asked JN for \$500 to conduct the sentencing and that JN had asserted that he had already paid a \$1,000 retainer to CT. The Member noted that the file did not indicate the payment of this \$1,000 retainer

and advised CT of that fact. The Member denied receiving any money from JN and denied that when CT gave him the file that there was any money on the file.

18. The Member put in evidence the Information concerning JN for the criminal offence in this matter (Ex 56). It was endorsed that CT did initially appear for JN in Court on February 24, 2003 and March 24, 2003 the Member appeared as agent and CT withdrew as counsel.
19. CT testified he received \$300 cash from JN on February 23, 2003 and immediately gave the file and cash to the Member and never appeared in court on the matter (the Information clearly states that he appeared February 24, 2003). The Member denied he received the file with any money on it.

#### **ALLEGATION REGARDING CLIENT BP**

20. BP gave MLG a \$5,000 retainer November 27, 2002 and the cheque was returned NSF, December 11, 2002. This is the last entry in the trust ledger. MLG trust account (EsiLaw) shows that the cheque was received November 29, 2002 and was NSF December 9, 2002 and that is the last entry. (Ex 13 & 15)
21. A money order dated December 13, 2002, made payable to the Member for \$3,000, was cashed at National Money Mart Company by the Member December 17, 2002 and admitted to by the Member. This amount did not appear on the trust ledger or the trust account. (Ex 12) There is no receipt on the file for this payment.
22. BP told the LSA investigator that he gave the Member two cheques but has never provided any proof of the second cheque. (Ex 61) BP subsequently advised that a second cheque was never given.
23. The Member testified that he cashed the cheque and turned the file and the cash over to his assistant to deposit the trust money. The Member advised the LSA investigator that only one money order was ever received by him. The Member

did not notice the \$3,000 was not recorded as he did not provide any legal services to BP prior to his suspension.

#### **ALLEGATION REGARDING CLIENT CM**

24. CM gave the Member a cash retainer of \$100 March 6, 2003, and a cash retainer of \$900 on March 7, 2003, and the Member gave CM a receipt for each. (Ex 20 & 21) The trust ledger on the file is blank. (Ex 22) The trust account shows a zero balance with an opening date of February 6, 2003.
25. The Member admitted he received the cash from CM, gave CM the receipts and turned the money and file over to his assistant to deposit the trust money. The Member admitted this to GH, the investigator for the LSA when interviewed in 2005. The Member told GH that he did not review the accounting system as he was not at a point where he would be billing this client for legal services provided.
26. GH only looked for a trust deposit of \$1,000 when he looked at the financial records for MLG.

#### **ALLEGATION REGARDING CLIENT BM**

27. BM gave the Member a \$500 cheque payable to the Member as a retainer on February 5, 2003, and the Member gave him a receipt. (Ex 16) The cheque was cashed by the Member February 7, 2003. The trust ledger is blank and the trust account shows a zero balance with an opening date of February 6, 2003.
28. BM testified that he was unsure that the Member asked him to make the cheque payable to the Member. He did remember verifying the spelling of the Member's name. He told the LSA investigator who interviewed him earlier that the Member asked him to make the cheque out in the Member's name.



29. The Member testified he did receive and cash the cheque and did turn the money over to one of his assistants to deposit. The Member denied asking BM to make the cheque out in his name. The Member admitted to GH in 2005, that he received and cashed the cheque and turned the money over to his assistant. The Member also advised that he did not review the trust ledger card as he was not in a position to invoice the client.

### **ALLEGATION REGARDING CLIENT DT**

30. The Member ran a trial for DT. An Assignment of Cash Deposit was signed by DT on February 12, 2003, and witnessed by the Member's second assistant, JC. (Ex 37) A bail assignment cheque dated April 11, 2003 from the Government of Alberta arrived at the Court House in the Member's name in the amount of \$2,000. (Ex 40) The trial was completed and monies were still owing for services rendered. The Member admitted that he attended at the Court House and received the cheque, he cashed the cheque and his bank account number (as is seen on many of MLG's cheques to the Member in Ex 9) appears on the reverse of the cheque with a date stamp of April 25, 2003. (Ex 40) The Member testified that he turned the money over to his assistant to deposit. The Member had been suspended on March 31, 2003 and no longer practiced at MLG.
31. The Member's bank account statement for the period March 27, 2003 to April 26, 2003, shows \$2,000 being deposited on April 24, 2003. All other transactions have been edited out from the exhibit except for a withdrawal of \$3,005 prior to the April 24<sup>TH</sup> deposit and a withdrawal of \$1,000 subsequent to the April 24<sup>th</sup> deposit. (Ex 42) The general account of MLG for DT does not show a deposit of \$2,000
32. The Member had entered into an Associate's Agreement with MLG and was not entitled to the total amount of the cheque. (Ex 6) The Member had received a

motorcycle as part payment and that was not turned over to MLG nor were arrangements made regarding the motorcycle..

### **ALLEGATIONS REGARDING CLIENT YZ**

33. The LSA did not call any evidence with respect to the client YZ and the LSA did not proceed with respect to this allegation.

### **COMMENTARY ON THE EVIDENCE OF THE LSA INVESTIGATOR**

34. GH was assigned the investigation, wrote a report of his findings and testified at this Hearing. He has a BComm., he is a CMA and he worked for Revenue Canada (now CCRA) for approximately 19 years. He came to the LSA initially as an auditor and then moved to the investigations section.
35. GH interviewed witnesses, was given a portion of the records of MLG to review at the LSA office and he reviewed some further documents at the MLG office, some of which he photocopied. He described MLG as guarded in their co-operation and he received only what he requested. The investigation occurred over a two year period as a result of the time it took to locate clients and his other work load.
36. The Member and his counsel asked for disclosure and continued with their requests during the investigation but nothing was disclosed until after GH's investigation was completed. Only the client files were disclosed during the investigation. GH did interview the Member but it was not tape recorded due to the insistence of the Member's counsel.
37. GH testified that for each of the client files he could not find a deposit. He initially testified that he looked within 3 to 4 days of the initial date but found no deposit. Then he testified that he looked 7-10 days after the receipt of the cheque/money

order and the cashing of the cheque/money order and he did not find a deposit. In his initial report he stated that he looked at the documents provided to him by MLG and could not find the deposits but he did not state he looked 3-4 days or 7-10 days beyond. He checked the manual ledger card on the inside of the file, the trust receipts ledger, general ledger, the receipts ledger, and the bank deposit slips. He did not find deposits for the clients. If he found the same amount of cash deposited on another client's file he checked with the client and their records. He sent out letters to ten clients regarding the payment information shown on their file and received three replies. One of the replies indicated that the client provided a cheque for that amount but on a different date.

38. GH testified that he relied on the accuracy of the accounting system. If the cash deposit had gone through the wrong account it would have come to somebody's attention. In his addendum report he referred to the accounting system as a poor accounting system.
39. GH testified that cash loses all identity and so he cannot be 100% certain that cash has been deposited in the subject accounts but he saw no record of the cash being in the accounts that are the subject matter of this Hearing.
40. GH did not differentiate the DT file as not being trust monies. When he looked for the cash deposits of CM he looked for \$1,000 and not two different days in two different amounts that would match the receipts issued by the Member.

## **COMMENTARY ON THE RELIABILITY OF EVIDENCE REGARDING LAW FIRM RECORDS**

41. The four incidents of JN, BP, CM and BM involve trust payments that the Member acknowledged that he received. The Member testified that he turned these four retainers over to his firm, MLG. Based on the evidence and arguments, there are alternate explanations as to where those funds may have gone without having been stolen by the Member:

- (a) Theft of the funds by another lawyer or employee of MLG; all the staff and members of the law office where the Member worked, testified that monies had gone missing from that office as did the MLG Executive Director, DO.
  - (b) The funds having been credited, through poor record keeping, to other MLG files, or to the MLG general account, instead of being credited to the files of the clients in question; DO testified he checked and this did not happen, GH, the LSA investigator, testified he looked at the records 7-10 days on either side of the events and this did not happen, however he did not take copies of these records and some of them can no longer be found. RJT, the expert called by the Member indicated that in order to do a full forensic accounting he would need these records and others which were never received by him.
  - (c) The funds had been intentionally misplaced by MLG so as to put the Member under a cloud in order to essentially avoid paying the Member for all the work he had done on residential school files (payment for which work would only go to the Member if he was still employed by the firm when those residential school files were eventually billed).
42. The alternate explanations given above obviously raise the issue of the reliability of the accounting system and record keeping at MLG. The cheques and credit for the general account were sent by courier daily to the central office in Regina. The trust monies and cash (including the money for DT) were deposited in a Calgary account and were overseen by the Regina office, where all the accounts from all the MLG offices were handled.
43. The best evidence one could hope for with respect to accounting controls would have been an organized and thorough chronology of what would typically happen to funds from initial receipt by a lawyer or staff person at MLG through to

crediting to a file (with reference to all standard documents and controls in place). This would then be followed by evidence as to what happened with respect to the specific files in question. The evidence in fact provided was not satisfactory. For example, the Committee would have expected general testimony from a MLG employee along the lines of "this is how we do bank reconciliations monthly to ensure that funds intended for trust accounts did not end up in our general account" followed by evidence of the documents showing that those control functions had taken place for the months relevant to the allegations in question. The evidence referred to in this example was not tendered.

#### **COMMENTARY ON THE ACCOUNTING SYSTEM AT MLG AND THE TRAINING OF STAFF AND ASSOCIATES**

44. JAS, the Calgary managing partner, indicated that there was no training for associates. She was aware that monies had gone missing from time to time.
45. The Member testified that he did not check the monthly report of the listing of trust transactions for each of his clients on a monthly basis. This would only come to his attention when more work was done on the file and work was to be billed.
46. The Member testified that he felt that the computerized accounting system of MLG was unreliable as did ML.
47. CT admitted he did not turn in a trust cheque given to him and he was allowed to pay it back to the firm. Only when the LSA investigator brought this to the attention of MLG was it reported to the LSS although CT was working in the Alberta office of MLG.
48. JC, one of the Member's assistants, reported that money had previously gone missing in the office and that she took precautions that monies she received did not sit in the basket provided. She became the Member's assistant on the

residential school files and another assistant with the same initials assisted the Member on the criminal files.

### **COMMENTARY ON THE MEMBER'S FINANCIAL CIRCUMSTANCES AND HIS RELATIONSHIP WITH HIS FIRM**

49. The LSA has established the Member was under extraordinary financial pressure. His wages from MLG had been garnisheed as a result of his student loans (firstly as of March 27, 2002 and then January 6, 2003) and he was forced to resort to cashing his paycheques at an expensive cheque-cashing business in order to avoid using his bank account which could result in the monies being garnisheed. The Member started cashing his paycheques at Money Mart August 30, 2002 and continued until he left the firm. (Ex 9)
50. In addition, the Member clearly felt aggrieved at MLG over its arguably unfair compensation system. This system saw the Member spending enormous time working on residential school files but not being compensated until the billing and collection on these files, which could take years.
51. Staff and legal members of the firm also testified to the difficult financial times in the MLG firm. Each payday staff wondered if they would receive a paycheque or an IOU. Partners were paid last out of the general revenue and all the partners either left or opted out of the partnership leaving the three M sons and the professional corporation of EFAM as the partners.

### **COMMENTARY ON THE ACCOUNTING RECORDS OF MLG, THE SYSTEM IN THE MLG OFFICE AND DISCLOSURE OF THESE RECORDS**

52. As the Executive Director, DO oversaw the accounting system for the MLG. Documents were provided to the LSA investigator initially, albeit guardedly.

53. The Member called RJT, an accounting expert, who testified that in order to do a forensic analysis with respect to the missing funds he needed further documents.
54. An Order was made that counsel for the LSA was to write MLG and request further documentation by November 19, 2007, as noted in Exhibit 59.
55. DO replied in a letter, as set out in Exhibit 60, on December 12, 2007. Some documents were forwarded and some they were unable to locate. These documents were forwarded to the LSA, although the letter indicated they were to be forwarded to RJT, as DO testified he did not read the letter in its entirety. He did not send them by the specified date because he 'has a busy life' and it was 'very unimportant to him.'
56. DO testified that some documents that were requested in the November 5, 2007 letter from the LSA counsel, do exist but were not sent. The general account for the Eau Claire MLG office is not a separate account and thus was not sent. Some of the documents are in storage.
57. The Member wished to have certain members of MLG and DO testify and obtained an Order for service *ex juris*. He requested that DO bring further documents. The members of MLG and DO attended and initially brought an application to have counsel appear on their behalf. EFAM wished to appear as counsel for MM even though MM was called as the first witness and EFAM was to be called as the second witness. They were given 24 hours by the Committee to obtain other counsel but they withdrew their wish to have counsel.

## **ONUS OF PROOF**

58. Generally an onus of proof to establish citations against a Member lies with the LSA. Where the citations assert criminal behaviour for which disbarment is a possibility, the onus (while not as high as the onus in a criminal prosecution) is nevertheless quite high.

59. The burden of proof is set out in *Ringrose v. College of Physicians and Surgeons of Alberta*<sup>1</sup>, as stated by Clement, JA:

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

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

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

60. In *Law Society of Alberta v. Estrin*<sup>2</sup> the Court said:

'The evidence required by the Law Society to reach a conclusion of deceit is short of that in a criminal proceeding but must meet a higher standard than the balance of probabilities.'

61. Counsel for the LSA stated that the burden of proof in this hearing would require more than a balance of probabilities but less than beyond a reasonable doubt. Counsel for the Member agreed as does the Hearing Committee.

62. The funds in question came, first, into the possession of the Member in trust for four clients. The Member does not dispute this. Section 67 of the Legal Profession Act (LPA) states that:

**Burden of proof**

**67** When it is established or admitted in any proceedings under this Division that a member has received any money or other property in trust, the burden of proof that the money or other property has been properly dealt with lies on the member.

63. The LPA at section 49(1) sets out the general definition of conduct deserving of sanction:

---

<sup>1</sup> *Ringrose v. College of Physicians and Surgeons of Alberta*, [1978] 2 WWR 534 ABCA

<sup>2</sup> *Law Society of Alberta v. Estrin* (1992), 4 Alta. L R (3d) 373 ABCA



**49(1)** For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society, or

(b) tends to harm the standing of the legal profession generally, is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

64. In *Adams v LSA*<sup>3</sup> the Alberta Court of Appeal at para 6 dealt with the context of a professional disciplinary hearing:

6 Before addressing the specific grounds of appeal, it may be helpful to consider the context of a professional disciplinary hearing. Professional bodies are those to whom the government has seen fit to grant monopoly status. With this monopolistic right comes certain responsibilities and obligations. Chief amongst them is self-regulation. Self-regulation is based on the legitimate expectation of both the government and public that those members of a profession who are found guilty of conduct deserving of sanction will be regulated - and disciplined - on an administrative law basis by the profession's statutorily prescribed regulatory bodies. Thus, a professional disciplinary hearing is not a criminal hearing; it is an administrative hearing. Admission or proof of the alleged professional misconduct (or incompetence) is not the same as a plea or finding of guilt in a criminal matter. Rather, it is a finding of conduct deserving of sanction or incompetent practice based on administrative principles, including applicable evidentiary rules. A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

## **OVERALL ANALYSIS**

### **ALLEGATION REGARDING CLIENT YZ**

65. There was no evidence called on this part of the citation and the Committee finds that this allegation was not made out.

### **ALLEGATION REGARDING CLIENT JN**

66. The determination of this part of the citation involves consideration of whether the testimony of CT and JN, combined with the totality of the evidence, convinced

---

<sup>3</sup> *Adams v LSA* [2000] AJ No 1031 ABCA

the Committee that the Member had received the \$1,000 paid by JN to CT and/or the \$500 cash retainer from JN. The Committee considered the evidence that CT had not turned in a trust cheque to MLG for another client as he 'forgot in his alcoholic fog' but, when confronted, admitted to it and repaid the money with the understanding that this would be reported to the LSS and not the LSA. The amount CT stated he received from JN is different than the amount JN testified to (and the bank statement of JN is some confirmation the amount was at least \$500 not \$300). The date CT testified he ceased to act for JN is different compared to the endorsements on the Information and the billing statement (Ex 54). In his testimony JN was clearly doing his best to recollect the circumstances regarding the \$500 retainer the Member is alleged to have received. There was no bank statement provided for that period of time and the bank statement produced showed that it had a total of \$56.65 on March 12, 2003, just prior to that time.

67. The Member testified and denied that he received funds from CT or JN.
68. The Committee cannot say the testimony of CT combined with the totality of the circumstances provided sufficient clear evidence to convince the Committee that the Member received the trust money that was given to CT by JN. The Committee cannot say that the testimony of JN provided sufficient clear evidence to convince the Committee that he had in fact paid a \$500 retainer to the Member. Accordingly we find that the citation, insofar as it pertains to the file of JN, has not been made out.

69. **ALLEGATIONS REGARDING BP, CM, BM AND DT**

70. The three retainer funds of BP, CM and BM that are the subject of this hearing did not show up in the records of MLG as trust funds standing to the credit of the relevant files.

71. One possibility, based on the evidence, is that the funds in question were stolen before they found their way to the bank account of MLG. The two assistants to the Member, who were the most likely recipients of the funds, each testified and each denied having taken any funds. Other staff or lawyers at MLG would have had access to the funds, or even a member of the public might have rifled the funds prior to deposit.
72. Another possibility based on the evidence, is that the funds in question found their way into one of the bank accounts operated by MLG, but due to bookkeeping errors were not posted as trust funds credited to the files in question.
73. The investigator for the LSA and the Executive Director of MLG each testified that they reviewed the relevant books of MLG and could not locate any evidence that the funds had been received by MLG and had been incorrectly placed in another file. However, as discussed already in these reasons, the evidence in this regard was not satisfactory. The evidence submitted was not thorough and complete, nor were sufficient records retained so that an independent consultant retained by the Member could either verify or disprove the assertion that the funds did not reach the bank accounts of MLG.
74. So far as the conspiratorial suggestion is concerned, that MLG intentionally altered the books to hide the receipt of such funds (in order to prevent the Member from remaining as an associate long enough to share in the fees to be obtained on the residential school files) the Committee does not find any evidence of this. It was not MLG who caused the Member to be suspended from the practice of law; it was the Member's own failure to pay annual dues to the LSA. No entries into the books of MLG to disguise the receipt of funds have been found.
75. In the matter of DT this money was for services rendered and there is no evidence that the LSA investigator turned his investigation to the fact that it would not have appeared in the trust account or the trust ledger.

76. We are then left with at least two possible innocent explanations which might explain why funds admittedly provided to the Member did not end up in the books of MLG:
- (a) The funds were stolen by employees of MLG (or others) before they entered into the possession of MLG. Note that this possibility would exist regardless of the state of MLG's accounting records.
  - (b) The state of MLG's accounting records was such that the funds may have found their way into the possession of MLG but were never credited to the client files in question (i.e. either mistakenly credited to the trust ledger of other files or mistakenly placed in MLG's general account).

#### **FACTORS POINTING AWAY FROM AN INNOCENT EXPLANATION**

77. Counsel for the LSA argues that the innocent explanations are inconsistent with the fact that four separate incidents (including DT) arose involving the Member. Evidence was heard that other monies had gone missing but there was no evidence as to the particular files or the lawyers that were responsible for those files. JAS testified that cash went missing once from the Eau Claire office. Accordingly it is submitted that the odds are very remote for this to happen with one lawyer on four different occasions within a fairly short time period.
78. As discussed earlier, the Member was under severe financial pressure and also felt that he had been financially mistreated by MLG.
79. Perhaps the strongest factor pointing away from innocent explanations is the way in which the Member received the funds in issue. In three of the four situations (BP, BM and DT) the funds were paid to the Member by way of cheque or money order in his name. All that the Member had to do was to endorse those cheques and money order and provide them to MLG. Instead the Member testified that he

cashed the cheques and provided the cash to MLG. Why would the Member take the extra trouble (to cash the cheques rather than to endorse the cheques) if not to obtain possession of the funds for himself?

80. Take the situation of the \$3,000 cheque provided to the Member by BP. The Member asserts that he cashed the cheque, but he did so at Money Mart, so he would have been charged a fee in that regard. The Member would then have had to have topped up the cash he received with his own cash in order to provide the full \$3,000 in cash to MLG, and this at a time when the Member was in financial distress. Why would he not simply have endorsed the \$3,000 cheque? He cashed the BP cheque on December 17, 2002 (Ex 12) and his own paycheque (Ex 9) at Money Mart.
81. The \$500 cheque provided by BM to the Member was not cashed at Money Mart as the Member went to the trouble of going directly to BM's bank to cash the cheque. Why would he do this rather than simply endorse the cheque to MLG?
82. The Committee considered the evidence that the \$2,000 in bail funds of DT, received by the Member after he had been suspended by the LSA and no longer with MLG, were picked up by the Member at the Courthouse. The Member deposited this cheque in his own bank account, withdrew \$1,000 shortly thereafter and had withdrawn \$3,005 just prior to the \$2000 deposit. (Ex 42) The Member testified that he went to the trouble of turning these funds over to MLG, yet at the same time a motorbike which DT provided as security for legal fees was kept by the Member and no accounting was ever provided to MLG by the Member in that regard.

## **CONCLUSION AS TO GUILT**

83. The Committee finds that a higher standard of proof has not been proven. The totality of the circumstances, including the evidence of thefts in the office, the insecure accounting system in the office, the investigation of MLG's accounting

system and the reluctance of MLG to disclose financial documents, led the Committee to find that the high standard of proof had not been proven to find that the Member had failed to deposit the funds or had stolen the funds in question.

Dated this 20th day of January, 2009

---

Shirley Jackson, Q.C., Bencher  
Chair

---

Wayne Jacques, Bencher