

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*;
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF ROBERT P. LEE,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Fred Fenwick Q.C., Chair (Bencher)
Don Cranston, Q.C., Committee Member (Bencher)
Robert Dunster, Committee Member (Lay Bencher)

Appearances:

Counsel for the Law Society – Sharon Borgland
Counsel for Robert P. Lee – Simon Renouf, QC

Hearing Dates:

February 18 and 19, 2016

Hearing Location:

Law Society of Alberta at The Bell Tower: 800, 10104 – 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

INTRODUCTION AND SUMMARY

1. Mr. Lee was referred to the Law Society of Alberta (LSA) Practice Review department (PR) pursuant to section 58 of the *Legal Profession Act (LPA)* by a Conduct Committee Panel (CCP) as a result of investigations of Mr. Lee which proceedings also led to citations. Those citations were unrelated to the citations in this hearing and were eventually dismissed.
2. Mr. Lee was invited to participate fully in a PR program, and PR requested a comprehensive set of undertakings from Mr. Lee for monitoring and compliance purposes. After discussions and negotiations surrounding the undertakings requested by PR, Mr. Lee declined to give the requested undertakings and PR declined to continue with him.
3. As a result, Mr. Lee faced a citation that he "...failed to comply with directions from [his] regulator...".
4. At the hearing of this citation the Hearing Committee heard evidence regarding the nature of Mr. Lee's practice, PR's reasons for requesting the undertakings and Mr. Lee's position concerning his negotiations regarding the reasonableness and compliance with some of the undertakings. These matters, taken together might be said to relate to the merits of PR's program and monitoring procedure.
5. The Hearing Committee eventually decided this case on the issue of whether or not, in these very specific circumstances, the requested undertakings were authorized by the *Legal Profession Act* and constituted directions from the regulator.
6. The Hearing Committee found that Mr. Lee was properly referred to PR, but in these limited and specific circumstances, was not required to comply with the requirements of PR. Mr. Lee was acquitted of the single citation.

HEARING

7. Prior to the hearing, the Committee was given an Exhibit Book. At the opening of the hearing, the jurisdiction of the Committee was established by the entering of the usual jurisdictional exhibits (the Letter of Appointment, the Certificate of Exercise of Discretion and the Certificate of Status). Counsel for Mr. Lee and counsel for the LSA conceded jurisdiction and agreed to the composition of the Committee. The Committee found that it had jurisdiction to proceed.
8. There was no application for a private hearing and accordingly the hearing continued as a public hearing.
9. Mr. Lee faced the following single citation:

1. It is alleged that you failed to comply with directions from your regulator and that such conduct is deserving of sanction.
10. The Committee was provided with a binder of exhibits illustrating Mr. Lee's e-mail and letter correspondence with PR. Two LSA employees testified, including Mr. Daniel Chow (a staff lawyer of the LSA attached it to Practice Review), and Ms. Katherine Whitburn, (a lawyer at the LSA, the Director of Conduct). Mr. Lee testified and was cross-examined by LSA counsel.

PRACTICE REVIEW GENERALLY

11. The Practice Review (PR) Committee is a statutory committee of the LSA under the *Legal Profession Act*. The PR Committee is chaired by an elected Bencher of the LSA. The Committee's work with members is supported by the LSA's PR department, which is staffed with experienced LSA employees, including lawyers and non-lawyers who are trained to assist members who are going through difficulties in their practices. In addition, the Committee relies heavily on the work of LSA member volunteers (including Bencher and non-bencher volunteers) who give freely and voluntarily of their time to assist fellow members experiencing difficulties in their practices.
12. PR has a role in the LSA's regulatory, conduct, and disciplinary function. Lawyers facing complaints may be directed to PR or a lawyer may be directed to PR for rehabilitation by a Hearing Committee. The Committee's daily work will inevitably rely on cooperation between members and the PR Committee, as lawyers are guided through a program designed for his or her situation.
13. It was confirmed in testimony that ultimately the vast majority of members do accept and cooperate with the assistance offered by PR.
14. In this case, Mr. Lee has refused the invitation of assistance from PR. The issue is whether or not that refusal is a failure "to comply with directions from your regulator" and is therefore conduct deserving of sanction.
15. The Hearing Committee notes that the authority to discipline a member must be found within the enabling statute, the *LPA*. This jurisdictional issue may have nothing to do with the propriety of PR taking an interest in a member who is obviously having a difficult time with practice, or the wisdom of that member in refusing that assistance when offered.
16. The Committee also points out that one might "arrive" at PR under a number of different regulatory scenarios, all of which would require a different regulatory response:
 - a. A member might have been found guilty of sanctionable conduct (or perhaps agreed to an admission of culpability together with a joint proposal for sanction) and PR might be engaged as a specific part of the

sanctioning process. Failure to comply with or cooperate with PR in that situation may be a failure to comply with a specific sanction imposed by a Hearing Committee.

- b. A member might be referred to PR as a result of an Interim Suspension Hearing by the Benchers. When conduct of a member is brought to the attention of the LSA by a complaint, the Benchers may make an Interim Order that a member agree to restrictions on his or her practice, or the intervention of PR, while the investigation and hearing processes continue. A member would be put to the choice of giving undertakings (which are then enforceable as such) or facing the possibility of an interim suspension pending hearing.
 - c. A CCP, after investigation of a complaint, might refer a member to PR as a reasonable alternative to citation and hearing. A member would be put to the choice to cooperate with PR or run the risks inherent in formal citations and a hearing.
17. Mr. Lee was investigated by the LSA as a result of a complaint involving lack of civility in court proceedings. The CCP directed a citation with regards to civility, which was eventually dismissed after a hearing. The CCP also directed Mr. Lee to PR to manage the high stress of his practice. That stress had figured prominently in his responses to the civility complaint.

MR. LEE'S PRACTICE REVIEW INVOLVEMENT

18. Mr. Lee was subject to a conduct complaint, the particulars of which were not particularly well-developed (and need not have been) at the hearing. Apparently there was an allegation that Mr. Lee had responded inappropriately to a judge in a courtroom setting, and after LSA investigations were conducted, a CCP cited Mr. Lee for that conduct and referred him to PR. Mr. Lee's dealings with PR are the subject of this hearing.
19. Ultimately, Mr. Lee was acquitted of the "civility" citation, and this hearing therefore does not concern the failure to cooperate with PR arising out of a sanction with conditions imposed by a Hearing Committee.
20. A CCP clearly has authority to refer a member to Practice Review pursuant to section 58 of the *LPA*:

Practice Review Committee

- 58 (1) The Conduct Committee, at any time during or after a review by it under section 56 of a member's conduct, may direct the Practice Review Committee to carry out a general review and assessment of the member's conduct in addition to the review under section 56.

(2) On being directed to carry out a review and assessment under this section, the Practice Review Committee may delegate the carrying out of any aspect of the review and assessment to a subcommittee consisting of one or more persons, whether they are members of the Practice Review Committee or of the Society or not, and in that case, the subcommittee shall submit a written report containing its findings and recommendations to the Practice Review Committee.

(3) The Practice Review Committee, in the course of a review and assessment carried out under this section, may require the member concerned to answer any inquiries or produce any records or other property that the Committee considers relevant for the purposes of the review and assessment.

(4) After concluding its review and assessment, the Practice Review Committee may

(a) make recommendations to the member concerned that it considers will, if followed, improve the conduct of the member in relation to the member's practice as a barrister and solicitor;

(b) obtain the member's undertaking respecting restrictions on the member's practice as a barrister and solicitor or the conditions on which the member's practice as a barrister and solicitor will be carried on.

(5) The Practice Review Committee shall submit a report to the Conduct Committee containing the results of a review and assessment carried out under this section and any recommendations made to the member under subsection (4).

(6) The Practice Review Committee may from time to time inquire into the manner in which the member has followed or is following the recommendations made to the member under subsection (4) and, on being satisfied that the member has not been or is not following the recommendations, the Practice Review Committee may submit a further report on the subject to the Conduct Committee.

(7) On receiving a report of the Practice Review Committee, the Conduct Committee may, with respect to any conduct of the member that is mentioned in the report,

(a) direct that an investigation be made into the conduct and, on receiving the report of the investigator, direct that the conduct be dealt with by a Hearing Committee, or

(b) direct that the conduct be dealt with by a Hearing Committee.

21. At his initial referral to PR, Mr. Lee was requested to provide a “snapshot” of his practice, which he did. He then entered into an exchange of e-mail and letter correspondence with the PR staff lawyer, Mr. Chow, which was put before this Hearing Committee.
22. Although the original conduct matter related to “civility”, the correspondence between Mr. Lee and PR was replete with Mr. Lee pointing out how stressful his practice was (apparently as a contextual explanation for the civility matters):
 - a. Mr. Lee practiced in a difficult and specialized area of law, crimes compensation, and the rights of persons alleged to have been abused in the Child Welfare system. This area of practice was getting progressively and legally more and more difficult for Mr. Lee. Changes in legislation made crimes compensation litigation more difficult and less financially rewarding. Representative and class action litigation was becoming subject to the supervision of the courts, including the jurisdiction to allow conduct and carriage of a class action to certain Plaintiffs and their counsel. For example, Mr. Lee had apparently “lost control” of an action to other counsel, pursuant to a court order.
 - b. Management of Mr. Lee’s practice was getting difficult as he had lost his long-time assistant and was unable to obtain a suitable replacement or a student to assist him.
 - c. Difficulties with his practice area had led to financial difficulties in his practice.
 - d. Most specifically and often referred to in Mr. Lee’s correspondence was the stress resulting from the extraordinarily sad nature of the cases. Mr. Lee also experienced stress associated with his perception of defence tactics of the government and government employees who were defendants in certain matters. Mr. Lee’s own specific and special psychological makeup also caused him to identify psychologically with his clients and take on their stresses and the stresses of the litigation, in a highly personalized fashion.
23. Mr. Lee's correspondence with PR concerning the stresses of his practice is not repeated in this decision but the detail about personal, legal and financial stress was long and specific. Any person reading the letters and emails would be concerned for both Mr. Lee’s practice and his physical and mental health. The LSA, as his regulator, the CCP and PR all had cause to inquire if Mr. Lee needed a helping hand.

24. As a result of their investigation which included the self-reporting of stresses in his practice, PR recommended a course of action involving Mr. Lee taking mentor advice from a senior lawyer. The mentoring would involve a general review of his caseload and an assessment of the files which should be kept and those which should be referred out. PR offered to help with the expense of the senior lawyer review. To monitor the process, PR required a series of formal undertakings from Mr. Lee concerning the file review.
25. PR also requested reporting on Mr. Lee's physical and psychological health.
26. The undertakings regarding the reporting PR requested of Mr. Lee are set out below:
 - 1) I will conduct and complete an audit of my current files under the supervision of a supervising lawyer (as approved by the Manager, Practice Review), for purposes of determining whether I should:
 - (a) cease acting for such clients and transfer their file to new counsel;
 - (b) advise any clients to discontinue their actions because their claims are not viable, and in either event, to file a notice of withdrawal.
 - 2) I will meet with the supervising lawyer as often as the supervisor deems appropriate (the supervisor will be available to provide guidance to me on all facets on an ongoing basis and may refer me to other sources or experts to expedite my files).
 - 3) I will report in writing to the Manager, Practice Review about the steps I have taken in respect of undertaking no. 1, as often and in the format that the Manager deems appropriate.
 - 4) I will attend, at my own cost and within any time frames that the Manager, Practice Review deems appropriate, on one or more medical professionals approved by the Manager, Practice Review and instruct those medical professionals to confirm with the Manager, Practice Review:
 - (a) whether I have been diagnosed with any condition (including depression, anxiety or other emotional issues) requiring treatment.
 - (b) whether I have been provided with appropriate treatment plans.
 - (c) That I am diligently participating in and complying with those plans.

- 5) I will obtain a report from my ●, Dr. AR, providing details of my [treatment] to date and forward a copy of that letter to the Manager, Practice Review.
 - 6) I will provide my consent to allow Practice Review to engage its own medical consultant to review any and all reports from my medical professionals.
 - 7) I will take concrete steps to work with a life or career coach to assist in determining if I should change my practice areas or cease the practice of law.
27. PR further directed that a formal practice review take place involving an office visit and the review of files and file management practices. This would inform PR's further recommendation regarding a potential restriction on the nature and number of files and recommendations for any continuing professional development that seemed necessary after the file review.
 28. Mr. Lee eventually refused to give the undertakings which PR felt were necessary to monitor his cooperation and progress through the PR process. Mr. Lee confirmed at the hearing that, although he had communicated a general willingness to give some of the undertakings and not others, he did not formally give any of them. PR then declined to continue to deal with Mr. Lee absent the undertakings, referred the matter back to the CCP and the citation for the failure to comply with the regulator was directed to a hearing.
 29. Evidence adduced and submissions at the hearing included considerations of:
 - a. Whether Mr. Lee was willing to cooperate in giving some of the undertakings;
 - b. Whether Mr. Lee had partially complied with the undertakings;
 - c. Whether or not the medical undertakings required were overly broad and could have been narrowed;
 30. The Hearing Committee was invited to decide this matter based on the merits of the undertakings requested and the nature of Mr. Lee's cooperation, or in the alternative, on the jurisdiction of PR to require Mr. Lee's cooperation in agreeing to accept the undertakings in this specific situation.
 31. As Mr. Lee is facing a specific citation concerning the failure to comply with directions from his regulator (the PR Committee), the Hearing Committee finds that the citation must be founded in the jurisdiction of PR in these very specific circumstances to require Mr. Lee to give the undertakings at all, without regard for their underlying merits.

32. As such our jurisdictional analysis of Mr. Lee's specific situation does not relate to:
- a. The general propriety of PR taking steps to offer Mr. Lee a helping hand with regard to matters involving his practice that came to light during the civility complaint;
 - b. The general propriety of a member accepting the helping hand of the PR Committee voluntarily;
 - c. The authority of PR to require a member's cooperation as specifically delegated by a Hearing Committee in relation to a specific sanction during the hearing process;
 - d. The authority of the Benchers in interim suspension matters to give a member the hard choice of accepting PR guidance or an interim suspension.
 - e. The authority of a CCP to respond to a member's alleged lack of cooperation with a PR referral by returning to such further investigations or citations as may be required, related to the original complaint

“REQUIRE” INFORMATION AND “OBTAIN” UNDERTAKINGS

33. The Hearing Committee considers that Mr. Lee was properly referred to PR by the CCP pursuant to section 58 of the Act. In addition to the “civility” citations referred by the CCP (for which a hearing was eventually held and an acquittal entered) Mr. Lee's self-reports of stress justified the CCP referral to PR to inquire into Mr. Lee's practice and health.
34. Section 58 sets out the steps to be taken pursuant to that referral:
- a. Under section 58(2), the PR Committee carries out a review and assessment and submits a written report. This Hearing Committee notices that the section 58(2) report, although done, was not put in evidence before us.
 - b. Section 58(3), allows the PR Committee to require the member to answer any inquiries or produce any records or other property that the Committee considers relevant. The term “require” is highlighted because the governing legislation uses the mandatory word “require” concerning inquiries and records but uses a more permissive term, “obtain”, in section 58(4) concerning undertakings which are the subject of this citation.
 - c. Pursuant to section 58(4), after concluding its review and assessment the Practice Review Committee makes recommendations and may, according to section 58(4)(b) “obtain the member's undertakings...”.

- d. Pursuant to section 58(5), the Practice Review Committee shall report to the CCP concerning results of the review and assessment. That report was not put before this Hearing Committee; we only know that as a result of the report, the CCP directed the citation that is now before this Committee (see 58(7) referred to below).
 - e. Pursuant to section 58(7), the CCP may either direct an investigation or direct that the conduct be dealt with by a Hearing Committee. It is relevant that the citation directed to this Hearing Committee by the CCP was specific to the "... failure to comply with directions..." as opposed to something directly related to Mr. Lee's self-reported stress management issues.
35. We are further aided in our interpretation of the specific situations that would require mandatory cooperation by PR the Practice Review Panel Guideline for Statutory Referrals, which states at paragraph 23:

23. In the event the member rejects the recommendations and/or refuses the undertakings, the Panel may advise the President and invite the President to convene a meeting of the benchers to consider an interim suspension or the imposition of interim conditions pursuant to sections 63 of the Act.

This suggests a member has a choice to refuse to give undertakings and the appropriate remedy may be an interim suspension order.

DISPOSITION

36. A member may arrive at PR by a number of different routes. Mr. Lee's specific involvement as part of the PR program was:
- a. Mr. Lee was appropriately referred to PR by a CCP;
 - b. The correspondence shows that Mr. Lee answered inquiries and produced records to PR (section 58(3)) and no complaint is made in the "informational" part of the process.
 - c. PR was entitled to ask for undertakings (section 58(4)) which it determined were necessary to monitor the PR program proposed, based on their expertise and Mr. Lee's self-reporting.
 - d. At this "obtain undertakings" stage of a CCP referral, a member seems to have a choice to cooperate or not. The wisdom of refusing the helping hand of PR's expertise (and willingness to assist with expenses) in this situation of high stress, is not a matter for this Committee based on this citation and may only rarely be considered by any Hearing Committee.

Ms. Whitburn's evidence suggests that members usually accept the help offered them.

- e. If a member does not give undertakings (which do not seem obligatory at this stage), the choices for the LSA include letting the matter go or referring the matter to the President, and then to the Benchers, if an interim suspension application seems warranted.
 - f. Absent that referral, or perhaps another CCP citation for the underlying issues (which would generate a hearing on the merits), the request for undertakings does not seem obligatory.
 - g. There may in other situations be a referral to PR and a direction to cooperate by a Hearing Committee as part of a finding of guilt and penalty in a citation, but that is not the case before us.
37. As a result of our interpretation of the program of Practice Review, as set out in section 58 of the *LPA*, the request for undertakings is not a direction from the regulator. A request for undertakings in this situation is distinct from a requirement to answer an inquiry under section 58(3), as one example. We find that Mr. Lee could in fact refuse to give the undertakings and that the specific and narrow wording of the citation against Mr. Lee is not made out.
38. Mr. Lee is acquitted.

39. The exhibits in this hearing and this report will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to witnesses other than LSA staff will be redacted. Further redactions will be made to preserve client confidentiality and solicitor-client privilege, and to preserve Mr. Lee's confidentiality regarding the nature of treatment he was receiving, referenced in paragraph 26.

Dated at the City of Edmonton, in the Province of Alberta, this 3rd day of August, 2016.

Fred R. Fenwick, Q.C., Chairperson

Donald Cranston, Q.C., Member

Robert Dunster, Member