

THE LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF WILLIAM MALCOLM
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Fred Fenwick, QC

Appearances

William Malcolm – appearing in person

Counsel for the Law Society of Alberta (LSA) – Nancy Bains

Hearing Date:

January 12, 2016

Hearing Location:

Law Society of Alberta at 500, 919 – 11th Avenue SW, Calgary, Alberta

HEARING COMMITTEE REPORT

Introduction and Summary

1. Mr. Malcolm acted as counsel for Ms. H.J. in a separation and custody matter with her former common-law spouse. Throughout 2010 to 2012, Ms. H.J. alleges that Mr. Malcolm committed multiple errors in the conduct of her matter.
2. This matter came to a hearing as a Single Bench Hearing with a Statement of Admitted Facts and Admission of Guilt. The parties presented a joint submission on

sanction (which included a fine, reprimand and Practice Review involvement), all of which had been negotiated between the LSA and Mr. Malcolm prior to the hearing and which was accepted after hearing submissions.

CITATIONS

3. Mr. Malcolm faced the following citations:
 - a. IT IS ALLEGED THAT Mr. Malcolm failed to serve his client and that such conduct is deserving of sanction; and
 - b. IT IS ALLEGED THAT Mr. Malcolm consented to a Court Order without obtaining his client's instructions and that such conduct is deserving of sanction.
4. Pursuant to the Statement of Admitted Facts and Admission of Guilt, attached as Schedule "A", Mr. Malcolm has accepted responsibility for the above noted citations. Pursuant to section 60(4) of the *Legal Profession Act*, there is a deemed finding that Mr. Malcolm is guilty of conduct deserving of sanction.

JURISDICTION

5. Jurisdiction was established at the beginning of the Hearing by entry of agreed Exhibits including:
 - Exhibit 1 – Appointment of the Single Bencher Hearing Committee;
 - Exhibit 2 – Notice to Solicitor;
 - Exhibit 3 – Notice to Attend and Private Hearing Application Notice; and
 - Exhibit 4 – Certificate of Membership.
6. Counsel for the LSA and Mr. Malcolm agreed that the Single Bencher Hearing Committee had jurisdiction and accepted the composition of the Hearing Committee.

FACTS

7. The facts were set out in a Statement of Admitted Facts and Admission of Guilt. Mr. Malcolm acted for Ms. H.J. in the conduct of a common-law matrimonial claim, involving child support, access and property issues. Mr. Malcolm's conduct of the file was careless, as evidenced by the following facts:
 - a. He prepared a Maintenance Order which did not have the required provision to allow it to be enforced by the Maintenance Enforcement Program;

- b. Having entered the faulty order, he took no steps to correct the order despite instructions;
 - c. He did not pursue a property claim prior to it being barred by limitations issues;
 - d. He consented to an Access Order without proper authority;
 - e. He did not respond to voicemail and emails; and
 - f. He withdrew from representing Ms. H.J. at a time when there was a serious application outstanding against her, for which she was not given notice.
8. The Statement of Admitted Facts and Admission of Guilt contained no explanation as to the reasons for these mistakes or any evidence upon which a Hearing Committee could decide on an appropriate sanction. When determining a sanction, the Hearing Committee must keep in mind the primary importance of protection of the public and the interests of subsequent clients.
 9. Mr. Malcolm and counsel for the LSA were invited to consider whether or not they wanted Mr. Malcolm to testify on his own behalf and be cross-examined by the LSA concerning the background to these issues, including any mitigating steps and protection of the public measures. Mr. Malcolm testified as part of the sanctioning process.
 10. It was learned in the testimony that Mr. Malcolm's self-analysis was that, in receiving instructions for this (potentially) complicated case he failed to get a proper level of clarity from his client as to the nature of the case he was to present for her.
 11. Further, Mr. Malcolm has been voluntarily involved with the LSA Practice Review department and had been discussing with Practice Review the nature of his obligations, in relation to obtaining instructions and presenting alternatives to his clients.
 12. Further we are informed that Mr. Malcolm intends to take further specific training in family law, including the Federation of Law Societies national course at its next occurrence in the summer of 2016.

DISCUSSION

13. The Single Benchers Hearing Committee process allows some streamlining of matters serious enough to attract a sanction. In this case, Mr. Malcolm and counsel for the LSA have put forward a sensible proposal in their joint submissions on sanction. The protection of the public is, however, the primary obligation of the Hearing Committee when considering any sanction.
14. Having heard from Mr. Malcolm, especially with regard to his voluntary involvement with Practice Review and the educational obligations which he has taken on, the Hearing Committee is persuaded that the joint submission of a fine plus reprimand and

continuing involvement with Practice Review adequately protects the public interest and allows Mr. Malcolm to further develop his practice and to continue to serve the public.

15. The joint submission on sanction is accepted as follows:
 - a. Mr. Malcolm received a reprimand from the Chair on the date of the hearing;
 - b. A fine of \$5,000.00 was imposed, to be paid within six months of the date of the hearing;
 - c. In the alternative, Mr. Malcolm may at his discretion “invest” the \$5,000.00 fine in a course of education or continuing professional development as approved by the Practice Review manager, which must be completed by December 31, 2016; and
 - d. Mr. Malcolm will continue his involvement with Practice Review until discharged by the Practice Review department.
 - e. Hearing costs of \$1,713 shall be paid within six months of the date of the hearing.

CLOSING MATTERS

16. This report, the Statement of Admitted Facts and Admission of Guilt, and all exhibits entered at this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of any clients and other confidential personal information, as is the usual practice.
17. No Notice to the Profession will be issued.
18. No referral to the Attorney General is directed.

Dated at the City of Calgary, in the Province of Alberta this 22nd day of April, 2016.

Fred R. Fenwick, Q.C.

[Note: An erratum was issued May 6, 2016, changing the reference to “Practice Review Committee” in paragraph 15.c. to “Practice Review manager”.]

Schedule "A"

IN THE MATTER OF THE *LEGAL PROFESSION ACT*, R.S.A. 2000, c. L-8

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
WILLIAM MALCOLM, A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

BACKGROUND

1. I was admitted to the Law Society of Alberta on November 10, 1986.
2. My present status with the Law Society of Alberta is active/practicing.
3. I have practiced law in Lethbridge, Alberta as an active member since my admission to the Bar. I currently practice in a small firm with three other lawyers. My practice consists primarily of matrimonial/family law and civil litigation.

CITATIONS

4. I understand and acknowledge that the following conduct has been referred to a hearing:
 - (i) It is alleged that Mr. Malcolm failed to serve his client and that such conduct is deserving of sanction.
 - (ii) It is alleged that Mr. Malcolm consented to a court Order without obtaining his client's instructions and that such conduct is deserving of sanction.
5. I further understand and acknowledge that the conduct referred to is regarding my former client HJ and my service to her in a family law matter.

FACTS

6. The conduct at issue took place between 2010 and 2012 when I was representing HJ in a separation and custody matter with her former common-law spouse.
7. I prepared a Maintenance Order for HJ that was entered on May 4, 2010 (the "Maintenance Order"). I did not insert a standard provision in the Maintenance Order that would allow HJ to register it with the Maintenance Enforcement Program ("MEP"). I acknowledge that this failure on my part resulted in HJ not being able to register the Maintenance Order in the MEP.

8. HJ instructed me to take steps to amend the Maintenance Order to insert the necessary MEP clause. I did not take steps to correct that Order or to clarify with HJ what steps I would be taking prior to HJ terminating her relationship with me in August 2012.
9. I did not pursue HJ's property claim in the matrimonial proceeding before it became statute barred (the "Property Claim"). I believed I had an understanding with opposing counsel to negotiate a resolution of the Property Claim but I did not enter into a tolling agreement with opposing counsel. After two years passed with no resolution, no tolling agreement, and no claim being filed on behalf of HJ, opposing counsel took the position that HJ's Property Claim was statute barred.
10. While I did take some preliminary steps toward resolving the Property Claim, I did not discuss the applicable limitation period with HJ, seek her specific instructions, or take action to protect HJ's interests in advance of the limitation period expiring. I acknowledge that this failure on my part resulted in HJ losing the right to pursue an equal division of property with her former spouse.
11. In August 2012, I consented to an Order regarding access to HJ's child by her former spouse (the "Access Order"). I consented to the Access Order without advising HJ of the specific terms being proposed or seeking her specific instructions. HJ and I had general discussions about the fact her former spouse would be granted some access to the child during the summer vacation period the Order related to. However, I did not advise HJ of the specific terms being proposed by opposing counsel and did not get her instructions before I consented to the Access Order.
12. During July 2012 I did not respond to a number of voicemail messages and emails that HJ left for me regarding access to the child and her intention to leave the province with the child.
13. In August 2012, after I had filed but before I had served a Notice of Withdrawal as HJ's counsel, I received an application from opposing counsel to alter parenting arrangements in favor of HJ's former spouse (the "Parenting Application"). The Parenting Application made serious allegations about the HJ and her fitness as a parent. I did not notify HJ of the application. Although I have no knowledge of it, I accept HJ's statement that she only became aware of the Parenting Application when she attended at the courthouse to try to address the deficiency in the Maintenance Order that I had not corrected before ceasing to act for her.

ADMISSION OF GUILT

14. I admit the facts contained in this Statement of Admitted Facts and Admission of Guilt for the purpose of this proceeding.
15. I admit to that I fell below the standard of conduct expected of a member of the Law Society of Alberta by failing to:
 - (i) insert a standard clause in the Maintenance Order that should have been included;

- (ii) seek specific instructions and take steps to protect my client's interests prior to the limitation period expiring on her Property Claim;
 - (iii) advise my client of the specific terms being proposed and to seek her instructions before consenting to the Access Order;
 - (iv) be clear and forthright in advising my client about the Parenting Application pending against her at the time I was ceasing to act for her; and
 - (v) respond to and telephone calls and email message from my client that reasonably contemplated a response.
16. I acknowledge that I have had the opportunity to consult legal counsel and that I am providing this Statement of Admitted Facts and Admission of Guilt on a voluntary basis.

THIS STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT IS MADE THIS 9TH DAY OF December, 2015.

"William Malcolm"

WILLIAM MALCOLM