

THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

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 BRIAN SEKIYA,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

INTRODUCTION

1. A Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the Law Society Offices, in Calgary, on December 17, 2012 to consider the conduct of Brian A. Sekiya.
2. The Committee was comprised of Anne L. Kirker, Q.C., Rose Carter, Q.C., and Larry Ackerl, Q.C. The LSA was represented by Mr. Brian Gifford. Mr. Sekiya was represented by Mr. Patrick Peacock, Q.C. A court reporter was present to transcribe the proceedings.

JURISDICTION

3. Jurisdiction was established through the introduction (by consent) of the following Exhibits (1 through 4):
 - Exhibit 1 - Letter of Appointment of the Hearing Committee dated November 21, 2012.
 - Exhibit 2 - Notice to Solicitor dated August 10, 2012 with acknowledgement of service.
 - Exhibit 3 - Notice to Attend dated August 10, 2012 with acknowledgment of service.
 - Exhibit 4 - Certificate of Status dated August 10, 2012 certifying that Mr. Sekiya is an active member of the Law Society of Alberta.
4. In addition, a letter dated November 26, 2012 was entered as Exhibit 5 confirming that pursuant to Rule 96(2)(a) and (b) of the LSA ("Rules"), a Private Hearing Notice had been served on two individuals as identified in the letter. The Committee was advised that no request for a private hearing had been requested.

EXHIBITS

5. The following additional Exhibits (6 through 21) were also entered into the record during the course of the proceedings with the consent of the parties:
 - Exhibit 6 - Memorandum of Complaint Form submitted by M.S., January 22, 2012, enclosing:
 - Tab 1 - Resolutions of the Directors of # Alberta Ltd., June 15, 2007 (signed)
 - Tab 2 - Transcript of Recording, April 3, 2008 (see Exhibit 16 below)
 - Tab 3 - Resolutions of the Directors of # Alberta Ltd., June 15, 2007 (unsigned)
 - Tab 4 - Letter from John H. Wilson to Brian A. Sekiya, July 3, 2008
 - Tab 5 - Letter from Brian A. Sekiya to John H. Wilson, July 9, 2008
 - Tab 6 - Trust Statement, undated

- Exhibit 7 - Letter from Brian Sekiya to LSA, March 15, 2010
- Exhibit 8 - Letter Requesting Response to Brian Sekiya, April 6, 2010
- Exhibit 9 - Letter of Response from Brian Sekiya, May 14, 2010
 - Tab 1 - Particulars of Share Transfers of #2 Alberta Ltd., undated
- Exhibit 10 - Letter from M.S. to LSA, July 8, 2010
- Exhibit 11 - Letter Requesting Response to Brian Sekiya, March 17, 2011
- Exhibit 12 - Letter from Brian Sekiya to LSA, March 31, 2011
- Exhibit 13 - Letter from LSA to Brian Sekiya, April 5, 2011
- Exhibit 14 - Letter of Response from Brian Sekiya, May 3, 2011
 - Tab 1 - Resolutions of the Directors of # Alberta Ltd., June 15, 2007 (unsigned)
- Exhibit 15 - Letter from M.S. to LSA, June 18, 2011
 - Tab 1 - Letter from Brian Sekiya to LSA, May 3, 2011
 - Tab 2 - Transcript from the Recording, April 3, 2008
 - Tab 3 - ICO's Un-audited Financials information, July 2, 2008
 - Tab 4 - # Alberta Ltd. Notice of Special Meeting of Shareholder, March 31, 2010
- Exhibit 16 - CD of recording labelled "Meeting with Brian Sekiya, April 3, '08, Brian's office"
- Exhibit 17 – ICO Update, July 16, 2008
- Exhibit 18 - Four page e-mail string commencing with an April 21, 2008 e-mail from C.L. to M.S. et al
- Exhibit 19 - Bundle of Documents including:
 - E-mail from Brian Sekiya to G.A. et al, September 20, 2007;
 - Wilson Laycraft invoice dated June 27, 2008 addressed to C.L., M.S., G.A. and S.C.;
 - ICO Update, July 16, 2008;
 - Two page Report to Shareholders;
 - Note dated April 3, 2008 re meeting in Brian Sekiya's office;
 - Letter dated July 17, 2008 from Mr. Wilson to C.L. and M.S.;
 - E-mail from M.S. to Mr. Wilson dated September 25, 2009;
 - Draft Statement of Claim.
- Exhibit 20 - Bundle of e-mails beginning with the e-mail sent by Brian Sekiya to C.L. et al, June 12, 2007
- Exhibit 21 - Resolutions of the Directors of # Alberta Ltd. and Share Certificates

CITATIONS

6. Mr. Sekiya faced two citations:
- (a) It was alleged that he disbursed funds without instructions to do so and that such conduct was deserving of sanction.

- (b) It was alleged that he accepted instructions from one client to the determine of another while in a conflict of interest or potential conflict of interest and that such conduct was deserving of sanction.

PRELIMINARY MATTERS

7. After Exhibits 1 through 5 were entered to establish the jurisdiction of the Committee, the Chair introduced the three Committee Members and inquired of both counsel whether the parties had any objection to the composition of the Committee. There was no objection.
8. The Chair also inquired whether Mr. Sekiya wished to make a Private Hearing application. He did not. The Chair therefore directed that the hearing proceed in public.

THE EVIDENCE

9. The two citations arose from a complaint made by M.S. in January, 2010.¹ M.S. was, at the time, the Vice President and one of only two remaining directors of # Alberta Ltd.², an investment company referred to throughout the hearing, and in these reasons, as ICO. M.S. himself held 50 shares in ICO having invested \$50,000.³
10. ICO was incorporated in or around January, 2006, by R.C. for the purpose of raising money to complete the development of a patent for commercial purposes.⁴ #3 Alberta Ltd. (referred to as "P Company") owned the patent.⁵ P Company had four shareholders. Three were privately held family companies owned by L.L., R.C. and M.G., respectively.⁶ The fourth shareholder was ICO, being the vehicle through which "friends and family" of the other shareholders could invest in the venture to take the patent to market.
11. The Board of Directors of P Company included R.C., L.L., C.L. and V.D.⁷
12. When ICO was first incorporated, R.C. was the founding shareholder and director. As other individuals invested they became shareholders and some became directors and officers of the company.⁸
13. Mr. Sekiya was retained by R.C. to set up P Company and ICO. After ICO was incorporated, Mr. Sekiya's involvement with ICO was limited to the issuance of Share Certificates to investors which he did on R.C.'s instruction and otherwise as approved by the Board of Directors of ICO.⁹ He was not involved in giving advice in connection with any management function.¹⁰
14. By June, 2007, the following individuals had become the directors of ICO: G.A., S.C., D.M., M.S. and C.L.¹¹
15. An ICO Update dated July 16, 2008, indicates that shareholders of ICO invested \$1,295,000.¹² Of the \$1,295,000 invested, over \$1,000,000 was directed either directly, or through one of the

¹ Exhibit 6

² Transcript of Proceedings, page 13, lines 15 - 27

³ Transcript of Proceedings, page 14, lines 15 - 20

⁴ Transcript of Proceedings, page 99, lines 13 - 21

⁵ Transcript of Proceedings, page 19, lines 19 - 22

⁶ Transcript of Proceedings, page 19, line 25 - page 20, line 1 and page 98, lines 20 - 24

⁷ Exhibit 19, Report to Shareholders

⁸ Transcript of Proceedings, page 102, line 26 – page 103, line 7

⁹ Transcript of Proceedings, page 99, lines 1 - 12; page 104, lines 3 - 28

¹⁰ Transcript of Proceedings, page 99, lines 10 - 12

¹¹ Transcript of Proceedings

¹² Exhibit 17, ICO Update

existing shareholders, to R.C. or L.L. who were apparently managing the patent development project. Mr. Sekiya was not involved in the transfer of these funds.¹³

16. On or before June 4, 2007, funds totalling \$28,000 were given to Mr. Sekiya by C.L., who had found nine new investors. Two of those investors gave their subscription finds directly to R.C.¹⁴ Mr. Sekiya received cheques from C.L. for the other seven investors (one of whom was C.L. himself through a numbered company) as follows¹⁵:
 - (a) D.B. - \$5,000
 - (b) M.S.B. - \$2,000
 - (c) S.E. - \$2,000
 - (d) C.E. - \$4,000
 - (e) M.D. - \$5,000
 - (f) R.R. - \$5,000
 - (g) #4 Alberta Ltd. (C.L.) - \$5,000
17. This \$28,000 was deposited into Mr. Sekiya's trust account. No specific trust conditions were communicated to Mr. Sekiya.
18. There was a limit to the number of "friends and family" who could invest in the venture through ICO without the company going public. With the addition of the nine new investors, that limit was going to be exceeded. ICO could not, therefore, issue the shares in the capital of the company which the new investors sought to purchase. In an e-mail dated June 4, 2007 from D.M., Treasurer of ICO,¹⁶ to Mr. Sekiya she noted that C.L. had warned the new investors he had brought in that "...it may not go thru..." and that there would have to be an adjustment. D.M. asked Mr. Sekiya not to "process what C.L. brought in on Friday" while the shareholder limit issue was addressed.¹⁷
19. On June 12, 2007, a meeting took place among the ICO Board of Directors and the P Company Board of Directors. Mr. Sekiya was asked to attend to provide advice on the structural alternatives available.¹⁸
20. Mr. Sekiya explained the issue to C.L. and the other directors of ICO and P Company and explained that to issue additional share certificates, ICO would have to take the steps necessary to go public. Alternatively, a second investment company could be established which would allow new investors to make the same investment in the patent development venture, albeit through the new investment company.¹⁹

¹³ Exhibit 17, ICO Update ; Transcript of Proceedings, page 99, line 23 – page 100, line 12

¹⁴ Exhibit 6, Tab 1

¹⁵ Transcript of Proceedings, page 103, lines 8 – 12; Exhibit 6, tabs 1 & 3

¹⁶ Transcript p. 24, line 27

¹⁷ Exhibit 19, e-mail from D.M. to Brian Sekiya, June 4, 2007

¹⁸ Exhibit 20, e-mails between Mr. Sekiya and C.L., G.A. and V.D. dated June 10 and 12, 2007; Transcript of Proceedings, page 106, line 2 - page 107, line 26

¹⁹ Transcript of Proceedings, page 106, line 2 - page 107, line 12

21. Mr. Sekiya testified that he subsequently received instruction to incorporate ICO 2 which was to own shares in P Company like ICO did so that all investors, whether they owned shares in ICO or ICO 2, had or would acquire the same interests in P Company.²⁰
22. M.S. asserted that Mr. Sekiya had no such authority from the Board of Directors of ICO. However, e-mails which Mr. Sekiya retrieved from an old computer just a week before the hearing²¹ established that by e-mail dated June 24, 2007, the Board of Directors of ICO did confirm its agreement with the "positioning of ICO 2" as the reasonable solution to the shareholder limit the problem.²² Specifically, Mr. Sekiya was instructed to "move 157 shares from ICO to R.C. effective June 25, 2007. The shares will be considered payment in lieu of cash for expenses incurred in the development and forward movement of the company. ICO will retain 55 shares in the company to be sold after the positioning of ICO 2."²³
23. ICO 2 was therefore incorporated. Shares in ICO were transferred to R.C. himself as payment for expenses he had incurred. Shares R.C. owned were then used to capitalize ICO 2. As had been the case with ICO, R.C. became the founding shareholder and director of ICO 2.²⁴
24. Once ICO 2 was incorporated, shares for C.L.'s nine new investors were issued out of that company.²⁵ The subscription funds of \$28,000 in trust were transferred within Mr. Sekiya's trust account to ICO 2 on June 27, 2007.²⁶ Mr. Sekiya subsequently paid the funds to R.C. on his instruction.²⁷
25. Unfortunately, the venture failed.
26. Mr. John Wilson Q.C. was retained by C.L., M.S., G.A. and S.C. to act on behalf of ICO after the business relationship with R.C. deteriorated. Mr. Wilson was called as a witness. He confirmed that while "there certainly was a focus on an accounting that was required...it was not from Mr. Sekiya. It was from L.L. and R.C."²⁸
27. Mr. Wilson testified that when he was initially retained, it appeared to him that Mr. Sekiya may have been acting in a conflict interest "if...there was going to be a payment to R.C. or R.C.'s company, for example, with my clients' trust funds."²⁹ He suggested that perhaps ICO should have been represented by one party and R.C. represented by someone else. Mr. Wilson's clients were of the view that the \$28,000 transfer to ICO 2 had taken place without authorization. Mr. Wilson acknowledged, however, that he had never seen Mr. Sekiya's file and so didn't know to what extent he had addressed any conflict of interest issues or authority to disburse trust funds in the manner he did.³⁰ Mr. Wilson testified that without having seen something that would justify the movement of the \$28,000 to the trust account for ICO 2, he was of the view the money ought to be repaid to ICO.³¹

²⁰ Transcript of Proceedings, page 107, lines 5-12

²¹ Exhibit 20; Transcript of Proceedings, page 113, lines 1 – 15;

²² Exhibit 20, e-mail from G.A. to Brian Sekiya, June 24, 2007

²³ Exhibit 20, e-mail from G.A. to Brian Sekiya, June 24, 2007

²⁴ Transcript of Proceedings, page 109, lines 1-10

²⁵ Exhibit 9, Tab 1, particulars of share transfers of #2 Alberta Ltd.

²⁶ Exhibit 6, Tab 6, Trust Statement

²⁷ Transcript of Proceedings, page 115, lines 1-10

²⁸ Transcript of Proceedings, page 89, lines 25-27

²⁹ Transcript of Proceedings, page 86, lines 12-15

³⁰ Transcript of Proceedings, page 83, lines 23-26

³¹ Transcript of Proceedings, page 84, lines 11-15

28. The Committee did not hear from C.L. or from any of the other ICO or P Company directors or from any other investors.

DECISION

29. The issues before the Hearing Committee were whether Mr. Sekiya disbursed the \$28,000 to R.C. without proper instruction to do so, and whether he accepted instruction from one client to the detriment of another while in a conflict of interest or potential conflict of interest.
30. Although M.S. and counsel for the Law Society asserted that Mr. Sekiya received the \$28,000 into trust on behalf of ICO and that he was not authorized to incorporate ICO 2, the evidence provided by Mr. Sekiya, including the series of e-mails he was able to retrieve just prior to the hearing (Exhibit 20), established that:
- (a) when Mr. Sekiya received the \$28,000 from C.L. and deposited the subscription funds into his firm's trust account on June 4, 2007, it was anticipated the investors would receive shares in ICO;
 - (b) because of the shareholder limit problem, ICO could not issue those shares;
 - (c) the directors of ICO and of P Company considered their options and instructed Mr. Sekiya to incorporate ICO 2 so that new investors could invest in the patent development venture purchasing shares in ICO 2;
 - (d) as had been done with ICO, ICO 2 was incorporated with R.C. as the founding shareholder and director;
 - (e) the new investors received shares in ICO 2 and the subscription funds were placed in trust for ICO 2;
 - (f) Mr. Sekiya received instruction from R.C. as founding shareholder and director of ICO 2 to release the funds which he did.
31. It appears that Mr. Wilson's clients had not fully explained to him the sequence of events leading to the decision to incorporate ICO 2 as an alternate vehicle through which new investors could purchase shares, or the fact that ICO was not in a position to issue shares to new investors and consequently, did not acquire any authority over the \$28,000.
32. On the basis of these facts, the Committee was unable to conclude that Mr. Sekiya was guilty of conduct deserving of sanction as alleged. Certainly, he can be faulted for failing to document his file more effectively and, in particular, for failing to produce the series of e-mails which revealed the consensus among all involved to the incorporation of ICO 2 until just a week before the hearing. Had the e-mail correspondence been made available sooner, it is possible the need for a hearing might have been avoided.
33. Mr. Sekiya was authorized to incorporate ICO 2 and he ultimately disbursed that company's money on the instruction of its founding shareholder and director.
34. As to the conflict of interest, there was no evidence, and indeed, Mr. Sekiya had no indication, of any actual conflict between or among the parties. While a potential for conflict existed, and Mr. Sekiya acknowledged that he ought to have reminded the parties they should consider obtaining independent legal advice, it is also fair to say that Mr. Sekiya's role in the business dealings between the parties was limited. Having not heard evidence from anyone other than M.S. and not fully understanding what informed the decisions made by the directors of ICO and P Company at

the material time, the Committee could not conclude that Mr. Sekiya's oversight rises to the level of conduct deserving of sanction.

35. Accordingly, on the totality of the evidence, the Committee unanimously concluded that the citations should be dismissed.

DATED at Calgary this 4th day of June, 2013.

Anne Kirker QC – Bencher and Chair
Hearing Committee
The Law Society of Alberta

Larry Ackerl, QC – Bencher and Member
Hearing Committee
The Law Society of Alberta

Rose Carter, Q.C. – Bencher and Member
Appeal Panel
The Law Society of Alberta