

**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 DARRELL ELGERT**

A Member of the Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULT

1. On February 18, 2014 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Edmonton, Alberta to inquire into the conduct of the Member, Darrell Elgert. The Committee was comprised of Robert Harvie Q.C., Chair, Norman Picard, Q.C., and Glen Buick. The LSA was represented by Mr. Geoffrey Hope and Ms. Lily Nguyen. Mr. Elgert was present throughout the hearing and was self-represented.
2. At the commencement of the hearing, counsel for the LSA and Mr. Elgert presented the Hearing Committee with an Agreed Statement of Facts in relation to the citation, entered as Exhibit 6. Further, as set out in paragraphs 106 to 107 of the Agreed Statement of Facts, Mr. Elgert admitted that his conduct was deserving of sanction. Upon consideration of the said admission, and upon Mr. Elgert being questioned by the Chair regarding the said admission, the Panel found that the admission of guilt was in a form acceptable to the Panel pursuant to Section 60 of the Legal Profession Act.
3. On the basis of the Agreed Statement of Facts, the admission of guilt referred to above and for the reasons that follow, the Hearing Committee found the conduct of Mr. Elgert to be deserving of sanction. The Hearing Committee sanctioned Mr. Elgert as follows:
 - a) Suspension from practice for a period of 18 months from the date of the hearing;
 - b) Should Mr. Elgert not already be subject to direction for Practice Review arising from previous conduct matters, a direction that Mr. Elgert be subject to Practice Review for a period of not less than 12 months, on such conditions as may be determined by the Practice Review Committee;
 - c) Costs of the hearing to be paid by Mr. Elgert in the sum of \$14,534.62, to be paid within twelve (12) months of Mr. Elgert being reinstated to practice.

CITATIONS

4. Mr. Elgert faced five citations as follows:

1. It is alleged that you engaged in a business transaction with a client who did not have independent legal representation, or who did not consent to dispense with independent legal representation, or where the transaction was not fair and reasonable to the client in all respects; and that such conduct is conduct deserving of sanction;
2. It is alleged that you acted for more than one party in a potential conflict situation where all parties had not consented or where it was not in the best interest of the parties that you so act; and that such conduct is conduct deserving of sanction;
3. It is alleged that you failed to serve and protect the interests of your clients, and that such conduct is conduct deserving of sanction;
4. It is alleged that you failed to be candid with your clients, and with Mr. C, and that such conduct is conduct deserving of sanction;
5. It is alleged that you failed to be candid with the Law Society of Alberta, and that such conduct is conduct deserving of sanction,

Circumstances of Complaint

5. The conduct complained of relates to a real estate transaction in which Mr. Elgert was a participant, along with a long-standing client, and a relative, Mr. W and Mr. M.

6. As set out in the agreed statement of facts, Mr. Elgert had represented Mr. M on an ongoing basis for some time, and in 2007, Mr. Elgert entered into discussions with his client, Mr. W, regarding a joint real estate venture, contemplating the purchase of an apartment building to be converted into a condominium project.

7. In May of 2007, a suitable property was found, and there was an agreement between Mr. Elgert and Mr. W, that the property would be purchased, and as a result of those discussions and subsequent to input and advice being received by Mr. W from Mr. Elgert, a real estate purchase contract was entered into requiring payment of \$16,500,000.00, by way of \$12,375,000.00 in new mortgage financing and the balance of \$4,125,000.00 by way of further cash payment by the purchaser.

8. By agreement, but under the direction of Mr. Elgert, the purchaser on the contract was Mr. W's numbered corporation "or Nominee" – the understanding being that Mr. Elgert would establish a new corporation to undertake the actual purchase of the property and subsequent development.

9. The initial deposit of \$200,000.00 was paid for by Mr. W, with Mr. Elgert advising that the additional deposit of some \$400,000.00 was to come from Mr. Elgert and Mr. M. It is to be noted that by the time of the purchase contract being signed and the deposit being paid by Mr.

W, there is no suggestion that Mr. M had any knowledge of the transaction or that he had made any commitment to become a party to same.

10. On May 30, 2007, Mr. W was asked by the realtor whether the conditions of the contract had been satisfied and could be removed. In accordance with the advice of Mr. Elgert, all conditions were removed with the exception of the obtaining of a property appraisal, which was extended to June 8, 2007. At this time, Mr. Elgert advised Mr. W that he was arranging for the payment of the additional deposit and that "financing approval was in place" (Exhibit 6, para. 48). In fact, there was no financing in place and those representations were false.

11. It should be noted that there was no advice given by Mr. Elgert to Mr. W to seek or obtain independent legal advice, and nor did Mr. Elgert disclose to Mr. W the true circumstances of Mr. M, or of the inherent conflict of interest between Mr. Elgert as counsel for Mr. W and Mr. Elgert as business partner with Mr. W. As a result, there was no conflict letter prepared by Mr. Elgert or signed by Mr. W.

12. In accordance with the advice of Mr. Elgert, Mr. W removed the all conditions by June 8, 2007, and as a result, by that date the purchase was now unconditional.

13. Subsequent to removal of the financing conditions, Mr. Elgert sought contribution of Mr. M to the transaction – soliciting a further \$150,000.00 from Mr. M as a deposit towards the purchase – with none of the details of the transaction being specifically communicated directly to Mr. M., and Mr. M relying solely on the advice and experience of Mr. Elgert to protect his interests.

14. It should be noted, again, that there was no advice given by Mr. Elgert to Mr. M to seek or obtain independent legal advice, or of the inherent conflict of interest between Mr. Elgert as counsel for Mr. M and Mr. Elgert as business partner with Mr. M. As a result, there was no conflict letter prepared by Mr. Elgert or signed by Mr. M.

15. On June 12, 2007, Mr. Elgert paid the funds provided by Mr. M to the realtor, and paid a further \$250,000.00 provided by Mr. Elgert and his wife.

16. From this point, until July of 2007, Mr. Elgert maintained to Mr. W and Mr. M that all matters were satisfactory, with no difficulty or concerns regarding the transaction being disclosed to either of his clients/business partners, even though no financing had even been applied for and the transaction was to close on August 1, 2007.

17. At a meeting held with the realtor on July 25, 2007, it was disclosed to both Mr. M and Mr. W that there was no financing in place, and that there was no source for the balance of the deposit, and it was at this meeting that Mr. M learned for the first time that there was an expectation that he would arrange for financing and securing the balance of the purchase price.

18. As deposits had, by this point, been paid, and as the contract was now unconditional, Mr. M used his best efforts to try and arrange for financing, however, notwithstanding those

efforts, he was unsuccessful. The closing date was extended to August 22, 2007, however, financing could still not be arranged and the transaction failed to close as a result.

19. Subsequently, Mr. Elgert sought to obtain return of the deposit, instituting legal proceedings on August 31, 2007. It is apparent, based upon the circumstances and the facts, that the action was poorly conceived and that the Member, Mr. Elgert, made only token effort to pursue the action.

20. On April 2, 2008, counsel for the Vendors offered to settle the suit by returning \$55,000.00 to the purchasers (Exhibit 6, Tab 18). Mr. Elgert did not respond to this offer and there is no evidence that Mr. Elgert communicated the offer to either Mr. W or Mr. M, even though, based upon the facts before this panel, it appears clear that the offer as extended was the maximum benefit that might have been obtained by Mr. W or Mr. M. Instead, the Member, Mr. Elgert, continued in a half-hearted effort to continue the litigation.

21. Examinations for Discovery of Mr. W and Mr. Elgert were scheduled with Mr. Elgert for July 16 and 17, 2008, however, Mr. Elgert did not advise Mr. W of same and neither Mr. Elgert nor Mr. W attended. On August 8, 2008, Mr. W and Mr. Elgert were formally served with an Appointment to attend Discoveries on September 22, 2008, which they did attend.

22. It was only subsequent to the said Discoveries that Mr. Elgert finally advised Mr. W that he could no longer act on his behalf, and advised he would arrange for new counsel to represent Mr. W. He did not do that, and nor did he advise Mr. W that he was not represented by counsel.

23. On October 22, 2008, counsel for the Vendors sought cooperation from Mr. Elgert to obtain a date for a summary judgment application – to which Mr. Elgert failed to respond.

24. Application for summary judgment was filed by the Vendor returnable February 5, 2009, requiring written briefs. Briefs were filed and served by the Vendors, however, Mr. Elgert did not respond. The deposits were ultimately ordered to be released to the Vendors, and the legal proceedings stood adjourned.

Response of Member

25. It is significant that upon a complaint being filed by Mr. Elgert's former partner, provided in response to a complaint brought to his attention by Mr. W, Mr. Elgert sought to mislead the LSA and to minimize his own conduct by, essentially, putting the responsibility on Mr. W for the failed transaction, denying any involvement in the transaction prior to the contract being entered into, and denying any involvement or discussion giving rise to the conditions of the purchase being removed.

26. Mr. Elgert only later admitted that his responses were "inaccurate and incomplete".

Prior Disciplinary History

27. It is noted that Mr. Elgert was the subject of a prior disciplinary hearing on November 29, 2010, where he admitted guilt to 18 citations occurring between 2005 and 2009, many of which are similar if not identical in nature to the citations facing Mr. Elgert in this matter.

28. Based upon a joint submission, Mr. Elgert was suspended for a period of six months, with costs ordered against him of \$9,124.50.

29. Further citations were made against Mr. Elgert concerning similar conduct also occurring between 2005 and 2009, resulting in an admission of guilt to three citations, however, as Mr. Elgert had already been suspended, and had "voluntarily absented himself" from practice after the June 16, 2011 expiry of his suspension, the Hearing Committee imposed a further 15 day suspension from May 7 to May 22, 2012, and ordered further costs against Mr. Elgert of \$3,814.55.

Sanction

30. This Panel has taken into account the totality of the representations made by counsel for the LSA and by the Member, Mr. Elgert.

31. In mitigation, the Panel takes into account:

- a) That Mr. Elgert has admitted his guilt in these proceedings prior to the hearing and has entered into an Agreed Statement of Facts that has instructed this Panel and facilitated a more timely resolution of matters;
- b) That Mr. Elgert was admitted to the Bar on August 15, 1986 and as such, practiced for some 24 years before the circumstances giving rise to the earlier 2010 citations arose, which appear to reflect a pattern of conduct which continued until Mr. Elgert ceased practice as a result of his suspension in December of 2010;
- c) That while the most recent suspension of Mr. Elgert expired in May of 2012, Mr. Elgert has remained in voluntary absence from practice until the present date, a further period of some 17 or 18 months – although, it is difficult to divine the true reasoning on the part of Mr. Elgert for this act, and there may have been personal self-interest in Mr. Elgert not returning to practice until all citations were resolved, such that this panel puts only modest weight in this factor from the perspective of mitigation.

32. However – notwithstanding the foregoing, the Panel also takes note of the following:

- a) That while Mr. Elgert may not have "profited" at the expense of Mr. W and Mr. M, the fact is that Mr. Elgert induced both of them to engage in a transaction to the potential benefit of the Member. To put it bluntly, Mr. Elgert engaged in a gamble

with clients' trust funds, to his potential benefit, without fully advising them as to their risks, and in fact, while actively misleading them in many respects to their ultimate great loss of funds. As a result of the high degree of trust imposed upon our profession respecting the handling of trust funds, this misuse of trust funds to the detriment of clients, motivated by the potential great benefit to Mr. Elgert is a matter of great significance and concern;

- b) That Mr. Elgert, when first contacted by the LSA, sought to avoid responsibility for his conduct, and, in fact, sought to mislead the LSA as to the true circumstances of this matter. This is particularly offensive when one notes that while the transaction and abortive law suit forming the basis of the citations before this panel predated the 2010 citations in which Mr. Elgert was found guilty, the 2010 citations pre-date the LSA investigation into the matters before this panel, and notwithstanding the Guidance and direction reflected by this body in its 2010 hearing against Mr. Elgert, subsequent to that, Mr. Elgert ignored that guidance and those opportunities to correct his behavior, and at least initially, made an effort to actively mislead the LSA regarding the true nature of the matters in question. Again, the refusal of a Member to take guidance from his regulator and the effort to seek to mislead his regulator speaks to the ability of the regulator to govern this Member and, again, is a matter of great significance and concern;
- c) That while there is not a lengthy history of misconduct, it is noted that there have been two relatively recent hearings, resulting in a finding of guilt, and sanctions imposed, including two separate suspensions, for a total of 15 different citations, which to a great extent mirror the conduct forming the basis of the matters before this Panel;

33. Section 49 of the Legal Profession Act, defines conduct deserving of sanction:

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.

34. In having made a determination that this Member's conduct is, in fact, conduct deserving of sanction, it falls upon this body to make a determination of the appropriate sanction to be imposed upon Mr. Elgert as a result.

35. As stated in *Bolton v. Law Society*, [1994] All ER 486, referenced at page 10 and 11 of the LSA Hearing Guide, this Panel considers the following:

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. . . . In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled, but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceedings to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

36. It is the duty of the Law Society of Alberta to regulate its members in a manner that assures:

- a) The protection and welfare of the public; and
- b) The protection of the standing and respect for the legal profession generally.

37. The Rule of Law is the cornerstone of a functioning democracy, and the confidence of the public in the Legal Profession is fundamental to the maintenance and continuation of the Rule of Law.

38. We are a self-regulating profession and, as such, owe the public and our profession a duty of conducting ourselves at the highest levels of integrity and honesty. The failure of a member to adhere to that obligation strikes at the core of our right of self-regulation and diminishes the ability of our profession to maintain the public confidence.

39. It is noted that the Hearing Guide of the LSA speaks to matters to be taken into account in imposing sanction, and this panel takes note of same, and makes the following comments:

- a) Mr. Elgert, in not only failing to adequately protect his clients, but in fact, in misleading and putting his own interests ahead of those of his clients has exhibited conduct which not only put the public at risk, but diminishes the respect for our profession;

- b) Mr. Elgert, in failing to respond appropriately to the sanctioning process in 2010, but continuing to attempt to mislead his regulator in the investigation of his conduct, exhibits behavior which suggests that he may not be amenable to regulation by the LSA;
- c) The fact that suspensions were imposed in 2010, but did not, it appears, have the expected result in securing an understanding on the part of Mr. Elgert of the need for candor and honesty with his regulator suggests that a more serious sanction is necessary, not only from the aspect of deterring his further improper conduct, but also from the perspective of general deterrence in sending a message that continued misconduct in our profession will attract harsher sanctions;
- d) The fact that while Mr. Elgert, in this instance, did not profit at the expense of his clients, he put their trust funds at risk to potentially benefit himself, and to that extent, his conduct discloses what can be described as a misuse of trust funds – which is amongst the most serious of offenses that can be leveled against a member of our profession.

40. Taking into account all of the foregoing, this panel has determined, as stated above, that an appropriate sanction would be a further suspension of some 18 months, an award of costs, and a direction that this matter be made subject to Practice Review of not less than 12 months following his reinstatement.

CONCLUDING MATTERS

41. The Hearing Committee Report, the evidence and the Exhibits in this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of any of Mr. Elgert's clients and such other confidential personal information.

42. There is no referral to the Attorney General arising from these proceedings.

Dated this 31st day of March, 2014.

Robert Harvie, Q.C., Bencher (Chair)

Norm Picard, Q.C.

Glen Buick