

**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 ALLAN FAY**

A Member of the Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULT

1. On January 30, 2014 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary, Alberta to inquire into the conduct of the Member, Allan Fay. The Committee was comprised of Robert Harvie, QC, Chair, Dennis Edney, QC, and Wayne Jacques, C.A. The LSA was represented by Lois MacLean. The Member was present throughout the hearing and was self-represented.
2. At the commencement of the hearing, counsel for the LSA and Mr. Fay presented the Hearing Committee with an Agreed Statement of Facts in relation to the citation. Further, as set out in the closing paragraph of the Agreed Statement of Facts, the Member admitted that his conduct was deserving of sanction, within the meaning of the *Legal Profession Act* of Alberta.
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. Fay to be deserving of sanction. The Hearing Committee sanctioned Mr. Fay by issuing a reprimand, ordering a fine of \$4,000.00 on each count (totaling \$8,000.00), directing Mr. Fay to Practice Review to conduct an assessment of his conduct and practice, and directing the payment of costs in the amount of \$2,632.88.

JURISDICTION AND PRELIMINARY MATTERS

4. Prior to the commencement of the hearing, an Exhibit Book was prepared and exchanged between the parties, including an Admitted Statement of Facts entered as Exhibit 16.
5. Jurisdiction of this panel was established, and there was no objection by the Member or counsel for the LSA regarding the constitution of the Hearing Committee.
6. There was no application to have the whole or any part of the hearing held in private, and as such, the entire hearing was conducted in public.

CITATIONS

7. The Member faced two citations:
 1. It is alleged that you failed to comply with the accounting rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction; and

2. It is alleged that you failed to respond to the Law Society on a timely basis and in a complete and appropriate manner, and that conduct is conduct deserving of sanction.

EVIDENCE

8. As noted above, the whole of the Exhibit Book was entered into evidence, by consent, including documents establishing jurisdiction of the panel.

9. The Admitted Statement of Facts was included by consent within the Exhibit Book as Exhibit 16. The Admitted Statement of Facts was signed by the Member on January 21, 2014 and the Member acknowledged same. A copy of the Admitted Statement of Facts is appended hereto.

FACTS

10. The Admitted Statement of Facts, as stated above, was entered by agreement of the parties.

11. Counsel for the LSA called no further evidence.

12. Mr. Fay called no evidence, and with respect to the citations in question, Mr. Fay confirmed a plea of guilty to the Hearing Committee.

FINDINGS OF HEARING COMMITTEE

13. In response to further questions from the Hearing Committee, Mr. Fay confirmed that he:

- i) made his admission voluntarily and free of coercion;
- ii) that he made his admission unequivocally admitting his guilt to the citations;
- iii) that he made his admission, knowing the nature and consequences of his admission and of the potential sanctions which might be imposed upon him as a result; and
- iv) that he made his admission, knowing that the Hearing Committee was not bound by any joint submission regarding sanctions that might have been made between counsel for the Law Society and himself.

14. Based upon the Admitted Statement of Facts, and taking into account the responses of Mr. Fay referred to above, the Committee accepted the Member's admission, and made a finding of guilt respecting the sanctions against him, finding that Mr. Fay's conduct was worthy of sanction in relation to the citations for failing to comply with the accounting rules of the Law Society of Alberta, and for failing to respond on a timely basis, and in a complete and appropriate manner when requested by the Law Society of Alberta.

DECISION AS TO SANCTION

15. Counsel for the LSA tendered the record of Mr. Fay, which was marked as Exhibit 17 in the Exhibit Book by consent. The Record indicates that the Member had two counts of conduct deserving of sanction on his Record from 2000 including failing to cooperate with successor counsel and failing to respond to the Law Society in a timely manner for which he received a reprimand, fine and costs.

16. Counsel for the Law Society and Mr. Fay were not in agreement with the appropriate sanction relating to the citations.

17. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct. The primary purpose of disciplinary proceedings is the protection of the best interests of the public and protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

18. In McKee v. College of Psychologists of British Columbia, [1994] 9 W.W.R. 374 (B.C. C.A.) at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

"In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree or risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science. ...".

19. The Hearing Guide for the Law Society of Alberta, at paragraphs 69 and 70, articulate the relevant factors to be considered in determining the appropriate sanction:

69. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

- a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.
- b) Specific deterrence of the member in further misconduct.
- c) Incapacitation of the member (through disbarment or suspension).
- d) General deterrence of other members.
- e) Denunciation of the conduct.
- f) Rehabilitation of the member.
- g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

20. In considering its decision on sanction, the Hearing Committee does acknowledge and takes into account the mitigating factor of the Member making a clear and unequivocal admission of guilt. His cooperation in bringing this matter to a conclusion is acknowledged. It is also acknowledged that the Member has been in practice for a period of almost 28 years, with one single complaint resulting in a formal hearing prior to the present matter before this panel.

21. This panel has considered troubling aggravating factors. There is a prior finding of guilt by the Member for failing to submit fully to the governance of the Law Society. For example, when concerns and complaints were raised respecting the Member's management of his trust account, he failed to follow through with his undertakings to the Law Society to bring those accounts into good standing.

22. Further, the Member's failure to comply with his undertaking gave rise to a demand for a response by the regulator. Again, the Member failed to provide an appropriate response on more than one occasion.

23. This failure raises a significant concern on the part of this panel. The ability of the Law Society to regulate its members and the willingness of its members to submit to and abide by that regulation goes to the very heart of the right of self-governance.

24. In 2000, this Member was found to have failed to properly attend to the demands of the Law Society, and at that time, he apologized and promised better conduct. When this matter arose, again, the Member was requested to comply with the directions of his regulator, and again, he promised – he gave an undertaking – to comply and respond to those demands. And yet, again, he failed in that undertaking.

25. If a member of the Law Society of Alberta comes to believe that the directions of this body are "suggestive" only, or that he can choose when and if he complies with its rules and directives, that not only impacts on the ability of the Law Society to regulate that particular member, but, in fact, it reduces the reputation of the Law Society to the whole of its membership and to the public at large, who rely upon the Law Society to protect the public interest by assuring that its members conduct themselves, at all times, with integrity and with respect for the rules governing the profession of law. When a member suggests that he or she will not or cannot abide by its rules, and its directions, it is incumbent upon this body to make it abundantly clear that such conduct will not be tolerated.

26. In submissions regarding sanction, there was, effectively a joint submission on the part of counsel for the Law Society and of the Member himself that a fine would be an appropriate sanction, with a direction that the Member be further reviewed for practice review.

27. In considering sanction, while this panel is not bound by a joint submission, it is trite to say that we are obligated to give it great deference and should only depart from a joint submission where the evidence is manifestly clear that the public interest or the interest of the profession requires it.

28. But for the joint submission suggesting the imposition of a fine, this panel may have considered a suspension of this member considering his clear disregard and disrespect for his regulator. However, there is not sufficient evidence or circumstance before this panel to warrant us departing from that submission, and accordingly, it is determined that a fine should be imposed upon the Member in this instance.

29. With respect to the amount of the fine, the Member suggested a fine in the area of \$1,000.00 would be appropriate, and counsel for the Law Society suggested a fine in the area of \$5,000.00 to \$6,000.00. Taking into account the dim view that this panel has taken over the conduct of this Member, the fine imposed upon the member shall be the sum of \$4,000.00 for each count, for a total of \$8,000.00.

30. It is further directed that the Member shall be referred to practice review, with a recommendation for particular attention being given to additional personal counseling and direction respecting client and time management.

31. A reprimand was also made upon the Member, which was delivered orally by this panel at the time of the hearing.

32. Finally, costs are payable by the Member arising from this hearing in the sum of \$2,632.88.

33. With respect to the fine and costs directed above, Mr. Fay is given time to pay same until May 30, 2014.

CONCLUDING MATTERS

34. 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. Fay's clients and such other confidential personal information.

Dated this 15th day of September, 2014.

Robert Harvie, QC, Bencher (Chair)

Dennis Edney, QC

Wayne Jacques, CA

In the Matter of the *Legal Profession Act*

**And In the Matter of A Hearing Regarding
The Conduct of Allan Fay**

A Member of the Law Society of Alberta

ADMITTED STATEMENT OF FACTS

1. Mr. Fay was called to the Bar in July, 1986. He has been a member of the Law Society at all times relevant to this proceeding.
2. Mr. Fay faces two citations, as follows:
 1. It is alleged that you failed to comply with the accounting rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.
 2. It is alleged that you failed to respond to the Law Society on a timely basis and in a complete and appropriate manner, and that conduct is conduct deserving of sanction.
3. On October 28, 2010, Lisa Atkins of the Law Society's Audit Department sent a memo to Katherine Whitburn, Manager, Complaints – Calgary, in which Ms. Atkins indicated that Mr. Fay was delinquent in submitting his Forms T to the Law Society. Ms. Atkins's memo is attached as *Exhibit 6*.
4. In that memo, Ms. Atkins indicated that the Forms T were outstanding for Mr. Fay's 2006, 2007, 2008 and 2009 years.
5. The Form T was a form which was required to be provided to the Law Society by all members on an annual basis during the years in question. It was to be completed by an independent accountant and contained information about the trust account of the member.
6. On November 10, 2010, Ms. Whitburn sent a copy of Ms. Atkins's memo to Mr. Fay, together with a formal demand for a response pursuant to s. 53 of the *Legal Profession Act*. The letter is *Exhibit 7*. No reply was received from Mr. Fay.

7. On December 14, 2010, Ms. Whitburn sent a follow up letter (*Exhibit 8*). She enclosed the previous letter and asked for an immediate response.
8. On January 5, 2011, Ms. Whitburn wrote to Mr. Fay again (*Exhibit 9*). She indicated that if there was no response by January 27th, the matter would be sent to a Conduct Committee Panel without the benefit of any response from Mr. Fay.
9. On February 3, 2011, an Investigation Order was issued by the Law Society of Alberta. The Order is attached as *Exhibit 10*. The Order was signed by Greg Busch and appointed Robert Ellergodt and Karen Vanderzweerde as the investigators.
10. The Investigation Report of Mr. Ellergodt is attached as *Exhibit 12*. The summary of the Investigation Report indicates that on February 7, 2011 the investigator hand delivered a letter to Mr. Fay's office giving him notice that a formal interview concerning these matters would take place on March 3, 2011.
11. Mr. Fay was asked, in the letter, to confirm his availability for that interview with the investigator by no later than February 25, 2011. Mr. Fay failed to respond. The investigator therefore attended at Mr. Fay's office again on February 28, 2011 and personally met with Mr. Fay. The investigator was informed that Mr. Fay was not available on March 3rd, but an alternate appointment was set for March 4th at 1:00 p.m.
12. On the morning of March 4th, Mr. Fay faxed to the Law Society his written response to Ms. Whitburn's letters (*Exhibit 11*). In part, Mr. Fay stated:

I deeply regret failing to respond to you and the Law Society in a timely fashion as I ought to have done. I can offer no good excuse. Over the last year or so, I have been struggling with a number of personal issues, including divorce, a protracted and painful property settlement issue, and the estrangement of my children and members of my family as a result of this. That does not excuse my behavior, but I hope that it puts it in context. As a result of this, and my own personal psychological issues, I have continually procrastinated and set aside doing those things that I was obliged to do.

13. Mr. Fay met with the investigator on March 4, 2011 as scheduled. The transcript of the interview is *Tab K of Exhibit 12*.
14. In brief, Mr. Fay indicated that he could not explain why he had failed to file his Form T's, and he could not explain why he had stopped communicating with the Law Society. He

indicated that he might be suffering from depression, and that he would be obtaining professional help for that. He promised full cooperation with the Law Society on an ongoing basis.

15. The investigators prepared their Report which was dated March 31, 2011.
16. On April 18, 2011, Ms. Whitburn couriered a copy of the Investigation Report to Mr. Fay and asked for his written response. The letter is attached as *Exhibit 13*. No reply was received.
17. On May 9, 2011, Ms. Whitburn wrote to Mr. Fay again enclosing a copy of her April 18th letter. The letter is attached as *Exhibit 14*. Again she asked for a response, however no reply was received.
18. On June 6, 2011, Ms. Whitburn wrote to Mr. Fay again providing a copy of the letters of April 18th and May 9th, and again asked for his response. The letter is attached as *Exhibit 15*. No response was received.

All of these facts are admitted. I acknowledge that the facts as set out above constitute conduct deserving of sanction within the meaning of the *Legal Profession Act of Alberta*.

This Admitted Statement of Facts is dated the 21st day of January, 2014.

Witness

Allan Fay