

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of
David E. Kiester, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On November 3, 2008, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of David E. Kiester, a Member of the LSA. The Committee was comprised of Dale Spackman, QC, Chair, Hugh Sommerville, QC, Member and John Higgerty, QC, Member. The LSA was represented by Janet Dixon, QC. The Member was present at the Hearing. Also present at the Hearing was a Court Reporter to record the transcript of the Hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [2] The Chair introduced the Committee and asked the Member and Counsel for the Law Society whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
- [3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.
- [4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA determined that the persons named therein were to be served with a Private Hearing Application Notice and Proof of Service on all such persons other than Dawn Swatcha were entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and, accordingly, the Chair directed that the Hearing be held in public.
- [5] Exhibits 1 through 9 contained in the Exhibit Book provided to the Committee and the Member were entered into evidence in the Hearing with the consent of the Committee, Counsel for the LSA and the Member. A Statement of Facts and Admission of Guilt on Citations 1, 2, 3 and 5 set forth below dated November 2, 2008 agreed to by the Member (the "Statement of Facts") was entered as Exhibit 10 at the commencement of the opening statement of Counsel for the LSA and the discipline record of the Member and an Estimated Statement of Costs were entered as Exhibits 11 and 12, respectively, at the

sanctioning stage of the Hearing, with the consent of the Committee, Counsel for the LSA and the Member. A copy of the Statement of Facts is annexed as Appendix I to this report.

CITATIONS

- [6] The Member faced the following Citations:
- (a) IT IS ALLEGED THAT you collected GST and then misappropriated or converted those funds to your own personal use, and that such conduct is conduct deserving of sanction.
 - (b) IT IS ALLEGED THAT you collected retainers from some of your clients and then misappropriated or converted those funds to your own personal use before rendering service to the clients and that such conduct is conduct deserving of sanction.
 - (c) IT IS ALLEGED THAT you disguised the receipt of income, and that such conduct is conduct deserving of sanction.
 - (d) IT IS ALLEGED THAT you lied to the Practice Assessors of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.
 - (e) IT IS ALLEGED THAT you failed to follow the accounting Rules of the Law Society of Alberta and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

- [7] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee found that Citations 1, 2, 3 and 5 were proven and that the Member was guilty of conduct deserving of sanction in respect of these Citations. The Member was disbarred and ordered to pay costs of the Hearing in the amount of \$5,000.

OPENING STATEMENT AND SUBMISSIONS OF COUNSEL FOR THE LSA ON SANCTIONS

- [8] Counsel for the LSA tendered the Statement of Facts. Counsel advised that the Statement of Facts did not address Citation 4, that the Member had an explanation to tender in respect of that Citation and that Counsel for the LSA was prepared to proceed with the Hearing on the basis of the Statement of Facts and to not call any evidence on Citation 4 if acceptable to the Committee.
- [9] The Hearing was adjourned for a short period of time to allow the Committee to consider whether it would accept the Statement of Facts.
- [10] The Hearing was reconvened and the Chair advised that the Committee had considered the Statement of Facts and were prepared to accept the Statement of Facts which would now be deemed, for all purposes, to be a finding that the conduct of the Member is

deserving of sanction. The Statement of Facts was entered as Exhibit 10 with the consent of the Member and Counsel for the LSA. Counsel for the LSA again advised that she would be calling no evidence on the fourth Citation and invited the panel to dismiss that Citation. After a short deliberation, the Chair advised that the Committee was prepared to dismiss the fourth Citation.

- [11] Counsel for the LSA advised that the LSA would be seeking disbarment as the appropriate sanction in this case and that, given the statutory criteria as to whether the Committee has reasonable grounds to believe that an offence may have been committed, this is an appropriate case to make a referral to the Attorney General. Counsel for the LSA tendered a letter from the Director of Lawyer Conduct of the LSA with respect to the Member's disciplinary record and an estimated Statement of Costs, which were entered as Exhibits 11 and 12 with the consent of the Committee and the Member.
- [12] Counsel for the LSA advised that the Member was admitted to the LSA in July of 1989 and that his practice has been conducted, by and large, in small firm settings. The Member practiced briefly with the firm of Litwiniuk & Company until 1991 and since then has practiced on his own. A Rule 130 audit was conducted in respect of the Member's practice in June 2005. Counsel for the LSA referred the Committee to the Statement of Facts which indicate, in general, that the Citations arose because of financial difficulties the Member encountered in dealing with his obligations to Revenue Canada. The Member also admits that he was aware that he did not seek assistance that was available from the LSA, including the Practice Review Program and ASSIST. Counsel referred to the Hearing Guide as forming the basis of her approach to her submissions on the appropriate sanctions and, in particular, the sanctioning discussions commencing on page 9 of the Hearing Guide. Counsel advised that, in general, the authorities (decisions of the Benchers) relating to sanction in cases of misappropriation arise from contested facts. Reference was made to the *McGeachie* decision, where the Member was convicted of misappropriation and received a suspension of 18 months, rather than disbarment. In that case, medical evidence was called to establish that the Member was suffering from an addiction and had a pattern of recklessness or inferred intent from recklessness, which distinguished it from this case. Counsel submitted that in applying the "purposeful approach" referred to in the Hearing Guide and considering the admission of guilt of the Member on Citations 1 and 2, and the conduct admitted to in Citation 3, which conduct goes to integrity, the personal circumstances of the Member are not of the nature that would mitigate the decision of the Committee on sanction. Counsel referred to the recent case, *Richardson*, where the Hearing Committee carefully tracked the Hearing Guide in terms of its application to a case of misappropriation.
- [13] Counsel for the LSA referred to Section 49 of the Act, which sets out the general definition of conduct deserving of sanction and reads as follows:

49(1) *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.

Counsel referred to the primary purpose of Section 49 as protection of the public interest and the standing of the legal profession generally. Reference was made to the leading case relied on in Alberta, being the *Bolton v. Law Society* case out of Britain. Counsel quoted the following excerpt from that case at para. 51 of the Hearing Guide:

It is important that there should be a 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 the offender does not have the opportunity to repeat the offence.

Counsel referred to the fact that, in this case, the Member was interim suspended in August 2005, which achieved the purpose of preventing the Member from continuing his misconduct. Counsel raised this issue in the context of when a Member should become entitled to practice again, if ever, and when you are protecting the public from a repeat occurrence this is really an issue of re-admission after disbarment. Counsel quoted the following from *Bolton*:

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.

Counsel, again, reiterated that the primary purpose of sanction is to protect the public and to protect the reputation of the profession. Again, quoting from *Bolton*, with respect to positive matters that could be raised on behalf of the Member:

Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment [referring to more of a criminal context] have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All of these matters are relevant and should be considered. But none of them touches on the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom

they instruct will be a person of unquestionable integrity, probity and trustworthiness.

Counsel submitted that this citation from *Bolton* speaks very well to the facts in this case. Counsel advised that the Member had shared an explanation with her that is a compelling explanation, to the effect that the Member was under enormous financial pressure, primarily being exerted by Canada Revenue Agency.

- [14] Counsel advised that the LSA does not understand why the GST of the Member fell into arrears from 1998 to 2005, but that once it had built to approximately \$48,000 and Canada Revenue Agency began actively pursuing it, this put the Member under an enormous amount of financial pressure and under that pressure, he made the series of bad decisions that go to the integrity of his professional role. He made a decision not to pay the GST; not to estimate it; not to file the Returns, but instead, to put Canada Revenue Agency to the task of collecting it from him; he continued to collect GST from his clients; he continued to receive it; he continued to deposit it to his general account. However, instead of reserving it to deal with the Canada Revenue Agency obligation, that is a statutory trust obligation, he used it for his own purposes. Counsel submitted that this goes to the essential element of the integrity of the profession. Counsel referred to the conduct by the Member in the face of garnishee proceedings by Canada Revenue Agency against his general account, of diverting of funds by processing personal expenses through his trust account, including payment of his secretary's salary, where his secretary would cash the cheque and then give extra money back to the Member included in the amount of the cheque. Again, counsel submitted that this clearly violates the basic integrity that the public can expect of the lawyer. In paragraph 19 of the Statement of Facts, the Member admits that he deliberately set up a separate bank account to avoid the Canada Revenue Agency garnishee and in paragraph 20, he admits that he negotiated a cheque issued by another law firm for shared legal fees, to avoid garnishee of his general bank account.
- [15] Counsel referred to the admissions by the Member in respect of Citation 2, that he followed a practice from time to time, where he would be retained by a client, receive a retainer and immediately take the retainer for fees, recognizing that further legal work was required to be done in respect of the matter. Counsel submitted that the portion of the fees unearned at any such time were misappropriated by the Member. Counsel further advised that in 10 of the 13 cases reviewed [by the LSA investigators], all of the legal work was completed and presumably the custodian of the Member's practice saw to the completion of the other three matters. Counsel submitted that the nature of the Citations goes directly to the discussion in *Bolton*, and that the Committee should be driven by the second arm of the "purposeful approach", that it is critical that the LSA articulate its disapproval of this conduct.
- [16] Counsel referred to paragraph 60 of the Hearing Guide and the general factors to be taken into account in the sanctioning process and, specifically, 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 and specific deterrence of the Member and further misconduct. Counsel referred to the fact that the conduct of the Member under review continued up

until his suspension in August, 2005 and that the onus of showing that this conduct will not be repeated in the case of a disbarment lies with the Member.

- [17] Counsel for the LSA spoke to the significance between a disbarment and a suspension on a “practical analysis”. In the event of suspension, the Member has the right to apply for reinstatement and, pursuant to Rule 115, the character and integrity of the Member are assumed so the Member does not have to bring evidence to show he has rehabilitated his character. The powers of the Reinstatement Committee are restricted to a referral to Practice Review or to the Credentials and Education Committee in respect of competency. In the case of disbarment, the onus is on the Member to show that he has rehabilitated his character. Counsel submitted that these factors drive disbarment in cases such as the one being considered because the basic misconduct have gone to the character of the Member. Counsel submitted that the “incapacitation of the Member” through disbarment would be a neutral factor in this case, given that the Member is currently suspended. Counsel submitted that, in the absence of some compelling evidence of illness, a decision short of disbarment would provide a message to the profession that is inconsistent with the high value that is placed on integrity of the profession and the importance of the safety of trust property. Counsel again reiterated that the customary sanction in a case such as that being considered is disbarment, the only exception since the Hearing Guide was implemented in 1999, being the *McGechie* case where there was compelling evidence of illness. Counsel referred to subparagraphs b), e) and f) on page 12 of the Hearing Guide and the relevance of the level of intent, the number of incidents involved and the length of time involved in the misconduct of the Member at issue.
- [18] Counsel for the LSA submitted that based on her discussions with the Member, the Member is very remorseful and has been cooperative, straight forward and respectful throughout the disciplinary process of the LSA. That said, counsel was not aware of any matters which should be properly considered in mitigation of sanction. Counsel submitted that these are matters which should be considered upon the Member applying for readmission after disbarment in assessing his integrity and character. This concluded the submissions of Counsel for the LSA.

SUBMISSIONS OF MEMBER

- [19] The Member indicated that Counsel for the LSA had been “thorough and fair” in her analysis of the conduct of the Member and his breaches of the Rules. The Member indicated that it was financial pressure which primarily led to his breach of the Rules, most of which occurred during the nine months that his general account was subject to the garnishee order of Canada Revenue Agency. The Member indicated that his wife is now working full time and that his children are grown so that the same financial pressures would not be present if he was allowed to commence a legal practice again. The bulk of the Member’s practice was personal injury and new legislation introduced by the Alberta Government on soft tissue injury hurt his practice. The Member tried to switch his practice to uncontested divorces and small criminal matters. However, this transition did not occur fast enough to alleviate the financial pressures on the Member. The Member indicated that he feels bad about what he did, knows that he broke the Rules and has learned from the experience. He did not feel that he would experience the same

kind of financial pressures again due to his change in circumstances. The Member indicated that he was not successful as a sole practitioner and in particular, the business aspects of running a practice. If readmitted, the Member's intent would be to seek employment as a salaried employee in a law firm or company setting. The Member indicated that he is prepared to enrol in programs or continuing education and get counselling. He did not get assistance and his mistakes compounded to put him in the situation he is in today. The Member indicated that he has learned from his past mistakes and referred to the fact that, since graduating from law school in 1984, he has no discipline record. The Member referred to the fact that he had written and passed the Nevada bar exam in 1985, the California bar exam in 1986, the Oregon bar exam in 1987 and the Alberta bar admission course in 1989. The Member felt that he could make a positive contribution if given the opportunity to practice law again. This concluded the submissions of the Member.

- [20] The Chair inquired as to whether the members of the Committee had any questions for the Member.
- [21] Mr. Sommerville sought clarification on certain matters contained in the Statement of Facts relating to the bankruptcies of the Member, documenting and reporting of GST to the trustee and keeping of proper books of account post-bankruptcy.
- [22] Ms. Dixon clarified that paragraph 21 of the Statement of Facts appears to be an admission as to the matters being explored by Mr. Sommerville with the Member. Counsel for the LSA also referred to page 4 of Exhibit 9 in addressing the questions of Mr. Sommerville with reference to the prior bankruptcy of the Member. Mr. Sommerville was satisfied with the responses to his questions.
- [23] The Hearing was adjourned to consider sanctions.

DECISION AS TO SANCTION

- [24] After consideration of the Statement of Facts and the submissions of Counsel for the LSA and the Member, the decision of the Committee was that the Member be disbarred. In coming to its decision, the Committee noted the preface to the Alberta Code of Professional Conduct, which reads as follows:

Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach.

Paragraph 67 of the Hearing Guide quotes Lawyers & Ethics: Professional Responsibility and Discipline By Gavin McKenzie as follows:

The requirement that lawyers must be of good character finds expression also in what is in most jurisdictions not coincidentally the first rule of professional conduct: lawyers must discharge with integrity all duties owed to clients, the

court, the public and other members of the profession. ‘Integrity’, the first commentary to this rule says, ‘is the fundamental quality of any person who seeks to practice as a member of the legal profession’.

Lawyers who by their conduct have proven to be lacking in integrity are likely to lose their right to practice...

In applying the “purposeful approach” as referred to in the Hearing Guide and considering the issues of lack of integrity and character displayed by the Member in his misconduct forming the subject of this Hearing, the Committee was of the view that it had no option other than to disbar the Member. The Committee also took note of the general factors referred to in paragraph 60 of the Hearing Guide and, in particular those referred to in subparagraphs c), e) and f), being specific deterrence of the Member in further misconduct, denunciation of the conduct and rehabilitation of the Member. Of particular significance in the decision of the Committee is the level of intent involved in the misconduct, the number of incidents involved and the length of time over which the misconduct occurred.

The Committee noted that with respect to the GST, the Member was significantly behind in his remittances to Canada Revenue Agency and chose to continue to collect GST but not remit it. While it is not the responsibility of the LSA to enforce the collection and remittance of GST and other taxes, the misconduct under consideration was significant, deliberate, continuing and admitted.

The Committee ordered a referral of this matter to the Attorney General and ordered that the Member pay costs of the Hearing in the amount of \$5,000, with six months to pay from the date of the Hearing. The Exhibits entered in the Hearing shall be available for public inspection with the proviso that Exhibits 8 and 9 be redacted for any client information.

[25] The Hearing was terminated.

DATED this 25th day of March, 2009.

Dale Spackman, QC (Chair)

Hugh Sommerville, QC (Member)

John Higgerty, QC (Member)

APPENDIX I**IN THE MATTER OF THE LEGAL PROFESSION ACT****IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DAVID E. KIESTER
A MEMBER OF THE LAW SOCIETY OF ALBERTA****STATEMENT OF FACTS**

1. David E. Kiester is a member of the Law Society of Alberta having been admitted to membership on July 21, 1989. At all times relevant to these Citations he was a sole practitioner.
2. In June 2005 a Rule 130 Audit was conducted on Mr. Kiester. These Citations arose from concerns identified during the audit and during the subsequent formal review and investigation of Mr. Kiester.
3. In general response to these citations Mr. Kiester admits that his difficulties arose in 1989 when he fell behind in his obligations to the Canada Revenue Agency. Mr. Kiester admits that he did not seek assistance which he knew at the time was available from the Law Society, including the Practice Review program, and ASSIST.

CITATION 1

IT IS ALLEGED THAT you collected GST and then misappropriated or converted those funds to your own personal use, and that such conduct is conduct deserving of sanction.

4. Mr Kiester admits that for the period from 1998 until his practice concluded in 2005 Mr. Kiester charged GST to his clients and collected GST from his clients. Mr. Kiester admits that he knew he had an obligation to file GST returns and to remit net GST collected to the Canada Revenue Agency.
5. Mr. Kiester admits that the total GST he was required to remit for the period 1998 to 2002 was \$48,281.56 and that he owed additional amounts for the period 2003 to 2005 which he is unable to determine as he did not maintain adequate accounting records.
6. Mr. Kiester acknowledges he was under a statutory trust obligation to remit the funds to the Canada Revenue Agency and admits he breached his trust obligation.
7. Mr. Kiester filed bankruptcy on October 31, 2004 to deal with, among other debts, the GST owed to Canada Revenue Agency.
8. On August 8, 2005, the date of Mr. Kiester's suspension, the Canada Revenue Agency was requesting Mr. Kiester file GST returns for November and December 2004 and to remit payment estimated at approximately \$2500.

9. Shortly after being suspended, \$8,500 in fee income was paid to the custodian of Mr. Kiester's practice. After paying debts of his practice including payments to CRA Mr. Kiester received approximately \$5,000 from his custodian.
10. Mr. Kiester is still undischarged bankrupt, in negotiations for a discharge.
11. Mr. Kiester admits Citation 1 and acknowledges it is conduct deserving of sanction.

CITATION 2

IT IS ALLEGED THAT you collected retainers from some of your clients and then misappropriated or converted those funds to your own personal use before rendering service to the clients and that such conduct is conduct deserving of sanction.

12. Mr. Kiester admits that from time to time he would take retainers from clients paid to him for future work on files and use the funds as his own, prior to doing all of the work for the client.
13. Mr. Kiester admits that in at least thirteen cases he received a retainer from his client and did not deposit the monies into trust. Mr. Kiester admits that in one case, he applied a cash retainer paid by a client directly to an outstanding bill, without depositing the funds in his trust or general account. Mr. Kiester admits in other cases he negotiated the retainer cheques for cash by presenting the cheque at his bank with identification. He then used the cash for his own purposes. Mr. Kiester did not deposit the monies into his general account as it was subject to a garnishee by the Canada Revenue Agency.
14. Mr. Kiester admits the total amount received in these thirteen cases was approximately \$15,260.
15. Mr. Kiester advises that the majority of these files involved uncontested divorces. In these cases it was his practice to take the retainer for his own use after receiving instructions from his client to permit him to file the Statement of Claim for Divorce and all forms required for the divorce judgment. It was his expectation that the balance of the action would proceed expeditiously and he relied on his secretary to perform the steps. In these cases the matter was an uncontested desk divorce.
16. On August 8, 2005 the date the member was suspended, all work was completed on ten of the thirteen cases. Mr. Kiester expected he would have completed the other three if he was not suspended.
17. Mr. Kiester admits Citation 2 and acknowledges it is conduct deserving of sanction.

CITATION 3

IT IS ALLEGED THAT you disguised the receipt of income, and that such conduct is conduct deserving of sanction.

18. Mr. Kiester admits that while his general account was under a continuing garnishee order by the Canada Revenue Agency, in order to get funds for personal expenses from his firm, and avoid the garnishee, he would issue a trust cheque to his secretary for wages and an additional amount. Mr. Kiester had an agreement with his secretary that she would cash her cheque and return the additional amount to Mr. Kiester. Mr. Kiester admits this scheme to avoid the garnishee occurred 10 to 12 times.
19. Mr. Kiester acknowledges that in February 2004 he opened a personal chequing account with the Royal Bank to avoid the garnishee order. Mr. Kiester admits he operated this account in place of a general account, but did not maintain deposit books, cancelled cheques or a general journal as required by the accounting rules.
20. Mr. Kiester admits that on one occasion he negotiated a cheque in the sum of \$4,602.77 at a Money Mart to avoid a garnishee on his general bank account. The cheque was issued by another law firm and payable to his firm for shared legal fees on a file. Mr. Kiester received approximately \$1000 as cash and the balance, less fees, in money orders.
21. Mr. Kiester admits that he did not advise his trustee in bankruptcy of the receipt of any of the income referred to in paragraphs 18 through 20.
22. All of the income taken by Mr. Kiester in this fashion was earned and a statement of account was rendered as required by the Rules.
23. Mr. Kiester advises that the garnishee of his general account commenced in early February 2004 and stayed in place uninterrupted until October 31, 2004. During this period Mr. Kiester made repeated inquiries with CRA's representative and was told that they were interested in rehabilitating him as a taxpayer, that the garnishee would be removed soon and to keep his business up and running.
24. Mr. Kiester admits Citation 3 and acknowledges it is conduct deserving of sanction.

CITATION 5

IT IS ALLEGED THAT you failed to follow the accounting Rules of the Law Society of Alberta and that such conduct is conduct deserving of sanction.

25. Mr. Kiester admits Citation 5 and acknowledges it is conduct deserving of sanction.

ALL OF THESE FACTS ARE ADMITTED THIS 2nd DAY OF NOVEMBER, 2008

David E. Kiester