

LAW SOCIETY HEARING

IN THE MATTER OF THE LEGAL PROFESSION ACT AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF SALLY ANNE McLELLAN, A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING DECISION

On June 25, 2008, a hearing committee panel comprised of Stephen Raby, Q.C. (Chair), Shirley Jackson, Q.C. and Wayne Jacques convened at the Law Society offices in Calgary, Alberta to enquire into the conduct of Sally Anne McLellan (the "Member"). The Law Society of Alberta was represented by Lindsay McDonald, Q.C. The Member was not present at any point during the hearing, nor was she represented by counsel.

Jurisdiction and Preliminary Matters

1. Mr. McDonald introduced Exhibits 1 through 4, inclusive. Further, he tendered into evidence an affidavit of Jennifer Rothery, the hearing co-ordinator of the Law Society of Alberta (the "LSA"). The Panel agreed that this affidavit could be introduced into evidence and it was marked as Exhibit 12. Pursuant to Exhibit 12, it was clear that it had been difficult to set the hearing dates in respect of this matter and that dates that had been set in November, 2006, May, 2007 and October, 2007 were not capable of being met and accordingly the Chair of Conduct had set this hearing on a peremptory basis for June 25 to 27, 2008.
2. Based on the Minutes of the Pre-Hearing Conference Report dated May 21, 2008, the Member advised that she would not be attending the hearing, that she would not be requesting a further adjournment and that she did not object to the composition of the hearing committee. While there was some indication that she was attempting to obtain counsel on the matter, Mr. McDonald confirmed that she would have been given the names of counsel who would be prepared to represent her on a pro bono basis once the matter was originally set for hearing and in fact there was some evidence that the Member had spoken to Tom Mudry on the matter.
3. Given the foregoing and the fact that the hearing had been set on a peremptory basis, the Panel concluded that the Member was not seeking an adjournment, that the Member deliberately did not attend the hearing and that the Member had had ample opportunity to retain counsel.
4. Mr. McDonald further advised that there was some issue as to whether or not the binder containing the first eleven exhibits to be tendered at the hearing had been properly served on the Member. Mr. McDonald sought to tender into evidence an Affidavit of J. Lara Ewen, an employee of the LSA, dated June 19, 2008, setting forth the history of the service of the member in Colorado. The Panel agreed that this Affidavit could be introduced into evidence and it was marked as Exhibit 13.

5. The Panel was satisfied, on the basis of the Member's emails to Mr. McDonald of August 22, 2007 and October 10, 2007, that she had in fact received the Exhibit Binder and that personal service of any further jurisdictional documents in respect of this hearing was waived by the Member. The Panel accordingly indicated that Mr. McDonald could proceed to present the case on behalf of the LSA.

Citations

6. The Member faced two citations as follows:
 - 1) IT IS ALLEGED that you used your position to take unfair advantage of the Complainants, and that conduct is conduct deserving of sanction.
 - 2) IT IS ALLEGED that you misled or attempted to mislead the Law Society with respect to the issue of the registered mail forwarded to you by the Law Society on August 18, 2005, and that such conduct is conduct deserving of sanction.
7. Mr. McDonald advised that he would be recommending to the Panel that Citation No. 2 be withdrawn as there was no reasonable prospect of a conviction on this citation.

Public Hearing

8. Mr. McDonald indicated that private hearing application notices had been served on the Member, K.K., M.K., G.K. and L.O.. There was no application for a private hearing and Mr. McDonald accordingly requested that the hearing proceed in public. The Panel concurred.

Evidence

9. The evidence of the LSA in this matter consisted of the examination of four witnesses, namely K.K., M.K., G.K. and L.O..
10. K.K., after having been duly sworn, provided the following evidence:
 - (a) M. and G. K. (the parents of K.K.) owned property just north of the City of Calgary and over the years had become quite friendly with the Member. They owned a quarter section of land on which a large dwelling house was located (hereinafter referred to as the "Ranch House") and across an access road was a smaller house (hereinafter referred to as the "Guest House"). They also operated a campground on lands in the vicinity of the Ranch House and the Guest House;
 - (b) M.K. and G.K. were friends with the Member to the extent that they shared meals on occasion and in fact the Member on at least a couple of occasions, celebrated holidays with G. and M.K.;
 - (c) The Member entered into a residential tenancy agreement to rent the Ranch House some years ago. Subsequently, and apparently as a result of the fact that the Member did not like to have other people in close proximity to where she lived,

the Member also leased the Guest House so that no third parties would be living near her. These arrangements had apparently been in place for approximately three years prior to May 1, 2005;

- (d) In the spring of 2005, the Member indicated to M.K. that she would have difficulty in continuing to pay the full rent required to lease both the Ranch House and the Guest House. As it was G.K.'s 80th birthday in August of 2005 and as a number of family members were planning on coming to celebrate this event, M.K. and the Member entered into a residential lease agreement dated May 1, 2005 in respect of the Guest House (Exhibit 10 - Tab 13) whereby the member would lease the Guest House for the period from May 1, 2005 to October 31, 2005 at a relatively low rent, but on the basis that members of the K. family would be entitled to use the Guest House when they required it for purposes of accommodating those attending the birthday celebrations. This apparently was acceptable to the Member on the basis that she was living in the Ranch House and did not require exclusive possession of the Guest House;
- (e) As a result of the rains of late May and early June of 2005 which caused flooding throughout southern Alberta, the K. lands were flooded on June 18, 2005. There was some contradictory evidence as to whether or not the Member was aware of an evacuation order, but in any event the Member was evacuated by helicopter from the lands and spent that evening in the Calgary home of Mr. and Mrs. K.. Mr. and Mrs. K. offered to allow the Member to stay with them until the flood waters receded and the damage could be cleaned up but the Member declined, apparently because she had a number of cats in the Ranch House that she was worried about. Ultimately, the Member apparently did stay in a motel for about a week shortly after the flood as a result of issues caused by the flooding;
- (f) The evidence of K.K. is that there was water in the basement of the Ranch House that was not being properly dealt with by the sump pumps in the basement as a result of it being constantly plugged by cat feces. Further, the hot water heater was not working as a result of the flooding. The Guest House was also flooded and had to be substantially cleaned but this did not appear to have affected the Member too much as she was not living there and only a couple of her household effects needed to be cleaned. While there appears to be contradictory evidence as to how badly the flood damage was and how quickly it had been repaired to the point where the two homes were once again habitable, very little appears to turn on this;
- (g) The Member did not pay the rent due for either house on July 1, 2005;
- (h) The Member and K.K. (acting on her mother's behalf) then commenced negotiations with a view to settling the issues relating to the flood damage to the houses and the lack of payment of rent by the Member on July 1, 2005. Those negotiations appear to have involved a voluntary agreement by the parties to terminate the lease some time by the middle of July. An "Amending and Termination Agreement" (Exhibit G - Tab 6) was prepared, and although never

executed, it appears that the parties thought they were close to a resolution at this time;

- (i) K.K. and her parents felt that the Member did not appear to be seriously looking for other accommodation and accordingly, K.K. gave the Member an ultimatum dated July 27, 2005 (Exhibit 10 - Tab 11) whereby the Member was given three time frames in which to execute and deliver the Amendment and Termination Agreement;
- (j) The Member did not attend on any of the three time frames to execute the Termination and Amending Agreement and did not pay the August 1 rent for either of the houses;
- (k) Accordingly, K.K. obtained advice as to how to terminate the leases and on the basis of this advice, in the early evening of August 9, 2005, she taped a Notice of Default of Lease (Exhibit 10 - Tab 7) to the door of the Ranch House (which was appropriate notice in accordance with the terms of the lease agreement for the Ranch House);
- (l) K.K. testified that for some time prior to these events, the Member had entered into a solicitor/client relationship with R. who was close to G. and M. K. and well known to K.K.. For purposes of maintaining solicitor/client privilege, this hearing decision report deliberately does not reference the actual relationship of R. to K.K. or to G. and M. K.;
- (m) One of two events critical to the citation relates to an incident which then occurred after the Notice of Lease Termination had been taped to the door of the Ranch House in the evening of August 9, 2005. At that time, K.K. and her cousin, L.O., were staying in the Guest House for G.K.'s 80th birthday celebrations. All personal effects of the Member which were in the Guest House had been moved into a bedroom which was not being used, with the exception of some dishes of the Member which were stored in a box in a cupboard;
- (n) Some time after the notice had been posted on the door of the Ranch House, K.K. testified that the Member got in her car and drove the short distance from the Ranch House to the Guest House. She was accompanied by her son, M.. K.K. testified that she could hear the Member yelling "I'm not paying" and as the Member seemed agitated, K.K. testified that she, her parents and L.O. determined to approach the Member after the Member had come out of the Guest House carrying certain items. K.K. indicated that the Member seemed concerned that K.K. and L.O. had been tampering with her personal effects and in particular her dishes which K.K. testified turned out to be in a box that she was carrying out of the house. At this time, she testified that L.O. had gone into the Guest House via a patio door to make sure that the Member had not been tampering with the personal effects of her or K.K. and subsequently came back out;

- (o) K.K. testified that the Member stated "If you want war, you'll have it." and advised G.K. that "R. will be very disappointed in you". When both G.K. and K.K. advised the Member that they didn't think that R. would be disappointed, K.K. testified that the Member stated "I can make things difficult for R.";
 - (p) There was then apparently a discussion regarding electrical power as the Member seemed to think that the K.'s had been tampering with her electricity panel. K.K. testified that in fact they had been working on a different electrical panel that provided electrical service to the campground and that it was even on a different pole. In the course of that argument, K.K.'s evidence was that the Member yelled at her using profane language, got in her car and took a wild swing at her as she drove by (but missed);
 - (q) K.K. testified that she immediately made notes of the incident and she testified that those notes (Exhibit 6 - TAB 2) were properly reflective of the incident;
 - (r) Subsequent to this incident, the Member sent an email dated August 14, 2005 to M.K. (Exhibit 9 - TAB 2) wherein she indicated that she was relinquishing possession of the leased premises and that by threatening to commence legal action against the Member relating to their residential tenancy situation, the Member advised that she was now in a conflict of interest and could no longer act as counsel to R. The Member then advised M.K. that she would withdraw as R.'s counsel on August 23, 2005 and that R.'s appeal would be struck. The email then goes on to indicate that this could be avoided if M.K. executed a full and final release with respect to the Guest House lease and the Ranch House lease, which release would require that the full damage deposit plus interest be returned to the Member, that the Member would not be required to pay rent for July or August, that the rent for the period from June 18 to June 30, 2005 would be returned and that all existing post-dated cheques would also be returned; and
 - (s) K.K. testified that she felt that the threat of withdrawing to act for R. unless the Member's terms in respect of the resolution of the tenancy issue were accepted, was completely inappropriate and accordingly a letter of complaint was filed with the LSA.
11. L.O., after being duly sworn, gave testimony that she is a cousin to K.K. and was staying in the Guest House in early August of 2005 in preparation for G.K.'s 80th birthday party. She indicated that she witnessed the August 9, 2005 confrontation between the Member and K. and G.K., except for the portion where she had gone into the Guest House to ensure that the Member had not removed or tampered with her personal belongings or those of K.K.. Her evidence corroborated the evidence of K.K. in respect of the August 9, 2005 incident.
 12. M.K., after having been duly sworn, gave evidence that she had in fact known the Member for some years and that she had allowed her daughter, K.K., to deal with the Member when the issues arose arising from the flooding of the property and the subsequent non-payment of rent by the Member. M.K. testified that she was not present

13. G.K., after having been duly sworn, testified that he was present for the entirety of the August 9, 2005 incident. He essentially corroborated the testimony of K.K. and L.O. and specifically testified that the Member had in fact indicated that she was prepared to "go to war" over the tenancy issue. He further confirmed that no one had tampered with the Member's electricity supply and that he and others had been working on the electricity supply of the campground on a different pole. Initially, he did not testify as to the Member's statement that R. would be disappointed in him. He was referred to the notes prepared by K.K. (Exhibit 6 - TAB 2) whereupon he confirmed that the Member had in fact indicated that R. would be disappointed in him, that he had denied that R. would be disappointed by his actions and that the Member had then suggested that she could make things difficult for R. and that Mr. K. should advise R. of his actions. The balance of his testimony was consistent with that of K.K. and L.O..
14. As the Member was not present, her evidence is essentially comprised of her letter to the LSA dated October 13, 2005 (Exhibit 9) and her letter of September 11, 2006 addressed to the LSA (Exhibit 11). The Member's statements in this correspondence contradicts the written correspondence of K.K. contained in the exhibits and contradicts all of the oral testimony provided by K.K., G.K. and L.O., especially as it relates to the August 9, 2005 incident.
15. What is perhaps most significant however is that the Member admits having sent the August 15, 2005 email to M.K..

Submission Re Guilt of the LSA

16. Mr. McDonald submitted that Citation No. 1 had been made out. He specifically referred the Panel to Chapter 1 Rule 7 of the Code of Professional Conduct which states that "a lawyer's position must not be used to take unfair advantage of any person or situation."
17. Mr. McDonald indicated that as the complainants were third parties in respect of this matter, the commentary to Rule 7 indicates that the taking of an unfair advantage in respect of third parties "equates to conduct that a normal person, acting reasonably, would consider to be dishonourable.". Mr. McDonald submitted that the Member's conduct, by threatening to cease to act on behalf of R. to gain an advantage in respect of the lease negotiations with the Complainants, was dishonourable.
18. Mr. McDonald referred the Panel to Chapter 6 of the Code of Professional Conduct dealing with conflicts of interest. He specifically referred the Panel to commentary G3 which differentiates between conflicting client interests and conflicts potentially created by considerations personal to a lawyer. In that context, he referred the Panel to Rule 8 of Chapter 6 which indicates that: "A lawyer must not act personally in a matter where the lawyer's objectivity is impaired to the extent that the lawyer would be unable to properly and competently carry out the representation." Mr. McDonald indicated that in his view,

there was certainly no issue of conflicting client interests in this matter and that continuing with the retainer of R. would not have been a conflict, notwithstanding the potential of litigation surrounding the tenancy between the Member and M.K..

19. Mr. McDonald then drew the Panel's attention to Chapter 14 dealing with a Member's withdrawal of legal representation and in particular Rule 2 of Chapter 14 which indicates that "a lawyer must withdraw upon reasonable notice to the Client when ... the lawyer's continued employment would violate the lawyer's obligations with respect to conflict of interest".
20. Upon questioning from the Panel, Mr. McDonald conceded that, even though not specifically set forth in Rule 8 of Chapter 6, arguably that Rule creates a subjective rather than an objective test. However Mr. McDonald indicated that even if the Member had subjectively concluded that she could no longer represent R. in the face of potential litigation surrounding the tenancy with M.K., to attempt to use that conflict as a basis to threaten withdrawal of her representation of R. was dishonest where the clear implication of the August 15, 2005 e-mail was that the Member would have no difficulty in continuing her representation of R. if only M.K. would accept the Member's terms to resolve the tenancy dispute.
21. Mr. McDonald further indicated that even absent the implied threat, the lawyer's liability to withdraw under Rule 2 of Chapter 14 was only upon reasonable notice. Mr. McDonald submitted that sending an email on August 15 threatening to withdraw on August 23 with the consequence that the appeal of R. would be struck (which may or may not have been factually correct) was not reasonable notice as required by the rules.

Decision as to Guilt

22. The Panel concluded that it had jurisdiction to hear the matter and deemed that service of all of the jurisdictional documents on the Member to be good and sufficient.
23. The Panel concluded that the Member had had ample opportunity to obtain counsel, pro bono or otherwise, and that there was no issue in this regard.
24. The Panel concluded that the Member had acknowledged that the hearing was to proceed on a peremptory basis and that the Member did not object to the hearing proceeding on June 25, 2008, notwithstanding that the Member would not be present.
25. The Panel accepted Mr. McDonald's recommendation that Citation No. 2 be dismissed.
26. The Panel found that the evidence of the four witnesses tendered by the LSA was both credible and consistent. The evidence of the Member to the contrary, found in the written responses to the complaint, is inconsistent with the evidence tendered on behalf of the LSA. Assuming that the August 9, 2005 incidents unfolded in the manner as set forth in the testimony of the four witnesses, the actions of the Member were highly unprofessional and her insinuations respecting her continued representation of R. were, in the Panel's view, dishonourable.

27. Notwithstanding the August 9, 2005 incident however, the Panel was satisfied that there was sufficient evidence to find guilt pursuant to Citation No. 1 solely from the terms of the August 15, 2005 email from the Member to M.K.. The clear implication from that email is that if M.K. was not prepared to agree to the unilateral terms being imposed by the Member to resolve the outstanding tenancy issues, then adverse consequences would be suffered by her client R. and that the Member used her solicitor/client relationship with R. as a means to attempt to gain an advantage in the tenancy dispute. The email in and of itself is dishonourable. The Panel also noted that if in fact the Member subjectively concluded that as a result of the threat of litigation over the tenancy issues, she could no longer provide competent advice to R., it would be difficult to believe that such subjective mindset could be instantly altered had M.K. accepted the Member's unilateral terms of resolution of the tenancy dispute.

Submissions re Sanction

28. Mr. McDonald, on behalf of the LSA, suggested that the conduct of the Member was not sufficient to warrant a suspension or disbarment and accordingly, he suggested that the appropriate sanction would be a fine, a reprimand and an order of costs.
29. There appeared to be some confusion as to the current status of the Member. Although it was clear that the Member had no discipline record, the certificate tendered by the Law Society as Exhibit 4 indicated that the Member is on the active/practicing list of the LSA, whereas correspondence from the Member appears to indicate that she believes that she is on the inactive list. In any event, it does not appear that the Member is currently practicing. Mr. McDonald indicated that the Member had advised him that she was not practicing, that she was living in Colorado, that her health was poor and that she was essentially impecunious. Notwithstanding the potential of impecuniocity, Mr. McDonald submitted that it was appropriate that a full order for costs go against the Member. As a matter of principle, the other members of the LSA should not be paying for the costs of a hearing where the Member's conduct has been sanctioned.

Decision as to Sanction

30. The Panel essentially concurred with the submissions of Mr. McDonald. The Panel was of the view that even though the costs in this matter were fairly substantial due to the lengthy history of adjournments and prehearing conferences, it was important that this type of conduct be denounced in the public interest and as a deterrent and accordingly, it was in order that a fine be imposed. The Panel accordingly imposed a fine of \$500.00 and ordered that the Member be responsible for the actual costs of the hearing as ultimately determined.
31. The Member shall have 30 days to pay both the fine and the costs from the date of service of the final statement of costs, failing which she shall stand as suspended.
32. No referral to the Attorney General is required in this matter.
33. No separate Notice to the Profession is required in respect of this matter.

34. The Chair indicated that since the Member was not present, a reprimand was rather academic but confirmed that had the member been present, the denunciation of this type of conduct would have been brought home to the Member for the reasons as set forth above in the Panel's conclusion as to guilt and as to sanction.
35. The decision, the evidence and the exhibits in this hearing are to be made available to the public, with the actual name of R. to be redacted therefrom and replaced with "R." wherever it appears.

“DATED this 8th day of August, 2008.”

Stephen Raby, Q.C.

Shirley Jackson

Wayne Jacques