



## 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 Robert Burchak, a Member of the Law Society of Alberta.

#### **A. Jurisdiction and Preliminary Matters**

1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Robert Burchak on April 28, 2008. The Committee consisted of Douglas R. Mah, Q.C., Chair, Carsten Jensen, Q.C., Committee member and Hugh Sommerville, Q.C., Committee member. The LSA was represented by Garner Groome. The Member was present and was represented by Robert J. Wachowich.
2. Exhibits 1 through 4, consisting respectively of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor with acknowledgement of service, the Notice to Attend with acknowledgement of service and the Certificate of Status of the Member, were admitted into evidence by consent. The admission of these documents established the jurisdiction of the Committee.
3. There was no objection by the Member's counsel or counsel for the LSA with respect to the composition of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. No request for a private hearing had been received and therefore the hearing proceeded in public.
5. Exhibits 6 through 21 were contained in the exhibit binder provided to the Committee members and the parties and were admitted into evidence by consent. The following additional exhibits were also admitted into evidence by consent:
  - Exhibit 22 – Certificate dated April 21, 2008 signed by R. Gregory Busch, Director, Lawyer Conduct, certifying that the Member has no discipline record with the LSA; and
  - Exhibit 23 – Estimated Statement of Costs.

#### **B. Citations**

6. As indicated in the Notice to Solicitor (Exhibit 2), the Hearing Committee was inquiring into four citations:

Citation 1: It is alleged that you failed to be courteous with J.H., and that such conduct is conduct deserving of sanction.

Citation 2: It is alleged that you unilaterally changed the hearing date by filing amendments to the Originating Notice of Motion, and that such conduct is conduct deserving of sanction.

Citation 3: It is alleged that you engaged in the unauthorized practice of law, and that such conduct is conduct deserving of sanction.

Citation 4: It is alleged that you misrepresented your professional status, and that such conduct is conduct deserving of sanction.

7. During the course of the hearing, LSA counsel indicated that he was not proceeding with citation 2. He also requested that citations 3 and 4 be combined to read as follows:

It is alleged that while on inactive status you authored correspondence and prepared and filed documents in the Court of Queen's Bench indicating you were a barrister and solicitor, and, without obtaining leave of the court as required by Rule 5.4 of the *Alberta Rules of Court*, attended in Justice Chambers on January 16 and 27, 2006 on behalf of another person, thereby also misrepresenting your professional status to the court and others, and that such conduct is conduct deserving of sanction.

8. The Member's counsel supported the application to amalgamate citations 3 and 4 as indicated above.

**C. Factual Background**

9. Following some 30 years of practice in small firm settings in Edmonton, the Member retired effective December 31, 2005 and transferred to the inactive list.
10. The Member had disposed of his practice to Douglas S. Murray, Esq., of the firm Penonzek Murray, on or about November 1, 2005. Mr. Murray assumed conduct of the Member's former solicitor files (mostly in the nature of corporate minute books and some estates), while the litigation files – one or two matters – were given to the firm's litigation lawyer, Mr. Penonzek.
11. The Member continued to occupy space along with Mr. Murray at the offices of Penonzek Murray until the end of 2005. The Committee was told by Mr. Murray that the Member conducted no professional activities in the office after December 31, 2005.
12. The within complaints have their genesis in a dispute between the Member's mother-in-law, Ms. E.L., and the condominium board of W.W.M.(W.W.) where she is a resident. W.W. is a seniors' complex, consisting of some 127 separate condominium units and is managed by a condominium board consisting of seven resident volunteers. At all times material to the complaints, Mr. J.A.H. was the president of the W.W. condominium board.
13. Mr. H. indicated in his evidence that in 2003 it came to the board's attention that Ms. L., who occupied suite 320, had to have her entra-phone reprogrammed every year. The entra-phone allows the resident to "buzz in" any visitors who are at the front door of the

- building. The reprogramming was required because each year Ms. L. disconnected the phone when she moved to her summer residence at the lake.
14. The condominium board determined that as many of the residents are away for long periods of time during both the summer and winter months, the reprogramming of phones could become a time consuming exercise for the volunteer responsible. It was explained that along with manually reprogramming a circuit board, the volunteer needed to produce an update to the entry in the panel each time a phone was reprogrammed. Consequently, the condo board determined, as a matter of policy, that annual hook-ups would no longer be permitted. As notice to Ms. L. and other residents, the policy was published in the update of the complex's "house rules".
  15. Mr. H. recounted that in the fall of 2004, Ms. L. again requested the reconnection of her entra-phone. He agreed to allow her one last free hook-up and asked her to countersign a letter he had prepared that outlined the policy and stated that this was her last hook-up. Ms. L. refused to sign the letter and Mr. H. refused to authorize the hook-up.
  16. The Member then telephoned Mr. H. and what ensued was, by both accounts, a cordial discussion of the issue. The discussion concluded with Mr. H. agreeing to one last reconnection for Ms. L.. Mr. H. thought that the Member understood that the policy would henceforth be strictly enforced.
  17. On a date in November 2005, Mr. H. received another call from the Member. Although the issue was the same, this telephone call was very different in tone. According to Mr. H., the Member was again demanding the reconnection of Ms. L.'s entra-phone but this time the Member's language was liberally peppered with profanity, notably the use (in Mr. H.'s description) of the "F" word and the "A" word. Mr. H. estimated the "F" word was used by the Member some 15 or 20 times during the conversation. Mr. H. says that he hung up on the Member. Mr. H. also says there was a subsequent telephone call from the Member later that evening, but Mr. H. hung up again.
  18. The Member testified that he did place a call to Mr. H. in November 2005. His purpose was to advise Mr. H. of what he (the Member) intended to do if Mr. H. refused to provide Ms. L. with the building services to which she was entitled (namely, an annual hook-up of the entra-phone) as a resident in good standing. The Member stated that the conversation lasted about 20 seconds and therefore it was impossible for him to say "fuck" 15 times. He denied using the "A" word. He admitted to calling Mr. H. a "mean spirited old fucking bully" and a "miserable fuck", which the Member in Exhibit 20 (e-mail of April 6, 2006 to the LSA) stated were phrases that accurately describe Mr. H.
  19. Mr. H. is 76 years old and retired after 30 years with the Edmonton Fire Department. Prior to that, he had served in the Canadian Navy for five years, including a 22 month stint of active service during the Korean War, aboard the Cayuga and the Athabasca. He stated that he had heard profanity before and knew that the so-called "F" word was directed at him personally by the Member and intended as an insult. He stated that he was offended and angered by the Member's language and had the conversation taken place in person, a physical altercation would most certainly have ensued.

20. As a consequence of the refusal of Mr. H. or W.W. to reconnect Ms. L.'s entra-phone, legal proceedings under Queen's Bench Action No. \*\*\*\* \*\*\*\*\*, naming E.L. as Applicant and the owners of the W.W.C.P. as Respondents, were commenced at the instance of the Member. The court record indicates the following documents were filed:

LSA Exhibit No.	Name of Document	Date of Filing	Responsible Law Firm / Lawyer
6	Originating Notice	December 7, 2005	Penonzek Murray / Douglas S. Murray
7	Amended Originating Notice	January 12, 2006	Penonzek Murray / Douglas S. Murray
8	Amended Originating Notice	January 16, 2006	Penonzek Murray / Douglas S. Murray
10	<i>Ex parte</i> Order (Mr. Justice S. Hillier)	January 16, 2006	Penonzek Murray / Douglas S. Murray
11	Affidavit of Service	January 24, 2006	Penonzek Murray / Douglas S. Murray and Robert D. Burchak
14	Order (Mr. Justice R. P. Marceau)	January 27, 2006	Penonzek Murray / Robert Burchak
17	Notice of Change of Solicitors	February 3, 2006	Robert D. Burchak Professional Corporation
18	Notice of Motion	February 3, 2006	Robert D. Burchak Professional Corporation
19	Affidavit	February 3, 2006	Robert D. Burchak Professional Corporation

21. During proceedings on January 16, 2006 (transcript at Exhibit 9) and again on January 27, 2006 (transcript at Exhibit 13), the Member appeared before a Justice of the Court of Queen's Bench in connection with the action. On both occasions, the Member appeared on behalf of the Applicant, E.L., but on neither occasion did the Member indicate to the court that he was an inactive member of the LSA, nor did he make an application under Rule 5.4 of the *Rules of Court*.
22. The Member sent correspondence dated January 29, 2006, to a director of the condominium corporation board (Exhibit 15) and again on January 31, 2006, to the board of directors of the owners of the W.W.C.P. (Exhibit 16) on letterhead indicating the sender as "Robert D. Burchak Professional Corporation, Barrister and Solicitor". The second letter showed "Robert Burchak, Barrister and Solicitor" in the signature block.
23. Mr. Murray testified, upon examining Exhibits 6, 7, 8 and 10 (which show Douglas S. Murray of Penonzek Murray as solicitor of record) and Exhibit 11 (which shows Douglas Murray and Robert D. Burchak of Penonzek Murray as solicitors of record) that he did not draft those documents, did not know who drafted the documents and did not believe that Mr. Penonzek had done so. Mr. Murray recalled that the Member at some point had asked if he could use the Penonzek Murray offices as a place for documents to be served, but does not recall consenting to the Member making use of the firm name Penonzek Murray. Mr. Murray further indicated that there was no E.L. file in the Penonzek Murray law office and could not explain why the firm was shown as the

address for service. Mr. Murray stated that he had never seen the documents before and had nothing to do with the matter.

24. When shown Exhibit 17, the Notice of Change of Solicitors from Douglas Murray to Robert Burchak, Mr. Murray said he had never acted for Ms. L., did not know anything about the matter and had not seen the document before.
25. Mr. Murray indicated that after December 31, 2005, Penonzek Murray provided no telephone answering services for the Member. He further stated that the firm had arranged nothing with regard to Ms. L.'s file.
26. Mr. Murray recalled, although he is not certain as to the exact date, that he received a telephone call from a female lawyer concerning the L. matter. He said that he contacted the Member and asked him to "do something about this".
27. The Member began his testimony before the Hearing Committee by admitting the conduct described in citation 1 and the combined citations 3 and 4.
28. With respect to the verbal altercation with Mr. H. that forms the subject matter of citation 1, the Member stated that he was assisting his mother-in-law on a *pro bono* basis because he felt the condominium board was acting in an unreasonable manner with respect to the entra-phone hook-up. He advised the Hearing Committee that his mother-in-law occupies a unit on the third floor of the building, but lives in a cottage in Stony Plain between May and October. He stated that Ms. L. does not have enough money to maintain two phone lines throughout the year.
29. The Member stated that the condominium board had refused to accommodate Ms. L. even after the Member offered to pay for the reconnection service, volunteered to do it himself and offered to hire a security company to do it.
30. The Member advised that his mother-in-law is elderly, not particularly mobile and has difficulty walking. He felt it was unreasonable to force her to walk down three flights of stairs to answer the front door. He advised that his mother-in-law had frequent visitors, such as Meals on Wheels, housekeeping services and a physiotherapist who attended at her residence. He felt there was no alternative but to take legal action to restore his mother-in-law's rights. The relief that he sought from the courts for his mother-in-law was ultimately granted.
31. The Member explained that he had no intent to mislead anyone after December 31, 2005 about his status to practice law. He noted that the action had been commenced prior to his retirement date and while he was still an active member. He explained that when he moved out of his law office, electronic templates, such as letterhead and court documents, were transferred to his home computer and he simply continued to use them on the L. matter.
32. While admitting that Mr. Murray had nothing to do with the file, the Member stated he had the consent of Mr. Murray to use the Penonzek Murray office as an address for

service. The Member indicated that he needed an office with regular business hours (as opposed to his own residence) for the purposes of service of documents on the L. file because he often was not at his residence during the daytime.

33. The Member admitted to being unfamiliar with Rule 5.4 of the *Alberta Rules of Court*. He was under the impression that as retired member he could act in the L. matter. Ms. Stefania Valle, a lawyer hired by the condominium board to deal with the L. matter, contacted Mr. Murray regarding the matter in January 2006. Mr. Murray then called the Member and asked him to, in effect, extricate Penonzek Murray from the proceedings. It was then that the Member filed a Notice of Change of Solicitors at Exhibit 17.
34. It is accepted that the Member's professional corporation permit expired on December 31, 2005.

**D. The Law Pertaining to Unauthorized Practice**

35. The relevant parts of the *Legal Profession Act* read as follows:

**Designation as barristers and solicitors**

**102(1)** Members of the Society shall be known and designated as barristers and solicitors.

**(2)** Active members are officers of the Court of Queen's Bench and all other courts of record in Alberta and have a right of audience in those courts.

**Practice of law**

**106(1)** No person shall, unless the person is an active member of the Society,

- (a) practise as a barrister or as a solicitor,
- (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
- (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
- (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.

**Permit**

**131(1)** Subject to this Act, a professional corporation may carry on the practice of a barrister and solicitor in its own name.

...

**(4)** A permit issued under subsection (3) expires on December 31 of the year for which it is issued.

36. Rule 5.4 of the *Alberta Rules of Court* reads as follows:

**Representation by agent**

**5.4** With the permission of the Court, a person may be represented before the Court by an agent other than a solicitor.

## **E. Disposition of Citations**

### **Citation 1**

37. LSA counsel urged the Hearing Committee to find that the language used by the Member in the context of his conversation with Mr. H., particularly the word “fuck” in all its forms, was discourteous, and that in the circumstances such conduct is conduct deserving of sanction.
38. The Hearing Committee found it unnecessary to rely on the authority cited by LSA counsel<sup>1</sup> to come to this conclusion. The Hearing Committee well appreciates that the so-called “F” word, and all of its various derivations, in certain contexts is a vulgarity, can be offensive and can be meant as an insult.
39. Mr. H. testified that, notwithstanding his background as a sailor and a fireman, he was clearly offended by the Member’s language and felt insulted to the point of anger. The Member admitted using the profanity on at least two occasions during the conversation (the actual number of times the “F” word was used by the Member is in dispute) and as much admits he intended to insult Mr. H. The Hearing Committee finds that the Member’s use of language in his conversation with Mr. H. was discourteous and constitutes conduct deserving of sanction.

### **Citation 2**

40. LSA counsel offered no evidence to support this citation and asked that it be dismissed. Accordingly, Citation 2 is dismissed.

### **Citations 3 and 4**

41. The Hearing Committee granted the application to consolidate the two citations in the manner indicated in paragraph 7. The Hearing Committee notes that the Member admits to the conduct described in the combined citation.
42. It is clear that at all times subsequent to December 31, 2005, the Member, as an inactive member of the LSA whose professional corporation permit had expired, had no standing to conduct causes before the courts on behalf of anyone. He could have requested such standing from the court under Rule 5.4 of the *Alberta Rules of Court*, but he did not. Regardless of what his intent or state of knowledge regarding the law of unauthorized practice actually was, his conduct in conducting a brief on behalf of a client (albeit his mother-in-law on a *pro bono* basis), appearing in court on her behalf, styling himself as a professional corporation and a barrister and solicitor, did mislead the court and those dealing with him as to his status.

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<sup>1</sup> “Fuck” by Christopher M. Fairman, Center for Interdisciplinary Law in Policy Studies Working Paper Series No. 39, March 2006, at <http://ssrn.com/abstract=896790>.  
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43. The Hearing Committee finds that the Member clearly misrepresented his status under the *Legal Profession Act* and consequently finds that his conduct, as recounted in the consolidated citation, is conduct deserving of sanction.

**F. Sanction**

44. As paragraph 51 of the *Hearing Guide* indicates, 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. Having regard to Citation 1, the Hearing Committee views the Member's use of profanity, even if only in two instances, constituted a failure to uphold the dignity of the profession and resulted in a loss of public respect. With respect to the consolidated Citations 3 and 4, the conduct was the consequence of carelessness and lack of attention and resulted in the Member misleading the court and others dealing with him as to his status to even practice law. This constitutes a misrepresentation of his status under the *Legal Profession Act*, as well as a contravention of the *Rules of Court*. This latter conduct also diminishes public confidence and respect in the profession.
45. In mitigation, the Committee notes that, during the course of committing the sanctionable conduct, the Member was assisting a vulnerable person, namely an elderly senior, enforce her rights in the face of what was perceived as an unreasonable policy. The Member was doing so on a *pro bono* basis and was well-intentioned, if somewhat overly exuberant, in helping his mother-in-law.
46. It is the decision of the Hearing Committee that the sanction in respect of both citations will be a reprimand and payment of 50% of the actual costs when determined. It is the Committee's view that the inability of counsel to achieve certain efficiencies, for whatever reason, should not be the responsibility of the Member.

**G. The Reprimand**

47. It is recognized that the W.W. condo board's policy regarding the entra-phone hook-up was the background giving rise to this imbroglio. The Hearing Committee does not purport to judge the conduct of Mr. H. nor question the wisdom of the policy, although those matters form part of the factual background of the citations. The Committee is here solely to look at the conduct of the Member.
48. Although the Member is currently an inactive Member, he is still subject to the LSA's jurisdiction. One of the privileges and obligations of being a self-regulated profession is that the LSA has the authority to prescribe standards of conduct. The LSA expects all of its members to act courteously, professionally and civilly to fellow practitioners and all members of the public. It goes without saying that civility is not just a professional standard, but also a standard of normal human relations in every day society.
49. The Committee accepts that, within certain contexts, language of the type that was used by the Member might be appropriate or at least not objectionable. Reflecting upon Mr. H.'s background, a navy troop ship might be one such context and a firehouse might be

another. However, the Committee has found that in the context of the Member dealing with Mr. H. as president of the W.W. condominium board, the language used by the Member toward Mr. H. was entirely inappropriate. This is not the manner in which a Member, whether active or inactive, should be dealing with a 75 year old retiree in a volunteer position when trying to settle a dispute on behalf of one's mother-in-law.

50. This type of conduct is not victimless. The profession itself is the victim. In Mr. H.'s mind, the reputation of the profession has been diminished.
51. With regard to the other citation, ignorance of the *Rules of Court* has never been an excuse. There is a presumption that all people know the law, particularly lawyers and former lawyers. The Hearing Committee appreciates the sentiment and motivation behind the Member's actions, but it would have been a simple enough matter for the Member to declare his status to the court and in his correspondence and documents. Despite what his intent may have been, his conduct did have the effect of misleading both the court and members of the public.
52. The court and the members of the public with whom the Member thought they were dealing with an active member of the LSA. This is an issue of governability. When a member represents himself or herself as active and practicing when in fact he or she is not, the LSA's ability to govern its members is compromised. Such conduct does a disservice to both the public and the profession.
53. The Hearing Committee notes that the Member has practiced 30 years without blemish on his record and that is to his credit. It is recognized that the Member was well-intentioned in trying to help his mother-in-law. He just could have chosen his methods better.

#### **H. Concluding Matters**

54. There will be no referral to the Attorney General.
55. There will be no notice to the profession.
56. With regard to time to pay, the costs payable are 50% of the actual costs of the hearing when determined and they shall be paid within 60 days of the date of service of the final Statement of Costs upon the Member or his counsel.

57. The record will be available for public inspection, including the provision of copies of exhibits, for a reasonable copy fee. There is no order with respect to redaction of the record.

Dated this 9th day of July, 2008.

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Douglas R. Mah, Q.C. – Chair and Bencher

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Carsten Jensen, Q.C. – Bencher

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Hugh Sommerville, Q.C. – Bencher