



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 William Shymko, 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 William Shymko on March 23, 2007. The Committee consisted of Douglas R. Mah, QC, Chair, Peter Michalyshyn, QC, Committee member and Brian Beresh, QC, Committee member. The LSA was represented by Janet Dixon, QC. The Member was present and was represented by Alex Pringle, QC.
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, established the jurisdiction of the Committee and were admitted into evidence by consent.
3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership 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 19, contained in an exhibit binder provided to the Committee members and the parties, were admitted into evidence by consent. The following additional exhibits were also entered into evidence by consent:
 - Exhibit 20 – Agreed Statement of Facts and Admission of Guilt dated March 23, 2007 and signed by the Member;
 - Exhibit 21 – letter of March 15, 2007 from R. Gregory Bush, Director, Lawyer Conduct, LSA to Janet Dixon, QC, counsel for the LSA, certifying that the Member has no LSA discipline record as at the date of the letter;
 - Exhibit 22 – estimated Statement of Costs.

B. Citation

6. As indicated in the Notice to Solicitor (Exhibit 2), the Hearing Committee is inquiring into one citation:

“It is alleged that you failed to comply with an undertaking to advance funds and breached a trust condition, and that such conduct is conduct deserving of sanction.”

C. Agreed Statement of Facts and Admission of Guilt

7. The Agreed Statement of Facts and Admission of Guilt (Exhibit 20) states as follows:

1. William Shymko is a member of the Law Society of Alberta having been admitted to membership on June 21, 1973. At all times relevant to these Citations he practiced as a sole proprietor.
2. The Complainant, VH, is a member of the Law Society of Alberta.
3. This matter arises from a commercial conveyance file. Mr. Shymko acted for Numbered Alberta Inc. (the "Purchaser") in the purchase of a golf course from VH's clients (the "Sellers"). The purchase price was \$4,100,000. Payments in the amount of \$3,100,000 were made in 2004 in accordance with the purchase agreement, and the final payment in the amount of \$1,000,000 plus interest was due on April 30, 2005. The property transferred in early 2004 and the subsequent payments owed by the Purchaser to the Sellers were secured by a demand collateral mortgage on the property in favour of the Sellers. The Purchaser was developing a subdivision on the golf course, which development was underway in 2004 after the Purchaser took title.
4. On March 24, 2005 Mr. Shymko's office advised VH that the Purchaser was placing a new mortgage against the golf course property and that a postponement of the Seller's collateral mortgage was required.
5. On March 30, 2005 VH provided Mr. Shymko with a Postponement of Mortgage executed by the Sellers on the express trust condition that no use be made of the Postponement prior to the receipt by VH of an undertaking from Mr. Shymko that the Sellers would be paid in full from the proceeds of the new mortgage on or before April 31, 2005.
6. On April 3, 2005 Mr. Shymko provided the following undertaking:"

Further to your letter of March 30, 2005, please find enclosed my undertaking.
That on or before April 30, 2005 the Rs will be paid in full. I have received confirmation from my client as well."
7. On April 5, 2005 VH sent a letter to Mr. Shymko emphasizing the reliance being placed by the Sellers on the undertaking of Mr. Shymko and seeking assurance that Mr. Shymko was in control of the mortgage advance and that the balance owed to the Sellers would be paid from the mortgage advance.
8. Subsequently, VH spoke to Chantelle of Mr. Shymko's office and received assurances that Mr. Shymko was in control of mortgage advances such that he could comply with his undertaking.
9. The new first mortgage on the property in the sum of \$9,500,000 was executed in early April 2005. Mr. Shymko utilized the Postponement provided in consideration of the undertaking in order to obtain the advance of the new mortgage proceeds.
10. On April 29, 2005 VH provided Mr. Shymko, at his request, with a payout statement as at April 30, 2005.
11. On April 30, 2005 no payment was made by Mr. Shymko to VH. Mr. Shymko was in breach of his undertaking.

12. On May 27, 2005 VH sent a letter to Mr. Shymko advising him of the breach of undertaking and advising that while he understood that the Sellers had agreed to give him a few days grace, "the brief extension permitted has now been considerably exceeded". VH requested that the matter "be rectified immediately".
13. On June 2, 2005 Mr. Shymko submitted a payment in the amount of \$500,000 toward the outstanding balance together with a letter indicating that the remaining balance would be paid on June 10, 2005.
14. On June 9, 2005 VH sent a payout statement as at June 20, 2005 to Mr. Shymko, as requested.
15. No payment was made on June 10, 2005.
16. On June 23, 2005 VH called Mr. Shymko's office and was advised someone from the office had telephoned the mortgage lender to inquire into the status of the funds but had received no answer.
17. On June 24, 2005 VH again phoned the offices of Mr. Shymko and spoke to Chantelle. He was advised the payout from the mortgage company "shouldn't be much longer". VH asked Chantelle how this mortgage advance problem had occurred in the first place and was advised that the original advance on the increased mortgage was received in Mr. Shymko's office when Chantelle was away and another assistant had processed it who was apparently not aware of the undertaking given by Mr. Shymko.
18. On July 18, 2005 VH sent a letter to Mr. Shymko confirming that the balance of the funds were received and Mr. Shymko was no longer in breach of the undertaking.
19. In his response to the Law Society regarding this matter dated July 8, 2005, Mr. Shymko acknowledged he continued to be in breach of the undertaking and offered the following information as background:
 - a. The Purchaser was unable to complete its final payment to the Sellers on April 30, 2005 because of some delays in completion of the Subdivision development and construction involved on the golf course, resulting in the mortgage company not advancing funds on that date.
 - b. Mr. Shymko was assured by his client, with whom he had a lengthy business relationship, that upon registration of the new first mortgage sufficient funds would be advanced to pay the Sellers out in full.
 - c. After the mortgage funds were not advanced Mr. Shymko was in touch with his client and contacted the lender, but was unable to say with specific certainty when he would be in a position to comply with his undertaking.
 - d. Mr. Shymko acknowledged his error was not to check personally with the lender that sufficient funds would be advanced upon the registration of the new first mortgage to permit payout of the outstanding obligation to the Sellers. Mr. Shymko stated as follows:

"It seemed to have caught everyone by surprise but the bottom line is that I should not have provided the undertaking in the first place without knowing all the facts, with regards to the advance of funds by the lender, or the construction progress of the subdivision."
20. In further response to the Law Society by letter dated October 25, 2005 Mr. Shymko advised as follows:

“However, on April 26, 2005 we received only the sum of \$499,527.09 from the law firm of Fraser Milner Casgrain, Solicitors for the lender ... under the express trust conditions that the said funds were to be solely used to pay out the amount owing to ... Contracting and pay additional engineering costs. The said funds were sent to the general contractors and engineers so that the final draws of the ... mortgage would be advanced to pay out the Rs.”

21. Mr. Shymko admits these facts and admits the conduct admitted is conduct deserving of sanction.

ALL OF THESE FACTS ARE ADMITTED THIS 23RD DAY OF MARCH, 2007.

”original signed”
William Shymko

D. Decision as to Citation

8. The Hearing Committee determined that the Agreed Statement of Facts and Admission of Guilt (Exhibit 20) was in an acceptable form. Consequently, it is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member, as stated in the citation, is conduct deserving of sanction.

E. Decision Regarding Sanction

9. The Member responded under oath to questions posed by counsel and by the Committee members. The Hearing Committee also heard submissions regarding sanction from both counsel.
10. The Hearing Committee decided to accept what was essentially a joint recommendation of counsel that a reprimand be issued to the Member and that the Member be required to pay the actual costs of the hearing.

F. The Reprimand

11. The Hearing Committee considered whether or not there is a material difference between a trust condition versus an undertaking, and its conclusion is that in the specific facts of this case, there is no material difference. The ethical effect of a breach of undertaking in this case is the same as that of a breach of trust condition.
12. LSA counsel relied upon *Witten, Vogel, Binder & Lyons v. Leung, Harwardt, MacPherson (Prowse and Company) and Leung*, (1983) 25 Alta. L.R. (2d) 257 (QB) and *Carling Development Inc. v. Aurora River Tower Inc.*, [2005] A.J. No. 988; 2005 ABCA 267. The Hearing Committee determined that these authorities are applicable.
13. As *Carling Development* indicates, the importance of trust conditions or solicitors' undertakings to commerce in Alberta cannot be understated. It would be difficult, if not impossible, to conduct commercial transactions in Alberta unless lawyers can be relied upon to honour their obligations in this regard.

14. In this particular instance, the Member failed to honour an express written undertaking. Counsel for the LSA pointed out that the breach was not trivial or technical in nature but rather had significant consequences for the vendors. As a result, the Member put the vendors, the vendors' lawyer and the Member himself through considerable anxiety. He has affected the public perception of our profession. There are now individuals in Alberta who question the integrity of our system of trust conditions and undertakings and, therefore, the integrity of our profession itself.
15. The Hearing Committee notes that it is a shame, that after 30 years of unblemished practice, the Member is now before this Hearing Committee because of passing carelessness on his part. He has provided the Hearing Committee with an explanation – that is, the press of holidays and reliance on past experience with a good client – but those are merely explanations and not excuses. The conduct in this regard cannot be excused.
16. On the positive side, the Member was cooperative and responsive to the LSA throughout. He rectified the specific situation and has taken remedial steps in his practice to prevent recurrence. It is obvious the Member is contrite and has learned his lesson.

G. Concluding Matters

17. There will be no referral to the Attorney General.
18. There will be no notice to the profession.
19. With regard to time to pay, the costs payable are the actual costs of the hearing when determined and they shall be paid within one month of the date of service of the final Statement of Costs upon the Member or his counsel.
20. The exhibits and proceedings will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that the identities and other identifying information about clients will be redacted from those exhibits.

Dated this _____ day of _____, 2007.

Douglas R. Mah, QC – Chair and Bencher

Peter Michalyshyn, QC – Bencher

Brian Beresh, QC – Bencher