

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 KATHERINE KUBICA, a Member of The Law Society of Alberta

**Introduction**

1. On March 20<sup>th</sup>, 2007 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society office in Edmonton to inquire into the conduct of Katherine Kubica (the "Member"). The Committee was comprised of Vivian Stevenson Q.C. as Chair, Rodney A. Jerke Q.C, and Hugh Somerville Q.C. The LSA was represented by Lindsay MacDonald Q.C. The Member was present for the Hearing. The Member was represented by William Tatarchuk.

**Jurisdiction and Preliminary Matters**

2. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, established jurisdiction of the Committee.
3. There was no objection by the Member or Counsel for the LSA regarding the constitution of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private Hearing. Counsel for the Member confirmed that no request for a private Hearing was being made. The Hearing was held in public.

**Citations**

5. The Member faced the following citations:
  1. IT IS ALLEGED that you sent a note, written by the Defendant's doctor dated September 22, 2004, directly to Justice Marceau, and that such conduct is conduct deserving of sanction.
  2. IT IS ALLEGED that you failed to provide the Complainant in a timely manner with the materials provided directly to Justice Marceau, and that such conduct is conduct deserving of sanction.
  3. IT IS ALLEGED that you made threatening comments to the Complainant's client outside the court room, and that such conduct is conduct deserving of sanction.
6. At the Hearing, LSA Counsel advised that the doctor's note referenced in the first citation was dated December 13<sup>th</sup>, 2004 rather than September 22<sup>nd</sup>, 2004 as set out in the citation, and that the citation should be amended accordingly. Counsel for the Member did not object and the Hearing Committee allowed the amendment.

### **Evidence and Findings of Fact**

7. There were 47 exhibits marked during the course of the Hearing. These exhibits are as follows:
  - a. A binder was entered by consent of the parties containing Exhibits 1 to 43.
  - b. An excerpt from the Alberta Rules of Court, Annotated 2007 was entered as Exhibit 44.
  - c. A transcript of Court proceedings on December 7<sup>th</sup>, 2004 in Action No. was entered as Exhibit 45.
  - d. An Order dated December 7<sup>th</sup>, 2004 in Action No. was entered as Exhibit 46.
  - e. An Estimated Statement of Costs was entered by Counsel for LSA as Exhibit 47.
8. In addition to the documentary evidence, counsel for the LSA called Sheriff J. Jordan, Mr. C and the Complainant to give evidence. Mr. Tatarchuk called the Member to testify.
9. At the relevant times the Member represented Mrs. C in matrimonial litigation. The Complainant represented Mr. C.
10. In July of 2004, Mrs. C made a suicide attempt. While she was still in hospital, the Complainant obtained an *ex parte* order on behalf of Mr. C granting him custody of the three children of the marriage and exclusive possession of the matrimonial home. Mrs. C initially had other counsel, but in October of 2004 she retained the Member and instructed the Member to take steps to obtain custody of the children.
11. The custody issue was set to be addressed in Special Chambers on December 17<sup>th</sup>, 2004 (the "Special Chambers Application"). Mrs. C swore an affidavit on November 19<sup>th</sup>, 2004 in support of her application for custody and was cross-examined by the Complainant on that affidavit on December 6<sup>th</sup>, 2004.
12. During the course of the cross-examination on affidavit on December 6<sup>th</sup>, the Complainant made fifteen requests for undertakings. The first request was for an undertaking for the production of the medical chart of Dr. M. Dr. M was one of Mrs. C's treating physicians. He had provided a written opinion commenting on Mrs. C's mental state. At the cross-examination Mrs. C testified that Dr. M had been aware of her suicide attempt at the time that the opinion letter was written.
13. The request for Dr. M's chart was repeated and refused three times.
14. Eleven of the remaining fifteen requests were for undertakings for medical charts or other medical records and were refused. The fifteenth undertaking, a request for Mrs. C's pay stubs, was granted by the Member.
15. It was the Member's evidence that she knew that the requests made at the cross-examination on affidavit for her client's medical records were proper requests given that her client's mental health was in issue. However, she also felt that the

requests were made solely as a delay tactic since the Complainant was asking for medical charts of doctors whose medical reports were already in evidence.

16. The Member explained during the Hearing that in custody disputes the court was reluctant to interfere with the status quo insofar as the children were concerned. Since Mr. C had obtained interim custody of the children in July, the longer that he maintained that custody before it was reviewed, the better his position would be. The Member was of the view that if she granted the undertaking requests, it would take months for her to obtain the records and that if there were outstanding undertakings at the time of the application, the application would almost certainly be adjourned until the undertakings were satisfied.
17. Accordingly, the Member's strategy was to refuse any undertaking that she could not comply with before the December 17<sup>th</sup> Special Chambers Application. The only undertaking that she felt she could comply with was the production of her client's pay stubs. However, the Member testified that regardless of the position that she took at the cross-examination, she fully intended to make efforts to obtain all of the information that had been requested and to provide it to the Complainant in due course in the proceedings.
18. A review of the cross-examination transcript reveals the fairly acrimonious relationship that had developed between the Member and the Complainant by this point in time.
19. On December 7<sup>th</sup> the Complainant brought four applications before Justice Bielby, including an application for a direction that the Complainant could not use any more affidavits for the Special Chambers Application than permitted by the Rules of Court. It appears that a direction was given as to the affidavits that the Member could use in relation to that application.
20. On December 13<sup>th</sup> it appears that there was another application by the Complainant and that an order was granted for financial disclosure requiring the production of Mrs. C's last three pay stubs. The order was served on the Member on December 14<sup>th</sup>.
21. Also on December 13<sup>th</sup>, Mrs. C gave the Member a note from Dr. M dated December 13<sup>th</sup> confirming that he had been aware of Mrs. C's suicide attempt at the time he wrote his opinion.
22. On December 14<sup>th</sup> the Member wrote a letter to Justice Marceau, the Justice assigned to the Special Chambers Application. The letter was copied to the Complainant and is Exhibit 7, Tab 2 in these proceedings. The letter indicates "I am now in receipt of, and enclose, a letter or note from (Dr. M) dated December 13<sup>th</sup>, 2004, which was Undertaking No. 1 given by (Mr. C) at Examinations on Affidavit...". The letter also encloses a copy of Exhibit 1 marked at those examinations, which was the transcript of a 911 call made by Mrs. C.
23. The December 14<sup>th</sup> letter was sent to Justice Marceau by courier. It was sent to the Complainant by regular mail.
24. The Member testified that there was nothing sinister about the fact that she mailed the letter to the Complainant as opposed to sending it by courier or by fax. She said that it was the easiest way to send it, since faxing it would require her to walk to the other end

of her office. The Member said that in her experience mail within Edmonton was frequently delivered in one day and therefore she had no concerns that the letter would not arrive.

25. During the course of the hearing it was agreed as a fact that a letter dated November 22<sup>nd</sup>, 2005 had been mailed from the Member's office to the Complainant's office and had been received on November 23<sup>rd</sup>, 2005 and that a letter dated December 30<sup>th</sup>, 2005 had been mailed from the Member's office to the Complainant's office and received on December 31<sup>st</sup>, 2005. Accordingly, the evidence was clear that it was possible for a letter to have been mailed to and received by the Complainant within a one day period, and some basis for the Member to have believed this to be the case.
26. The Member also testified that the reference to the note from Dr. M in her letter to Justice Marceau as being a response to an undertaking given at the discovery was an honest mistake. She said that she considered the note from Dr. M to represent partial compliance with the Complainant's request for Dr. M's chart, since the real issue for the Complainant was clearly whether or not Dr. M had known about the suicide attempt when he wrote his opinion. In her view the note merely confirmed the evidence that had been given by her client at the cross-examination that Dr. M was made aware of the suicide attempt on September 22<sup>nd</sup> which was before the date of his report.
27. The Member conceded during cross-examination that she knew that a note from a doctor was not the same thing as a doctor's chart and notes, which was the subject of undertaking #1 at the cross-examination. She also conceded that the material was being provided after the deadlines for material provided for in Practice Note 3. However, she said that she knew that the note from Dr. M was the best she could do in the time available, and that in the normal course, the late provision of material for this type of application was not an issue.
28. The Member also said that she sent the letter from Dr. M to Justice Marceau so that the Court would have enough information to deal with the application and to put the Court's mind at ease with respect to Dr. M's opinion. She also testified that providing the note was, to some extent, an attempt to help her own position with the Court because of all of the objections to undertakings made at the cross-examination.
29. The Member pointed out during her testimony that there was no advantage to be gained by failing to get the note to the Complainant before the Special Chambers Application, since she would only be risking an adjournment by doing so.
30. The Member telephoned the Complainant on December 15<sup>th</sup> to ask her if she intended to make reference to the transcript. She says that she was referring to the 9-1-1 transcript enclosed with the letter to Justice Marceau and that this clearly indicates that she was not trying to hide anything and thought the Complainant had the letter. The Complainant testified that the conversation related to the transcript from the cross-examination on affidavit, which had been delivered to her office on December 13<sup>th</sup>.
31. On December 15<sup>th</sup>, the Complainant received a fax from the Member enclosing copies of three pay stubs.

32. The Member and the Complainant and their clients attended the Special Chambers Application on December 17<sup>th</sup>. The transcript from the application is Exhibit 43 in these proceedings.

33. The transcript shows that during the course of the appearance before Justice Marceau, the following exchange occurred:

Member: ...We sent in a letter and we've been talking on that letter.

The Court: That is something I just got?

Member: Yes.

The Court: Did you not get this?

Member: It was mailed to other counsel same day, My Lord.

The Court: December 14<sup>th</sup>.

....

Member: She hasn't received it in the mail, My Lord. I mailed a letter...

The Court: Just a minute. Did you get this letter, December 14<sup>th</sup>?

Complainant: No, I don't have the letter.

The Court: Well, you better have a look at it.

Complainant: Do you have a letter, My Lord, that counsel has not been provided?

The Court: I have a letter dated December 14<sup>th</sup> that has attached to it a letter from (Dr. M).

Member: It was one of the undertakings which we didn't refuse.

The Court: And it says---

Complainant: And it has been provided to Your Lordship, but not to opposing counsel?

The Court: Well, there is a cc...(Complainant)

Member: It was mailed to other counsel, My Lord.

The Court: Now, I do not know why you would mail something on the 14<sup>th</sup> when it is coming up on the 17<sup>th</sup>.

Member: I don't know. Well, I don't know.

The Court: During the Christmas season. Give me a break....

34. Like the transcript from the cross-examination, the transcript from the December 17<sup>th</sup> proceedings demonstrates the acrimonious and combative relationship between counsel, a situation which led to a comment from Justice Marceau that he was not satisfied that the animosity between counsel was any worse than the animosity between the parties. Even the exchanges between the Member and the Court were heated, to the point that near the end of the proceedings, the Member invited the Court to cite her in contempt.
35. Ultimately, the December 17<sup>th</sup> application was adjourned so that the Member could obtain additional evidence relating to Mrs. C's mental state. Because the Complainant had another matter to be heard, she remained in the court room. Mr. C left the court room and walked out into the lobby area outside. He was followed by Mrs. C, the Member and at least two other individuals.
36. There is a discrepancy in the evidence as to what precisely occurred at this point. According to the evidence of Sheriff Jason Jordan, Mr. C was standing 5-6 feet to the right of the court room doors and the Member and 5 or 6 other people were 5-6 feet to the left of the doors. Sheriff Jordan heard the Member say to Mr. C something to the effect that if he had a recording device at the house over Christmas, that she would have him arrested. Sheriff Jordan said that this comment was made in a raised voice, and that it appeared that the Member was angry or upset.
37. This comment was followed by a comment from another member of the group that "what goes around, comes around and you'll get yours". Sheriff Jordan was concerned that this might have been intended as a threat of physical violence and therefore made a note of this comment and asked Mr. C whether he would like to be escorted from the Court House. Sheriff Jordan did not make a note of the Member's comment at the time. He said that he did not consider the Member's comment to be a threat since there was no mention of physical violence. He did make a note of the incident when approached by the Complainant three days later after she had specifically asked about it and advised of a potential complaint to the Law Society.
38. Sheriff Jordan also said that Mr. C did not ask him for assistance. He was satisfied that Mr. C felt safe enough to leave the Court House by himself. Sheriff Jordan said that Mr. C was quiet and said very little. He could not tell whether or not Mr. C had been shaken by the comments that had been made.
39. Mr. C testified that there were 8 or 9 people in the group with the Member, and that they were standing 20 to 30 feet away. He says that the Member spoke to him in an "angry voice" and loudly enough that she could be heard throughout the lobby area. He testified that her comment was "If you try and record anything while you are at (Mrs. C's) house over Christmas, I will personally press charges against you". He remained adamant that those were the exact words that were used, although he made no note of the incident until three days later when he completed his complaint to the Law Society.
40. It was the Member's evidence that she said to Mr. C that if he taped his wife any more, that she would have him arrested. She testified that she made the comment because Mr. C had been making surreptitious recordings of her client and it was impacting her client's mental health. She also testified that she believed that Mr. C was committing an illegal act in taping his wife without her consent. She said that she was serious about the remark. She testified that it was not a threat, but a promise. She also testified that

she made the comment in a loud voice, but denied that she yelled. She said that she assumed that the Complainant was in the vicinity at the time.

41. The Member also testified that she was in poor health in December of 2004, and learned later that she had sustained damage to her heart which had been affecting her mood and ability to think clearly.

### **Decision**

42. The Committee did not accept that the content and circumstances surrounding the Member's letter of December 14<sup>th</sup> simply reflected a series of unfortunate errors on the part of the Member.
43. The Member had been involved in procedural wrangling with the Complainant throughout December, including at least two applications that addressed the nature of the material that was to be before the Justice hearing the December 17<sup>th</sup> application. She must have anticipated that sending additional material to the Justice would be met with opposition from the Complainant.
44. The Committee also had difficulty accepting the Member's evidence that she mistakenly thought that the note from Dr. M was a response to an undertaking given at the cross-examination on affidavit.
45. In the first place, the Member had adopted a specific strategy to refuse all undertakings given at the examination which could not be satisfied by December 17<sup>th</sup>. While in other circumstances she might not have remembered which undertakings had been given or refused at an examination 11 days earlier, the acrimonious nature of the examination and the approach adopted by the Member to the requests for undertakings were fairly unique.
46. Secondly, a note from a doctor created after the cross-examination could not be considered a response to a request for a doctor's charts on any reasonable interpretation.
47. Thirdly, the Member herself conceded that she had sent the note to the Justice to set the Court's mind at rest on the issue of Dr. M's knowledge, and to assist her own position in light of her objections to requests for medical information which she knew to be appropriate requests.
48. Fourthly, during argument on December 17<sup>th</sup>, the Member advised the Court that she had refused all but one of the undertakings given at the cross-examination, but that the undertaking in relation to Dr. M was the one undertaking that was not refused. This explanation is not consistent with the explanation that the Member made to the Committee.
49. The Committee also accepts that mail can be delivered within Edmonton within a day of mailing. Counsel for the LSA did not suggest otherwise. But the Committee rejects the suggestion that the Member made a timely disclosure of her correspondence to Justice

Marceau by putting a copy of the letter in the mail 11 days before Christmas, and two clear days before the application was to be heard, while at the same time sending the letter to the Court House by courier.

50. The Committee was advised that in family law practice, it is not unusual for correspondence to be sent by counsel directly to the Court and copied to opposing counsel. In the Committee's view this practice is not be encouraged, and is inappropriate except in unusual circumstances.
51. Based on all of the evidence, the Committee was satisfied that the Member's decision to send additional material to the Justice and to delay receipt of that material to the Complainant was deliberate and calculated to try to gain a tactical advantage. The Committee considered the second citation to subsume the first citation, in that the sending of the material to Justice Marceau was culpable because it was inaccurate and because it was not sent in a timely fashion. Furthermore, the Committee concluded that this conduct was conduct deserving of sanction as being incompatible with the interests of the members of the Law Society of Alberta and tending to harm the standing of the legal profession generally. The Committee dismissed the first citation and found the Member guilty with respect to the second citation.
52. With respect to the third citation, the Hearing Committee agreed with counsel for the Member that the comment made by the Member to Mr. C outside the court room was not a "threat" in the legal sense, and that the Member may well have believed that Mr. C's actions were illegal when she made the comment. The Committee accepted that the Member's words did not constitute a threat in the legal sense because there was no threat of physical harm. However, given the circumstances which had given rise to the sensitive relationship between the litigants, the animosity between counsel, the rather remarkable proceedings that had just transpired in Chambers, and with the words of the Chamber's Judge ringing in everyone's ears, Mr. C's perception that this was a threat was a reasonable consequence, and one that the Member intended. In all of the circumstances, the Committee considered the comment to have been inappropriate. The Committee also considered that it had been inappropriate for the Member to have spoken to a party represented by counsel, in the absence of that counsel. The Committee concluded that the citation had been made out and that the Member's conduct was conduct deserving of sanction.

### **Sanctions and Orders**

53. In the circumstances, the Committee considered the appropriate sanction to be a reprimand. The Member was also ordered to pay 2/3 of the actual costs of the Hearing and was given 3 months to pay from the provision to her of the statement of costs.

### **Concluding Matters**

54. Because of the highly private and personal nature of the proceedings between Mr. and Mrs. C, the Committee directed that the Exhibits and proceedings would not be made available for public inspection.

55. The Committee did not consider it necessary to direct that there be a Notice to the Profession. No referral to the Attorney General was required.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Vivian Stevenson, Q.C., Bencher  
Chair

\_\_\_\_\_  
Rod Jerke, Q.C., Bencher

\_\_\_\_\_  
Hugh Somerville, Q.C., Bencher