LAW SOCIETY HEARING

**IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING IN REGARDING
THE CONDUCT OF LORI A. O'REILLY
MEMBER OF THE LAW SOCIETY OF ALBERTA**

REASONS FOR DECISION

On September 6, 2006, a hearing committee panel comprised of Stephen Raby, Q.C. (Chair), John Higgerty, Q.C. and Yvonne Stanford convened at the Law Society offices in Calgary, Alberta to enquire into the conduct of Lori A. O'Reilly (the "Member"). The Member was represented by Harris Hanson. The Law Society of Alberta was represented by James Conley. The Member was present throughout the hearing.

Jurisdiction and Preliminary Matters

Jurisdiction was established by Exhibits 1 through 4 inclusive. There was no objection to the composition of the Panel. No private hearing application was made and as such the hearing proceeded in public.

Citations

The Member faced two citations as follows:

1. IT IS ALLEGED that you misled or attempted to mislead your clients, thereby breaching the code of professional conduct, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED that you obtained information contrary to the instructions of your former clients by illegal means, thereby breaching the code of professional conduct and that such conduct is conduct deserving of sanction.

Evidence

The evidence in this matter consisted of sworn testimony of each of the Complainants, N.B. and A.H., the sworn testimony of the Member and the sworn testimony of Kamal Mahmoudi-Azar, a former student of the Member. The Panel also had the benefit of the investigation report of Donald C. Procyk (Exhibit 26).

The evidence was difficult in that the testimony of the Complainants and that of the Member differed in many material respects.

Uncontroverted Evidence

The Panel concluded that the following was uncontroverted evidence:

1. N.B. is a Canadian citizen and ultimately married A.H. in Egypt. They returned to Canada in the spring of 2003 for the purpose of visiting family. Mr. H. obtained a visitor's visa and

Immigration Canada was advised that Ms. B. and Mr. H. did not intend to remain in Canada at that time.

2. The Complainants obviously changed their mind and sought a consultation with the Member to determine the steps that were necessary to obtain immigration status for Mr. H. The consultation fee charged by the Member was $107.00 which the Member indicated would be deducted from her fee if, in fact, she was formally retained.

3. The Member was formally retained on July 16, 2003. The Member was to apply for three things on behalf of Mr. H., namely:

   (a) an extension to the visitor visa (which would be required pending finalization of the immigration application);

   (b) formal immigration into Canada; and

   (c) a work permit.

4. On July 16, 2003, the Member received from the Complainants the sum of $2,085.00 which represented the government fees for the three applications, together with $535.00 representing the remainder of the first half of the legal fees. The balance of the legal fees ($632.00) was to be payable when the decision regarding immigration status was made.

5. While apparently the immigration application and the work permit application could be submitted together, the visitor visa extension application had to be sent separately. While they were both processed in the Vegreville office of Immigration Canada, there were in fact two separate postal codes to which the two applications were sent and the applications were processed by different departments within the same facility.

6. The Complainants were concerned that the visitor visa be extended because if the extension application was not granted, Mr. H. would have had to leave the country on its expiry which was sometime in November of 2003.

7. The Member advised the Complainants that she would be couriering both sets of documents to Immigration Canada and that it would take two business days to arrive by courier.

8. Payment of the application fees was essentially done by way of bank transfer, much in the same way as one might pay a utility bill. In this case the Member would deposit the money into her trust account, would request the bank to make payment of the application fee and would be given receipt for such payment by the bank.

9. The application for immigration and work permit were, in fact, received by Immigration Canada in July of 2003 but the application for the visitor visa extension, according to Immigration Canada, was not received until August 15, 2006 (Exhibit 5).

10. By early September 2003, the Complainants were concerned that they had not heard anything with respect to their visitor visa and indicated that because the Member was not returning phone calls from them, they contacted Immigration Canada directly. Immigration Canada

indicated that they had no record of receipt of the application at that time. Apparently Immigration Canada is not able to confirm receipt of a visitor visa extension application until such time as a file has been opened and an officer assigned to the matter, which can be well after the application actually arrives at their offices.

11. Because of the indication from Immigration Canada that the application had not yet been received for the visitor visa extension, the Complainants phoned the Member's office and asked for confirmation that, in fact, the application had been sent on or about July 18, 2003.

12. The Member's file disclosed a letter to Citizenship and Immigration Canada dated July 18, 2003, expressed to be sent by Xpresspost™ which was the application for immigration status and application for the work permit. That letter indicated that the extension of the visitor visa was being made under separate cover (Exhibit 18, Tab 1). The Member's office caused a fax to be forwarded to Ms. B. at her place of employment which confirmed that the extension application had, in fact, been made and sent by Xpresspost™ on July 18, 2003 (Exhibit 18, Tab 2). This letter erroneously refers to the visitor visa extension application as an "initial work permit application". The Member also forwarded to the Complainants copies of the receipts for the three application fee payments due to Immigration Canada which included a $75.00 visitor visa extension fee. What was provided was a receipt stamped by the Member's bank with a date of July 18, 2003. Interestingly, the barcode receipt for this payment is the next consecutively numbered receipt after a $150.00 payment also dated the same day which is the fee for a work permit application (Exhibit 10, Tab 1).

13. There is no doubt and in fact the Member admits that a visitor visa extension was sent by Xpresspost™ to Immigration Canada on August 13, 2003 and that it was received on August 15, 2003. There is no doubt that this extension was sent from the Member's office and a $75.00 application fee was made. The Member admits that she had no actual knowledge as to whether she, in fact, made the initial application on July 18, 2003 and that she has insufficient accounting records to determine whether, in fact, two separate $75.00 application fees were paid and if so, where the second $75.00 would have come from.

14. There is evidence to show that the Complainants had called Ms. O-Reilly's office in early August to advise that Ms. B. was pregnant and to determine if this would have any impact on the applications to Immigration Canada. While it was unclear as to exactly what date that such telephone conversation occurred, it would appear that it occurred shortly before or on August 13, 2003.

15. In the Member's letter of September 11, 2003, she advised the Complainants that they could expect to hear a decision regarding their visitor visa extension within 2 to 3 weeks. Having heard nothing by October 1, 2003, the Complainants called Immigration Canada and were advised that the application had not been received by them until August 15, 2003 and that it was still in process. The Complainants testified that they completely lost faith in the Member's representation of them as they concluded that they had been misled by the September 11, 2003 letter.

16. The Member admits that during a call from Mr. H. on October 2, 2003, he was very angry and indicated that he no longer wished the Member to represent him on the matter.

17. On July 18, 2003, the Complainants had signed a document entitled, "Authorization to Disclose", which allowed the Member the ability to deal with Immigration Canada on their behalf and to access their file at immigration Canada, or at least that part which was available to the Complainants.

18. On October 6, 2003, the Complainants rescinded their authorization to disclose by written communication addressed to Immigration Canada (Exhibit 9). The Complainants acknowledge that they did not send a copy of this rescission notice to the Member.

19. It appears clear that the Complainants advised the Member or her office on or about October 2, 2003, that because of the handling of the matter, they no longer felt obliged to pay the balance of her account and, in fact, took the position that they should not be required to pay any of her fees. This matter was ultimately resolved by taxation.

20. At some point, it seems clear that Mr. H. advised the Member that he had "changed his address" in respect of the immigration files.

21. Mr. H. ultimately received his visitor visa extension in mid-October, 2003, prior to the expiry of his existing visa.

22. Mr. H. received his landed immigration status on March 24, 2004.

23. The Member forwarded a letter to the Complainants dated May 19, 2004 confirming that Mr. H. had received his immigration status on March 24, 2004 and requesting payment of the balance of her invoice (Exhibit 14).

24. While it is unclear from the evidence exactly how the Member's office received confirmation of the approval of Mr. H.'s landed immigrant status, it would appear that this information was obtained by the Member's office through an internet inquiry which was only available to persons who had authorized access to an applicant's file.

Controverted Evidence

As previously indicated, a good portion of the evidence is disputed. The significant areas of disputed evidence are as follows:

1. While it has been acknowledged by the Member that a visitor visa application was made on August 13, 2003 and received by Immigration Canada on August 15, 2003 and that the application fee was paid by bank payment from the Member's account on August 13, 2003, it is not clear whether a first application had been made on July 18, 2003 and simply gone missing or whether the Member's office neglected to send the visitor visa extension application on July 18, 2003 and sent it for the first time on August 13, 2003. It is also unclear as to whether the Member herself submitted the application on August 13, 2003 or whether this was done by Mr. Mahmoudi-Azar who became the Member's student in early August, 2003. It is also unclear as to who physically attended at the bank to make the $75.00 payment.

2. It is unclear as to who drafted the September 11, 2003 letter from the Member which was faxed to Ms. B. There was some evidence that Mr. Mahmoudi-Azar prepared this letter but it is clear that the Member signed same.

3. Mr. H. indicates that on October 2 or October 3, 2003, he spoke to the Member personally, confirmed that her services were no longer required and confirmed that she had no further authorization to access his immigration files. Both Mr. H. and Ms. B. stated that after October 3, 2003, they had no direct personal contact with the Member or the Member's office, with the exception of one telephone call by Mr. H. to Mr. Mahmoudi-Azar where Mr. H. confirmed that he was still unhappy with the Member, but apologized for previously being uncivil towards Mr. Mahmoudi-Azar. The Member on the other hand indicates that while it was clear to her that her services were terminated, it was not clear to her that her authorization to access Mr. H.'s file with Immigration Canada had been terminated as well. More significantly, Ms. O'Reilly indicates that approximately 2 weeks after the October 2nd or October 3rd, 2003 telephone conversation between the Member and Mr. H., the Member received another telephone call from Mr. H. The Member states that during the conversation, Mr. H. indicated that he, in fact, had received his visitor visa extension, that Mr. H. apologized for his behaviour and that he had "already changed his mailing address with Immigration Canada". The Member testified that as a result of this conversation, she thought that everything was okay and that given that the balance of the applications had been made and were simply subject to processing by Immigration Canada that there was really nothing further for her to do on the file and that she acknowledged that the ultimate decision on the applications would go directly to Mr. H. as he had changed the address.

4. Mr. Mahmoudi-Azar indicates that he, in fact, had direct telephone contact with Mr. H. after October 3, 2003 on more than one occasion and that while Mr. H. still didn't seem particularly pleased with the Member's conduct, according to Mr. Mahmoudi-Azar, Mr. H. had calmed down a great deal and, in fact, spoke to him generally regarding a number of immigration-type issues. Further, Mr. Mahmoudi-Azar testified that the Member, in fact, came into his office to advise him of a call from Mr. H. along the lines of the testimony of the Member and, in fact, Mr. Mahmoudi-Azar further testified that the Member had advised that Mr. H. had indicated that he was, in fact, prepared to pay the balance of the legal fees.

5. The Complainants testified that there was no question in their mind that the Member's authorization to access their Immigration Canada files had been rescinded by their verbal advice on October 2 or October 3, 2003. They did acknowledge, however, that there was no written communication to this effect given to the Member or the Member's office, even though written correspondence was issued to Immigration Canada to confirm the rescission.

6. The Member testified that, although she didn't discuss the issue of her being rehired in the mid-October, 2003 telephone call with Mr. H., she didn't particularly consider it necessary to do so as a result of the fact that in her view, her involvement in the matter was largely completed.

7. It is unclear who in Ms. O-Reilly's office contacted Immigration Canada to determine that Mr. H. had, in fact, received his immigration status on March 24, 2004 but she did acknowledge that it is most likely that such access occurred through an internet access

whereby she knew that she was required to have specific authorization to access the file. She indicated that in her view, she had such access based on the mid-October, 2003 conversation with Mr. H.

Submission of Counsel re Guilt

Mr. Conley submitted on behalf of the LSA that the burden of proof in respect of the citations is as set forth in Sections 39 to 40 of the Hearing Guide. In matters involving deceit or illegally accessing information, Mr. Conley admitted that the degree of the onus of proof was higher than in most circumstances. He confirmed that in his view, the onus was higher than on the balance of probabilities, but not as high as beyond a reasonable doubt. Mr. Conley suggested that the evidence of the Complainants should be given greater weight than that of the Member as a result of the fact that the Complainants have no real benefit to be gained by having the citations made out, since the taxation of the accounts has already been concluded. He also submitted that the Complainants' recollection of events should be clearer to them than that of the Member who had approximately 200 files to deal with at the time. Mr. Conley admitted that if the Member was honest in believing that she still had the ability to access Mr. H.'s Immigration Canada files and if her belief in that regard was reasonable, then Citation No. 2 could not be made out. He confirmed it was the Panel's job to determine if in fact the Member did have an honest belief that she had such right of access and if such belief was reasonably founded.

Mr. Hanson indicates that the evidence of Mr. Mahmoudi-Azar is key to this matter as he is essentially a neutral observer in respect of this dispute between Member and client. This is especially so given the fact that Mr. Mahmoudi-Azar's departure from the Member's employ was apparently somewhat less than cordial. Mr. Hanson urged the Panel to conclude that the September 11th letter to the Complainants was not done with the intent to mislead the client, but rather to provide them with what they had requested, namely confirmation that the visitor visa extension application had been made on July 18, 2003, which information was readily available from the file (even though there was some question as to the accuracy of such information at that time). Mr Hanson further urged the Panel to conclude that the threshold test is not met with respect to the second citation as it appeared to be unclear from the evidence as to whether the Complainants had even advised the Member that she was no longer entitled to access their records and that there was no other way for the Member to determine if she, in fact, had earned the balance of her fee.

Decision as to Guilt

With respect to Citation No. 1, there appears to be no doubt that the Member's office made an application for a visitor visa extension on August 13, 2003. Regardless of whether or not an application had been previously been sent on July 18, 2003, it was clearly within the Member's knowledge that the August 13, 2003 application had been made and there must have been some issue as to the sending or receipt of the July 18, 2003 application or it would not have been re-sent. Notwithstanding that there was little harm that could have come from the delay in making the application (as evidenced by the fact that the application, in fact was granted in mid-October, 2003), the Panel had no doubt that the Complainants had made it clear to the Member that this was very crucial to them. When the Complainants requested confirmation as to the date that the application was made, the Panel concluded, on the basis of the evidence before it, that the

Member knew that an August 13, 2003 application had been made and at the very least, the Member should have advised the Complainants that a subsequent application had been made (even assuming that an original application had been made on July 18, 2003).

In the result, the Panel concluded that Citation No. 1 is made out.

With respect to Citation No. 2, while the Member may have had a number of opportunities in which to clarify her status as the complainant's solicitor either during or after the mid-October, 2003 conversation, she admits that she did not do so. On the other hand, the Complainants, who appear to have kept very detailed written records of the matters before the Panel, admitted that they did not think to advise the Member in writing that her access to their Immigration Canada files had been rescinded. The Panel concluded that, on the basis of the threshold as confirmed by Mr. Conley, the evidence was not sufficient to conclude that the Member did not have an honest belief that she was back on sufficiently good terms with the Complainants that she could access their records or that her belief in this regard, while tenuous, was unreasonable. Citation No. 2 is accordingly dismissed. While the threshold test was not made out in respect of Citation No. 2, the Panel commented that the Member should be much more cognisant of her ethical obligation in respect of this confidential information and that her right to access files is not simply a tool in order to assist her in collection of her accounts. There appeared to be enough questions in respect of this matter that a prudent solicitor would likely have clarified whether they were still retained by the complainant and whether or not they were still entitled to access such confidential information.

Submission re Sanctions

Mr. Conley, on behalf of the LSA, indicated that because Citation No. 1 is a matter dealing with the integrity of the Member, and because of integrity of the legal profession is such a key principle to be protected by the LSA, it was important that LSA be seen to be denouncing of this type of conduct and that a fine of $1,000.00 would likely be an appropriate fine under the circumstances.

Mr. Hanson urged the Panel to conclude that this was not really a matter of integrity on the part of the Member, but was simply a result of carelessness. Mr. Hanson tendered a number of written commendations on the work performed by the Member for other clients (Exhibit 30) and suggested that Panel should conclude that this was a matter of carelessness versus integrity. Mr. Hanson suggested that there was no necessity of a fine in this matter and that the time spent by the Member in dealing with this matter and payment of costs should be a sufficient sanction. Further, he urged that only one-half of the costs should be awarded given the mixed success of the citations and that the Member be given until January 31, 2007 to pay.

Decision As To Sanction

Having regard to the submissions of counsel, the Panel determined that a fine of $500.00 with respect to Citation No. 1 was sufficient to confirm that the LSA must be seen to be ensuring that its members act in a fully ethical manner and with the highest of integrity when dealing with members of the public. The Panel further concluded that the Member should pay 50% of the actual costs when levied.

Payment of the fine and costs as awarded are to be paid in full by January 31, 2007, in default of which the Member would stand as suspended.

No referral to the Attorney General is required in this matter.

No separate notice to the profession is required in respect of this matter.

The Chair delivered a reprimand to the Member.

This decision, the evidence and exhibits in this hearing are to be made available to the public.

Dated this _____ day of October, 2006.

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Stephen Raby, Q.C.

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John Higgerty, Q.C.

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Yvonne Stanford