

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
MS. DIANA RUTSCHMANN,
a Member of The Law Society of Alberta

INTRODUCTION

1. On January 31, 2006, a Hearing Committee of the Law Society of Alberta (LSA) convened at the LSA office in Calgary, Alberta to inquire into the conduct of Ms. Diana Rutschmann, a Member of the LSA. The Committee was comprised of Charles Gardner, Q.C., Chair, and Morris Taylor and John Prowse, Q.C. The LSA was represented by Lindsay MacDonald, Q.C. and the Member was represented by Patrick Peacock, Q.C. The Member was present for the Hearing.

JURISDICTION AND PRELIMINARY MATTERS

2. At the commencement of the Hearing, a book containing Exhibits which were marked as Exhibits 1 through 51 was entered.
3. 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 the jurisdiction of the Committee to proceed with the Hearing.
4. There was no objection by the Member's Counsel or Counsel for the LSA regarding the constitution of the Committee.
5. The Certificate of Exercise of Discretion and Affidavit of Service of a letter and Private Hearing Notice on Ms. "G" were entered as Exhibit 5. Counsel for the LSA advised that the LSA had not received a request for a private hearing and neither Counsel for the LSA nor Counsel for the Member requested a private hearing; accordingly, the hearing was held in public. Counsel agreed that Ms. "G", the mother of the child who is the subject of an adoption to which a number of the citations related, be referred to at the Hearing and in this report as Ms. "G" to protect the identity of the child.

CITATIONS

6. The Member faced the following citations:

Citation 1: IT IS ALLEGED that you forged or caused to be forged a signature on certain documents submitted to the Court and

thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you swore a false Affidavit of Service on October 19, 2001, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 3: IT IS ALLEGED that you failed to serve notice of the application for adoption on the Director of Child Welfare and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 4: IT IS ALLEGED that you misled or attempted to mislead the Court in applying to Mr. Justice Langston for a Fiat when your identical application to Mr. Justice MacLean had been denied, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 5: IT IS ALLEGED that, in failing to disclose to Mr. Justice Langston the fact that Mr. Justice MacLean had refused your previous application for a Fiat, you breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 6: IT IS ALLEGED that you misled or attempted to mislead the Law Society with respect to the Affidavit sworn on October 19, 2001, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 7: IT IS ALLEGED that you failed to respond to the Law Society about the foregoing matters on a timely basis and in a complete and appropriate manner, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 8: IT IS ALLEGED that you failed to respond to the Law Society about the matters raised by Ms. M. Herrmann, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 9: IT IS ALLEGED that you failed to respond to opposing counsel, Lori Andreachuk, on a timely basis and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Citation 10: IT IS ALLEGED that you failed to respond to the Law Society about the allegation that you failed to respond to Lori Andreachuk on a timely basis and thereby breached the *Code of Professional Conduct*.

EVIDENCE

7. A binder with agreed Exhibits 1 through 51 was entered by consent of the parties.
8. Exhibits 52, 53 and 54 were marked as Exhibits by consent during the course of the Hearing.
9. The Hearing Committee heard evidence from Ms. "G", Mr. "A" and the Member.

FINDINGS OF FACT

10. The Member at all material times practiced law in the City of Medicine Hat, Alberta. The first seven Citations which she faced at this Hearing relate to two private adoption files in which she was retained to represent the Applicant. The first in which her client was Mr. "A", involved the adoption of a boy whose mother was Ms. "G" (hereinafter referred to as the "G adoption"). The second involved an adoption of a child by the child's own mother and grandmother (hereinafter referred to as the "A adoption").
11. Citation 1 containing allegations of forged Court documents, relates to the G adoption. The position of the LSA was that the Member had forged or caused to be forged the signature of Ms. "G", the mother. The signatures represented the mother's consent on a Provincial Court Custody Order and on Court of Queen's Bench adoption documents. The documents themselves were dated in or about the years 2000 and 2001. The Citation arose out of a concern of a Justice of the Court of Queen's Bench, which was brought to the attention of the Law Society at his direction by a Clerk of the Court, that there were certain inconsistencies in the signatures of Ms. "G" on the documents.
12. The evidence to support the Citation consisted of the documents themselves, the written report of a handwriting expert engaged by the LSA, a statement of Ms. "G" given to a Law Society investigator (the transcript of which formed part of the Exhibits), and the evidence which Ms. "G" gave at the Hearing that the signatures were not hers.
13. The documents do, in fact, display some inconsistencies supporting the original concern. The handwriting expert's opinion is inconclusive, as he felt he that he

could not rule out Ms. "G" as the signer of the document. Mr. "A" was called on behalf of the Member and testified that he was present in the Member's office when Ms. "G" signed the documents. The Member testified that she did not forge the documents and they were, in fact, signed by Ms. "G" in her presence.

14. In the result, if Citation 1 was to be made out, it would have to be based upon the evidence of Ms. "G". It should be noted that at no time has Ms. "G" ever contended that she did not consent to Mr. "A" being initially granted joint custody of the child or subsequently, that she did not consent to him adopting the child. The issue is simply whether or not the impugned signatures are hers. While the Hearing Committee did not feel that Ms. "G" was deliberately attempting to mislead, it was most apparent that her evidence was woefully unable to support the Citation. As Mr. MacDonald noted, Exhibit 52, her recollections to him on December 5, 2005 about the signatures, varies significantly with what she had told the LSA investigator in her interview with him (Exhibit 33). Further, under cross-examination at the Hearing, Ms. "G" acknowledged that she was unsure about whether or not the signatures were hers.
15. Clearly her evidence was unreliable. This was acknowledged by Mr. MacDonald on behalf of the LSA, who said that it falls quite short of supporting a conviction. The Hearing Committee agreed and Citation 1 was dismissed.
16. Citations 2 through 7, in a somewhat intertwined way, relate to the Member's handling of the G adoption and the A adoption both in or about the years 2001/2002. Both adoptions involved what was an apparently unique approach by the Member in which she, in order to preserve the rights of the natural parent (who would not in the normal course be adopting), named that parent as a co-petitioner. The Member also sought to avoid proceeding through a private adoption agency as was required by the relevant legislation for non step-parent type adoptions. In both cases, the mother who was consenting, in the G adoption to the man who raised the child and who thought erroneously that he was the natural father, and in the A adoption by the child's grandmother, were named as a co-petitioner to preserve the mother's status. It seems, at least insofar as these circumstances illustrate, the Member's unique approach to preserve this status had no foundation in law.
17. The Member testified that in an earlier file (the "L adoption") she had attempted essentially the same thing with the assistance of Mr. Justice Cairns, who had provided a required filing Fiat after showing an interest in this new methodology and having a student prepare a Brief supporting the procedure. The Member seems to make much of the significance of that Brief to support the propriety of what she was purporting to do in both the A and G adoptions.

18. Citations 4 and 5 stem from the G adoption and the initiating Fiat application, which the Member was required to make to proceed in this unique fashion. It is to be noted that prior to seeking the Fiat in G, the Member made a Fiat application in A before Mr. Justice Cairns. Interestingly, the Member did not, in this application, refer his Lordship to the earlier L adoption or the Brief of Law, and in fact, in the face of Justice Cairns' reluctance, obtained the Fiat only on the basis that the legal foundation for the procedure would be fully established at the time of the application for the actual adoption order.
19. Justice Kent granted that Order, again somewhat reluctantly as the transcript discloses, on the strength of representations from the Member that there was legal authority for such from Justice Cairns.
20. To say the least, this caused the Hearing Committee to have grave concerns about the manner in which the Member was ferrying this unique procedure through the Courts.
21. Returning to the G adoption, the Member found herself before Justice McLean who, it seems, already had suspicions about the signatures that are subject of the Citation 1 allegation. In a Private Chambers Application, it was clear to the Member that Justice McLean was having no part of this unique procedure and her application for the Fiat was dismissed in what will be described as a brusque fashion. This took place in April of 2002.
22. The Member, some eight days later in that month, then applied before Justice Langston for the same Fiat. She testified that she could do so as she had asked Justice McLean if she could make the application before another Judge and his reply was words to the effect that he didn't care what she did. The Member also testified that she did not have a good relationship with Justice McLean. No transcript of the private chambers application exists. She testified further that through oversight, she neglected to tell Justice Langston that Justice McLean had recently denied her Application. Oversight spawned by a busy day in Court, was her explanation for this to the Committee. In any event, Justice Langston denied the application for the Fiat and that was the end of the G adoption.
23. The Hearing Committee was troubled by this explanation, given her earlier experiences before Justice Cairns and Kent in the A adoption and the obvious recent unpleasant rejection of her application by Justice McLean. Oversight does not seem a credible explanation in those circumstances for the Member not fulfilling her obvious legal duty to disclose the earlier application. In any event, the Member did admit at the Hearing that she was bound by that duty and to fail to fulfill it was conduct deserving of sanction. This then was an admission of guilt with respect to Citation 5, which the Committee found to be in an acceptable

form. As a result of the admission, Counsel for the LSA invited the Committed to dismiss Citation 4 and it did so.

24. This report will now return to the A adoption to address Citations 2, 3 and 6. The Order granted by Madam Justice Kent was dated September 10, 2001. In Order to perfect the adoption, the relevant legislation required the Member to serve the Adoption Petition on certain parties including the Director of Child Welfare and the other parent of the child, and to file with the Court proof of that service. The Clerk's Office at Medicine Hat, through letters and telephone calls, brought to the attention of the Member that the necessary proof of service had not been filed. Eventually, the Member's Affidavit of Service, dated October 19, 2001 (Exhibit 12) was filed. It was subsequently determined and the Member admitted such at the Hearing that the necessary service had not taken place and the Affidavit of the Member was false.
25. The Member's admission that she had sworn a false Affidavit and that such was conduct deserving of sanction as alleged in Citation 2, was accepted by the Committee. The Member testified at the Hearing that she did not feel that she was required to serve the father; that she had not served the Director but that she thought she had done so. Mr. Peacock, on behalf of the Member, argued that simply not doing as the Statute required, while wrong, was not necessarily sanctionable conduct. The Committee's suspicions about the Member's intent in not serving, given the uniqueness of the procedure and the subsequent false Affidavit of Service, were aroused. However, given the Member's admission regarding Citation 2, the Hearing Committee chose to accept what Mr. MacDonald described as an arguable point by Mr. Peacock and granted the Member the benefit of the doubt and dismissed Citation 3.
26. Of course, the swearing of a false Affidavit by a lawyer is a most serious matter but things were made worse by the Member here when facsimile documents were manufactured in the Member's office in an attempt to conceal the swearing of the false Affidavit. These circumstances came to light during the LSA investigation. While it was never clear to the Committee, primarily as a result of the Member's poor recollection, whether the evidence was manufactured by the Member or a staff member at her behest or whether it was done at the time of the swearing of the false Affidavit, or much later during the LSA investigation, the fact that it happened is of grave concern. Notwithstanding the lack of forthrightness in her testimony, the Member admitted that she intended to mislead the Law Society by the manufactured evidence and this was sanctionable conduct. The admission was accepted by the Committee.
27. Citation 7 is founded on the Member's failure to respond to the LSA in a complete and appropriate manner concerning the allegations arising out of the G and A adoptions. The Member, at the Hearing, admitted that she had failed to do

so and that this was sanctionable conduct. The admission was accepted by the Hearing Committee.

28. Citation 8 stems from two complaints advanced against the Member in January 2002 by Marilyn Herrmann, a lawyer, about the Member's conduct in two matrimonial files in which Ms. Herrmann and Ms. Rutschmann represented opposing parties. The Member responded, at the request of the LSA, to the complaints. Ms. Herrmann then responded to the Member's response, and that response was forwarded on to the Member for reply. The Member did not reply, feeling that her original response adequately set out her position. This Citation relates to her failure to respond to Ms. Herrmann's second letter. As the Member initially responded and it was apparently unclear as to whether or not a subsequent response was required, Citation 8 was dismissed by the Hearing Committee.
29. The final two Citations arise from the complaint of a client of another lawyer, Lori Andreachuk, that the Member failed to respond to an offer of settlement made to her by Ms. Andreachuk in a timely fashion. The offer was made to the Member by letter dated December 2004 and the complaint to the Law Society is dated April 19, 2005. Ms. Andreachuk wrote a second letter requesting a response from the Member on February 22. The Member never did respond.
30. The Member testified that her reason for not responding was that she had a difficult client who would not provide her with his position concerning the offer, therefore she could not respond. Of course, she should have not simply ignored Ms. Andreachuk; however, the Committee did not feel that the circumstances warranted a finding of sanctionable conduct; and accordingly, Citation 9 was dismissed.
31. Unfortunately, the Member chose not to respond to the LSA concerning this last complaint and admitted at the Hearing that her failure to do so amounted to sanctionable conduct; an admission that was accepted by the Hearing Committee.

DECISION AS TO CITATIONS

32. In summary, the Committee found that the Member's conduct had been made out and was sanctionable with respect to Citations 2, 5, 6, 7 and 10 and Citations 1, 3, 4, 8 and 9 were dismissed.

SANCTION

33. Mr. MacDonald, on behalf of the LSA, placing particular emphasis on the Citations relating to the false Affidavit and the manufactured or forged documents

and the underlying deceitfulness of that conduct, argued that disbarment or a lengthy suspension were the only sanctioning options open to the Committee.

34. He felt that disbarment was the more appropriate option, given that the Member's conduct was "calculated and deliberate", the conduct was not repudiated in the face of opportunities to do so at a later time, particularly when the Member relied upon the manufactured documents long after she had an opportunity to reconsider her position.
35. The Committee was provided with a number of authorities from other LSA discipline proceedings, in which similar conduct involving the swearing of false Affidavits had attracted a variety of sanctions from reprimand to disbarment. Clearly the circumstances of the transgressions and the circumstances of the Member can have a considerable affect on determining an appropriate sanction.
36. Mr. Peacock urged the Committee not to disbar the Member but to consider a reprimand and fine or a short suspension. A lengthy suspension, he felt, would be tantamount to ending the Member's practice as she is now a sole practitioner. He described his client's actions in swearing the false Affidavit as "stupid and obviously doomed to failure"; "an error in judgment." Further, her actions caused no harm to any client. At the time that these events took place, Mr. Peacock reminded the Committee that the Member testified that she was under tremendous strain, working long hours, having taken over the practice of three lawyers in a firm which placed high demands upon her and provided little support. He asked the Committee to consider his client's "gross error in conduct" as stemming from an extremely stressful practice environment from which the Member removed herself in 2004.
37. The move to a sole practice, Mr. Peacock said, has not been without challenges and difficulty for the Member, as evidenced by the more recent, albeit less serious, Citations. However, the Member has also gained some stability in her personal life having recently married a supportive and understanding spouse. She has also begun to access some support from the Practice Review Department of the LSA and has very recently consulted with a psychiatrist, Dr. Boodhoo, who has diagnosed an apparent long-standing depressive illness. Dr. Boodhoo's psychiatric report letter dated December 4, 2005, was marked as Exhibit 53.

DECISION ON SANCTION

38. After deliberating overnight, the Hearing Committee reconvened on February 1, 2006, and the Committee, through the Chair, advised that it was the decision of the Hearing Committee that the Member would be suspended from Membership in the LSA for a period of two years commencing on March 1, 2006. After hearing from Counsel for the LSA and the Member, the Committee determined

- that it was not necessary to appoint a custodian for the Member's practice and that the Member would be granted one month's time to March 1, 2006, in order to make arrangements for transfer of her client's files to other lawyers and to ensure that the LSA was advised of the arrangements that she would make in that regard.
39. On the issue of costs, given that the Member has had some success with respect to the Citations, the Member was directed to pay 2/3 of the actual costs of the Hearing, such costs to be paid to the LSA prior to the Member's reinstatement as a Member.
 40. The Hearing Committee pointed out to the Member that as part of the reinstatement process, she would be required to satisfy the requirements of a reinstatement panel or panels and the Committee noted that it was particularly concerned that the LSA be satisfied that the concerns about the Member's medical condition as raised in Dr. Boodhoo's report be resolved to the satisfaction of any reinstatement panel.
 41. Finally, the Hearing Committee directed that there be a mandatory referral to the Practice Review Department upon Ms. Rutschmann's return to practice to address not only the Member's medical issues but practice management issues in which she acknowledged she requires assistance. This acknowledgment was made in her recent meeting with a representative of the Practice Review Department as described in Exhibit 54.
 42. The Committee refers to the following aggravating factors in support of its decision:
 - a) a demonstrated lack of integrity and honesty;
 - b) deceit in the face of the Court;
 - c) the swearing of the false Affidavit made worse by the manufacture of false documents;
 - d) deliberate attempts to mislead the Law Society;
 - e) a general attitude of uncooperativeness with the Law Society throughout its investigations;
 - f) no real indication that even though the Member seems to be in a better practice situation, that she has her difficulties under control, having sought help at such a late stage;
 - g) the Member's lack of forthrightness at the Hearing itself; and

- h) the general effect on the reputation of the legal profession by the conduct of the Member.

43. In support of the Member, the Committee has taken into account the following mitigating factors:

- a) the Member in fifteen years of practice has no discipline record;
- b) the Member has acknowledged her wrongdoings, although not as forthrightly as the Committee would have wished, and only at the eleventh hour during the Hearing;
- c) the Member has left what was, for her apparently, an unhealthy practice environment;
- d) the Member is now seeking help for the first time in her life with her medical condition;
- e) there seems to be some stability in the Member's personal life;
- f) no specific damage was caused to a client or a member of the public;
- g) as the Member practices in a smaller urban community, her difficulties with the Law Society have become widely known;
- h) the Member received no direct personal gain from her actions;
- i) the Member was under considerable stress at the time; and
- j) the Member's depressive illness as described by Dr. Boodhoo.

44. The Member's conduct in the context of the two adoption files, specifically her lack of candor in Applications before Justices Cairns, Kent and Langston, the swearing of the false Affidavit, and most troubling, the manufacture of false documents and the manner in which the Member dealt with the Law Society concerning these complaints, was very troubling for the Committee and took the Committee to a position just about as close to disbarment as it could come without actually disbarring the Member.

45. The fact that the Member has sought assistance has been cited as a mitigating factor. However, the Committee was very concerned that that help was sought so late in these circumstances. The Committee was not very comforted by Dr. Boodhoo's diagnosis and it has concern about whether or not the Member will be able to ever cope with the stresses of the practice of law in the future. But based upon Dr. Boodhoo's report, in which he states that her long-standing depressive illness has contributed to her ability to function effectively through the years, but

despite this, she has continued to struggle to the best of her ability, and that she has the ability to work on improving her general well-being. As a result, the Committee was not able to find that some treatment, indeed significant treatment, is not going to assist the Member in overcoming her present psychological difficulties and place her in a position where she can at the end of the suspension be able to safely practice law in Alberta. Thus the lengthy suspension was imposed.

OTHER MATTERS

46. The Committee also found that there are reasonable and probable grounds to believe that a criminal offence may have taken place with respect to the swearing of the false Affidavit and the fraudulent manufacture of documents, and accordingly, a direction is made for a copy of the Hearing Report to be forwarded to the Attorney General.
47. A Notice to the Profession will follow as a result of the suspension.
48. With respect to the Exhibits, it was the submission of Mr. MacDonald that none of the Exhibits other than the jurisdictional Exhibits 1 through 5 should be available for public inspection since all deal with private adoptions. Mr. Peacock concurred in that and the Committee made that direction. Finally, the Committee directed that any transcript of the Hearing ordered by a member of the public, be sanitized by changing the names of all clients and non-clients to initials to protect their privacy.

DATED this 22nd day of January, 2007.

Charles D. Gardner, Q.C., Bencher
Chair

Morris Taylor, Bencher

John Prowse, Q.C., Bencher