

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF THEODORE SCHWARTZBERG,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Single Bencher Hearing Committee:

Adam Letourneau, QC - Bencher

Appearances:

Nicholas Maggisano - Counsel for the Law Society of Alberta (LSA)
Theodore Schwartzberg – Self-Represented

Hearing Date:

November 10, 2017

Hearing Location:

LSA office, at 500, 919 – 11th Avenue SW, Calgary, Alberta

HEARING COMMITTEE REPORT

Jurisdiction, Preliminary Matters and Exhibits

1. On November 10, 2017, a Single Bencher Hearing Committee (Committee) convened at the office of the LSA to conduct a hearing regarding Statement of Facts and Admission of Guilt dated August 25, 2017.
2. Mr. Schwartzberg and counsel for the LSA were asked whether there were any objections to the constitution of the Committee. There were no objections to the identity of the Bencher hearing the submissions, on the grounds of bias or otherwise, and the hearing proceeded.

3. The hearing was held in public.
4. The jurisdiction of the Committee was established by Exhibits 1 through 4, consisting of the letter of appointment of the Committee, the Notice to Solicitor pursuant to section 60 of the *Legal Profession Act* (the Act), the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA.

Statement of Facts and Admission of Guilt

5. The Statement of Facts and Admission of Guilt is attached hereto as Exhibit A (the Agreed Statement). This Agreed Statement had been found to be in an acceptable form by a Conduct Committee Panel on September 13, 2017, and therefore this hearing was convened by a single bencher, pursuant to section 60(3) of the Act.
6. Pursuant to section 60(4) of the Act, after a statement of admission of guilt is accepted by the Conduct Committee, it is deemed to be a finding of the Hearing Committee that the lawyer's conduct is conduct deserving of sanction.
7. After hearing submissions by counsel for the LSA and Mr. Schwartzberg and confirming Mr. Schwartzberg's understanding that the Bencher was not bound by the Joint Submission on Sanction, the Bencher confirmed the Agreed Statement constituted a finding of conduct deserving of sanction on four citations, pursuant to s. 49 of the Act.
8. The only question for determination by this Committee is one of appropriate sanction.

Discussion on Sanction

9. The LSA and Mr. Schwartzberg sought a reprimand and hearing costs.
10. Both the LSA and Mr. Schwartzberg rightly noted that Mr. Schwartzberg had freely admitted his error after reporting the matter, which is a mitigating factor. The approach taken by both Mr. Schwartzberg and the LSA in dealing with this matter through a Single Bencher hearing avoided an unnecessary contested hearing, witness inconvenience, and process costs. This is commendable.

Concluding Matters

11. The parties agreed on a reprimand, and the Committee agrees that, on the facts of this case, a reprimand is an appropriate sanction. The reprimand was given at the Hearing and is included here verbatim:

The *Legal Professions Act* sets out the general definition of conduct deserving of sanction in Section 49(1). I will read that for the record:

For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that is incompatible with the best interests of the public or of the members of the society, or tends to harm the standing of the legal profession generally, is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor, and whether or not that conduct occurs in Alberta.

I am going to read a quote from *Lawyers and Ethics Professional Responsibility and Discipline* by Gavin MacKenzie, at page 26-1:

The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases which professional misconduct is either admitted or proven, the penalty should be determined by reference to those purposes.

And then I will also read from *Regulation of Professions in Canada* by James T. Casey, at page 14-4:

Given that the primary purpose of the legislation governing professionals is the protection of the public, it follows that the fundamental purpose of sentencing for the professional misconduct is also to ensure that the public is protected from acts of professional misconduct.

And then I will read one quote from *McKee v. College of Psychologists* from 1994:

The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession.

Mr. Schwartzberg, these are serious breaches of trust with the members of the public. You have breached the trust of a purchaser of a property, as well as a lender related to that transaction, putting both at significant risk.

Mr. Schwartzberg, it's paramount that the public can put its trust in our lawyers. These people and institutions put their trust in you, Mr. Schwartzberg, and you failed them in this instance. By not actively involving yourself in the files, and the complicated legal process of real estate transactions, you put the public at risk. This can no longer happen. You must make every effort to ensure that does not happen again. Your clients depend upon your diligence and your accuracy.

Mr. Schwartzberg, I do commend you for admitting guilt early on in this process, and for facing the consequences of your errors. I do hope that the new systems and assistance that you have put in place, and that your active involvement in Practice Review, will be positive and will protect the public from any future errors or omissions. You must always be cautious about potential conflicts of interest.

Mr. Schwartzberg, these are serious citations that you have been found guilty of, and you should not take this reprimand lightly. I order that Mr. Schwartzberg shall pay costs of \$13,910.71 and that the same shall be paid within one year of today's date. Mr. Schwartzberg shall be referred immediately to Practice Review, and shall cooperate with them fully.

12. Mr. Schwartzberg shall pay the actual hearing costs of \$ 13,910.71 within one year of the date of the hearing, which was on November 10, 2017.
13. Hearing exhibits shall be made available to the public, with the exception that they shall be redacted to prevent the disclosure of confidential or privileged information.
14. There shall be no Notice to the Profession issued.
15. There will be no Notice to the Attorney General.

Dated at the City of Calgary in the Province of Alberta, this 4th day of December, 2017.

Adam Letourneau, QC

SCHEDULE A

IN THE MATTER OF *THE LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF THEODORE
SCHWARTZBERG,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta (the "LSA") on April 1, 1982.
2. My present status with the LSA is Active/Practicing.
3. I practice law in Calgary, Alberta. My practice is comprised of 75% real estate conveyancing, 10% commercial, 5% corporate, 5% matrimonial/family and 5% other areas of law.

R.G. COMPLAINT

4. R.G.'s complaint concerns a real estate transaction that closed in August, 2015. R.G. (the "Purchaser") purchased a residential property (the "[B] Property") from L.J. and J.K. (the "Sellers"). I represented the Sellers, the Purchaser and the Mortgage Lender. M.G. (my "Assistant") completed all documentation relating to the transaction. Both my Assistant and I knew the Sellers very well, and I had acted for them for years. They are in the property development business.
5. Immediately prior to this transaction the Sellers, through a corporation, held a second mortgage on the [B] Property. The first mortgagee began foreclosure proceedings against the owner of the [B] Property at the time, J.C., as a result his default including his failure to keep his property taxes current. J.C. sold the [B] Property to the Sellers in order to payout the first mortgagee. I represented all parties on this transaction and my Assistant requested a payout statement from counsel for the first mortgagee. Counsel for the first mortgagee sent her a payout statement which did not include the property tax arrears. The Sellers obtained financing from private lenders, B.W. and T.C., in the amount of \$209,000, whom I also represented. This amount was deposited into my trust account and my Assistant sent the payout amount of about \$207,000 to counsel for the

first mortgagee on April 30, 2015. My Assistant incorrectly believed that the taxes were paid by counsel for the first mortgagee. I acknowledge however that ensuring the property taxes were paid was ultimately my responsibility, and that it did not occur.

6. The Purchaser and the Sellers entered into four separate Residential Purchase Contracts in relation to the [B] Property because the Purchaser was having difficulty getting financing from the Mortgage Lender. Ultimately the Contract set the purchase price at \$380,000, with a deposit of \$50,000 and financing from the Mortgage Lender of \$330,000. The Purchaser did not have the \$50,000 deposit but the Sellers agreed to accept his mobile home in lieu of it. During the transaction B.W. and T.C.'s mortgage was paid out and discharged. I represented all parties on this transaction.
7. Again the property tax arrears were not paid during this transaction despite a June 29, 2015 email from one of the persons involved to my Assistant advising of an outstanding tax bill and specifically inquiring whether it had been addressed. Also a direction to pay from the Sellers directed me to pay any real estate taxes and arrears necessary to complete the transaction. Again my Assistant incorrectly believed that the taxes were paid. I acknowledge however that ensuring the property taxes were paid was ultimately my responsibility, and that it did not occur.
8. I also failed to provide the Purchaser with final documents from the transaction including the Statement of Adjustments and Trust Reconciliation. I stated that I did not provide documents to the Purchaser as he had not paid my account. However my account was dated May 9, 2016, about 9 months after the transaction closed.
9. After the transaction closed the Purchaser received a tax invoice from the City of Calgary indicating the [B] Property would be sold if the outstanding tax balance of \$5,698.71 was not paid. This ultimately led to a complaint to the LSA by the Purchaser and an investigation by the LSA.
10. Upon receiving notice of the property tax arrears the Purchaser contacted my Assistant to enquire as to why the property tax arrears were not paid. My Assistant determined that she had made an error. She calculated that the Sellers owed \$3,124.50 for the property tax arrears. The Sellers provided it to her at her request and the amount was paid to the City of Calgary on April 19, 2016.
11. The Purchaser received a subsequent invoice from the City that indicated he still owed about \$5,000 despite the \$3,124.50 payment.
12. The Purchaser retained another lawyer, J.D., to address the issue of the property tax arrears, and missing documentation, with me. He contacted me on May 4, 2016. I ultimately provided the Statement of Adjustments and Trust Reconciliation to J.D. on

May 9, 2016, the date of my account. J.D. indicated that despite the recent payment of \$3,124.50 the Sellers were still responsible for arrears and penalties of \$1,947.45. He further noted that the Statement of Adjustments incorrectly showed that the Sellers had paid the 2015 property taxes.

13. My response to J.D. was that the Purchaser never paid the shortfall amount to me and had he done do, the taxes would have been paid. The Purchaser ultimately paid off the property tax arrears to avoid a tax sale. While preparing for my November 2, 2016 interview during the LSA's investigation my Assistant discovered a further error in her calculation of the outstanding taxes, confirming that the payment of \$3,124.50 had been insufficient.
14. The Mortgage Lender's instructions specified that all taxes must be paid in full when the mortgage advance was made. Contrary to these instructions I failed to ensure the property tax arrears were paid or advise the Mortgage Lender of this issue. As stated above, my Assistant incorrectly believed that the taxes were paid. I acknowledge however that ensuring the property taxes were paid was ultimately my responsibility, and that it did not occur.
15. The Mortgage Lender's instructions required that I advise if any credits toward the purchase price in favour of the Purchaser did not proceed through my trust account. I did not advise the Mortgage Lender that the \$50,000 deposit did not go through my trust account as the Sellers agreed to accept the Purchaser's mobile home in lieu of it. My Assistant did provide the Mortgage Lender with a copy of the mobile home sale contract, which she believed was adequate notification.
16. I failed to register the Mortgage Lender's mortgage with Land Titles until two weeks after the mortgage funds were disbursed, leaving the Mortgage Lender unsecured for that time.
17. I acknowledge that the LSA's investigation found that I failed to discharge a mortgage on an unrelated property, and so failed to ensure the Mortgage Lender was registered as first mortgagee on title, contrary to its instructions. The error was not corrected until after it was brought to my Assistant's attention by the LSA's investigator, about 5 ½ months later.
18. I acted for multiple parties on the above transactions without their fully informed and voluntary consent after full disclosure. A conflict letter was signed by the Purchaser, but not the Sellers. I did not disclose to the Purchaser or the Mortgage Lender that I also acted for the private lenders, B.W. and T.C., who had an interest in the transaction closing and having their mortgage paid out. I did not disclose to the Purchaser or the Mortgage Lender that I had acted on the previous transaction, and that the Sellers had

just purchased the [B] Property for substantially less. I did not disclose to the Mortgage Lender that I was acting for both the Sellers and the Purchaser. If I had handled the file personally I would have prepared a conflict letter to all parties.

19. My Assistant handled the above files without supervision from me. I did not see the files or review them. I did not meet with the clients. The Purchaser's potential liability under a CMHC mortgage was explained to him by my Assistant, not me.
20. My firm handled a high volume of files in 2014 and 2015, which put strain on my Assistant and my ability to properly supervise her. I have now changed my procedures and meet with every client and review each file.

Conduct - Admissions

21. I admit that I failed to serve my client, the Purchaser, and that such conduct is deserving of sanction.
22. I admit that I failed to serve my client, the Mortgage Lender, and that such conduct is deserving of sanction.
23. I admit that I acted in a conflict or potential conflict of interest without obtaining my clients' consent or in circumstances where it was not in the best interests of my clients, and that such conduct is deserving of sanction.
24. I admit that I failed to properly supervise my support staff and that such conduct is deserving of sanction.

CONCLUSION

25. I admit as facts the statements in this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.
26. I acknowledge that I have had the opportunity to consult legal counsel and provide this Statement of Admitted Facts and Admission of Guilt on a voluntary basis.
27. For the purposes of Section 60 of the *Legal Profession Act*, I admit guilt to the following conduct:
 1. It is alleged that Theodore Schwartzberg failed to serve his client, the Purchaser and that such conduct is deserving of sanction;
 2. It is alleged that Theodore Schwartzberg failed to serve his client, the Mortgage Lender and that such conduct is deserving of sanction;

3. It is alleged that Theodore Schwartzberg acted in a conflict or potential conflict of interest without obtaining his clients' consent or in circumstances where it was not in the best interests of his clients, and that such conduct is deserving of sanction; and
4. It is alleged that Theodore Schwartzberg failed to properly supervise his support staff and that such conduct is deserving of sanction.

THIS AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT IS MADE THIS 25TH DAY OF AUGUST, 2017.

"THEODORE SCHWARTZBERG"

THEODORE SCHWARTZBERG