

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF LEONARD THOM
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Corinne Petersen – Chair
Nate Whitting – Bencher
Martha Miller – Adjudicator

Appearances

Kelly Tang – Counsel for the Law Society of Alberta (LSA)
Leonard Thom – self-represented

Hearing Date

August 23, 2019

Hearing Location

401,10104 - 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

Overview

1. Leonard Thom was admitted as a member of the Law Society of Alberta (LSA) July 23, 1992. His current status is “retired.” This hearing arises as a result of a complaint from S.M., a former legal aid client, which has resulted in two citations.
2. On August 23, 2019, the Hearing Committee (Committee) convened a hearing into the conduct of Mr. Thom, based on the following two citations:
 - 1) It is alleged that Leonard Thom breached a trust condition to another lawyer and that such conduct is deserving of sanction; and
 - 2) It is alleged that Leonard Thom retained his client, S.M.’s, file materials contrary to the Code of Conduct.
3. After reviewing the evidence and exhibits, and hearing the arguments of the LSA and Mr. Thom, for the reasons set out below, the Committee finds Mr. Thom guilty of conduct deserving of sanction on both citations pursuant to section 71 of the *Legal Profession Act (the Act)*.

As the Committee did not hear submissions on sanction, a separate sanction hearing will be convened to consider those submissions, as well as the submissions of any remaining matters.

Preliminary Matters

4. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested. Accordingly, a public hearing into Mr. Thom's conduct proceeded.

Statement of Facts/Background

5. A statement of admitted facts was provided by Mr. Thom and accepted into evidence. A redacted copy of the statement of facts is attached as Appendix 1. No further evidence was tendered.
6. Both citations arise from the same complaint and the facts pertinent to each citation are interrelated.
7. Mr. Thom was appointed by [L] ([L]) to represent S.M. in matrimonial proceedings. He received S.M.'s file from her prior counsel, F LLP (F) on February 23, 2017 under the trust condition that he would pay F's outstanding account in the sum of \$2,575.53 plus interest after settlement of the matrimonial property dispute or sale of the matrimonial home.
8. On June 12, 2017, Mr. Thom received the proceeds from the sale of S.M.'s matrimonial home and shortly thereafter negotiated a settlement of the matrimonial property dispute.
9. On August 18, 2017, Mr. Thom dispersed funds from the sale of the matrimonial home to counsel for S.M.'s former spouse, to [L] on S.M.'s behalf and the remainder to S.M.
10. In breach of the F trust condition, Mr. Thom failed to pay the outstanding account. Mr. Thom did not, at any time, seek an amendment to or release of the trust condition.
11. On September 25, 2017, S.M. requested that her file be returned to her. Mr. Thom responded, on October 24, 2017, that she would need to confirm payment of the outstanding F account before her file would be released.
12. In response to an enquiry from Information Assessment Counsel for the LSA on November 9, 2017, Mr. Thom advised that he could not return S.M.'s file because of her former counsel's solicitor's lien. No such solicitor's lien had been asserted by F.
13. Notwithstanding a further request on December 28, 2017 by Conduct Counsel for the LSA for Mr. Thom to return S.M.'s file, Mr. Thom did not address the unfulfilled trust condition or the request for return of the file until May 28, 2018 when he contacted F and

was advised the account had been paid. Mr. Thom later learned the account had been paid on August 25, 2017.

14. S.M. was advised that she could pick up her file on June 13, 2018. As of August 19, 2019, the file had still not been received by S.M.

Analysis and Decision – Citations 1 and 2

15. Counsel for the LSA argued that the issue to be determined with respect to both citations is whether the admitted conduct complained of is deserving of sanction.
16. She argued that breach of a trust condition, contrary to s. 7.2-14 of the Code of Conduct (Code), is serious and considered a strict liability offence. She further argued that wrongfully asserting a solicitor's lien and the delay in returning S.M.'s file with no valid reason to retain it were in breach of a number of sections of the Code, including ss. 3.1-1, 3.1-2, 3.2-1 and 3.7-7, which speak to competence, promptness and return of the client's property. These aggravating factors were enough to establish that the conduct complained of in both citations is deserving of sanction.
17. The LSA cited *Law Society of Alberta v. Burgener*, [2010] LSDD No. 195 (*Burgener*), as authority that breach of a trust condition is a strict liability offence. In that decision the hearing committee, relying on the Saskatchewan Court of Appeal decision in *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33, "accepts as an established principle that the offence of breach of trust conditions in contravention of the Code constitutes a strict liability offence" (para. 65).
18. The position of the LSA is that Citation 1 is proven on the basis that breach of the trust condition is a strict liability offence and Mr. Thom has not established that he exercised due diligence to avoid the breach. Regarding Citation 2, she argued that there were several contributing and aggravating factors, which are sufficient to prove that the conduct is deserving of sanction. Those factors include asserting a solicitor's lien when there was none, the fact that the trust condition required Mr. Thom to pay the account, the delay in rectifying the breach promptly and despite LSA involvement, delay in determining whether the F account had been paid, and retaining the file without any valid reason.
19. Mr. Thom argued that breach of a trust condition is not a strict liability offence and that the LSA must prove moral culpability, intent, a mental component or some element of malfeasance. Further, there must be something of "significant gravity" to be conduct deserving of sanction. He argued that the issue for him, understandably, is reputational and that he is disputing the citations because he wishes to retire with a clean record.
20. Mr. Thom relies on several decisions in support of his argument that the LSA has the burden of proving culpability and that not every act of breach of the Code amounts to

professional misconduct: *Law Society of British Columbia v. Martin*, [2005] LSBC 16 (*Martin*); *Law Society of Alberta v. Mirasty*, 2016 ABL 21 (*Mirasty*); *Law Society of Alberta v. Llewellyn*, 2017 ABL 17 (*Llewellyn*) and *Law Society of Alberta v. Vinci*, 2014 ABL 58 (*Vinci*). None of the decisions consider citations related to breach of trust conditions, although some do confirm that there are strict liability offences. These decisions speak to the necessity of finding that the conduct giving rise to the citations must be of a degree and nature which brings the profession into disrepute. The test articulated in *Martin* is “whether the facts as made out disclosed a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct” (para 171).

21. In *Mirasty*, the hearing committee found that the degree of intent required to be proven by the LSA depends on the wording of the citation; some are strict liability offences which can only be discharged where the lawyer establishes due diligence on a balance of probabilities. The committee further found that breach of a strict liability offence (breach of a court order in that instance) in the absence of evidence establishing due diligence “brought the profession into disrepute and that such conduct is deserving of sanction” (para 81). In arriving at this conclusion, the committee found that “[c]onduct deserving of sanction need not be disgraceful, dishonourable or reprehensible” (para. 71). The committee concluded, at paragraph 72:

The fundamental question is simply whether or not the conduct in question is incompatible with the best interests of the public or the practice of law, or whether the conduct, once proven, would tend to harm the standing of the legal profession generally.

22. Mr. Thom argued that *Llewellyn* and *Vinci* are authority for the proposition that sanction does not necessarily follow a breach of a provision which may be considered mandatory or strict liability. However, the Committee notes that neither decision considers citations for breach of a trust condition and, in this respect, the Committee accepts that breach of a trust condition is a strict liability offence as stated in *Burgener*.
23. Mr. Thom has admitted that he breached the trust condition imposed by F. The onus is on him to show that he exercised due diligence to avoid the breach. He has failed to discharge that onus.
24. Mr. Thom has admitted that the trust condition was breached and that there was in fact no solicitor’s lien. The evidence is clear that there were significant, unexplained and inexcusable delays in returning S.M.’s file to her. However, while he admits and regrets that he made a “mistake,” Mr. Thom argues that he retained the file on the innocent but mistaken belief that he was required to assert a solicitor’s lien “by proxy” until he was satisfied that the account was paid. There is no evidence which explains his mistaken belief or the significant passage of time which accrued before the matter was dealt with.

25. While the Committee has some sympathy for Mr. Thom's arguments, and agrees that not every technical breach of a trust condition will in and of itself be conduct deserving of sanction, Mr. Thom's conduct in this case goes well beyond a technical, inadvertent breach.
26. Mr. Thom asserted a solicitor's lien in the face of a breached trust condition when he knew or ought to have known that there was no solicitor's lien. By asserting the solicitor's lien, he was only protecting his own liability to pay the F account, a liability he agreed to when he accepted the trust condition. He was not protecting F.
27. Mr. Thom was, or ought to have been, aware of his breach of the trust condition no later than October 24, 2017 when he wrote to S.M. advising that her file would not be returned until she confirmed the F account had been paid. Liability for payment of the account at that time rested with Mr. Thom. Nonetheless, he maintained the file and continued to assert the solicitor's lien even after he was asked to return the file by the LSA in November 2017. There is no evidence that he took any steps to rectify the breach at any time before he contacted F and was advised on May 28, 2018 that the account had been paid. The fact that the account had been paid in August 2017 suggests that had he enquired earlier, the unacceptable delay in returning the file could easily have been avoided.
28. There is simply no evidence that Mr. Thom took any reasonable care or actions to ensure the breach of the trust condition was rectified or that S.M.'s file was returned to her in a timely manner. Rather he held steadfastly to, at best, a mistaken belief that he had a right to retain the file for more than eight months from September 25, 2017 when S.M. asked for return of her file until June 13, 2018 when he advised her that she could pick it up.
29. Mr. Thom agreed to the trust condition and it was incumbent on him to satisfy that trust condition. By accepting the condition, he took on personal responsibility for payment of the F account. Reframing that responsibility as a solicitor's lien "by proxy" was not an option open to him and he ought to have known this. This is not a simple error of law but a serious error of judgment. His error and actions which followed were not reasonable and cannot be considered due diligence. Rather his actions aggravated the situation and the Committee finds his conduct is serious, incompatible with the public interest and practice of law, likely to harm the reputation of the legal profession and is therefore conduct deserving of sanction.
30. The Committee finds Mr. Thom guilty of conduct deserving of sanction on both citations pursuant to section 71 of the *Legal Profession Act* (the *Act*).
31. As the Committee has not yet heard from the parties with respect to sanction and any other remaining matters, a separate sanction hearing will be convened to consider those matters.

Dated at Edmonton, Alberta, November 4, 2019.

Corinne Petersen

Nate Whitting

Martha Miller

IN THE MATTER OF THE LEGAL PROFESSION ACT

- AND -

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
LEONARD THOM
A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF FACTS

A. INTRODUCTION

1. This hearing arises out of one complaint comprising of two citations.

B. BACKGROUND

2. I was admitted as a member of the Law Society of Alberta (the "LSA") on July 23, 1992. My current status is "Retired".

C. COMPLAINT

3. On August 9, 2017, the LSA received a complaint from S.M., my former client, alleging:
 - a. That I failed to handle her file properly and follow her instructions;
 - b. That I did not communicate with S.M. during the course of my representation of her; and
 - c. That I pressured S.M. to agree to a settlement.

D. CITATIONS

4. On February 12, 2019, the Conduct Committee Panel of the LSA (the "CCP") directed that the following conduct be dealt with by a Hearing Committee as follows:
 - a. That I am alleged to have breached a trust condition to another lawyer and that such conduct is deserving of sanction; and
 - b. That I am alleged to have retained S.M.'s file materials contrary to the Code of Conduct.

E. FACTS

5. In late January 2017, [L] (“[L]”) appointed me to represent S.M. in her matrimonial proceedings. As part of her agreement with [L], S.M. was to reimburse [L] for some of my fees.
6. Before my retainer, S.M. was represented by a non-[L] lawyer, [JM], who at the time worked at the law firm of [F] LLP.
7. I received S.M.’s file from [F] LLP on February 23, 2017 under the trust condition that I would pay S.M.’s outstanding account of \$2,575.53 plus interest at the rate of 1% per annum from September 1, 2016 upon from any matrimonial property settlement or sale of the matrimonial home.
8. On February 22, 2017, S.M. executed an Assignment to [F] LLP, assigning to the law firm her outstanding statements of account plus interest at 1% per annum, due from any matrimonial property settlement or sale of the matrimonial home. The Assignment authorized me as S.M.’s new solicitor to pay the amounts owed under the Assignment to [F] LLP.
9. On June 12, 2017, I received the sum of \$76,099.65 in trust, being the proceeds of the sale of S.M.’s matrimonial home.
10. On July 11, 2017, the parties reached a negotiated settlement of their matter. S.M. was to receive \$58,000.00 from the matrimonial home sale proceeds, and the balance was to be paid to S.M.’s former spouse, A.M.
11. On August 18, 2017, I paid \$18,099.65 to A.M.’s counsel, \$3,000.00 to [L] on S.M.’s behalf, and \$55,000.00 to S.M. I failed to pay [F] LLP’s outstanding account pursuant to the trust condition I accepted.
12. At no time did I seek an amendment or release of the trust condition imposed by [F] LLP, nor did I contact [F] LLP to advise that I did not fulfill the trust condition.
13. On September 25, 2017, S.M. emailed me to request that her file be sent to her.
14. On October 24, 2017, I sent a letter to S.M. advising her that she first needed to confirm that her outstanding account with [F] was paid before her file would be released. I did not receive a response from S.M.
15. On November 9, 2017, I spoke to Information Assessment Counsel for the LSA and was advised that S.M. was concerned she had not received her file back. I asserted that I could not return S.M.’s file materials because of Ms. [JM]’s solicitor’s lien, which I informed S.M. of in my letter of October 24, 2017.
16. I acknowledge that Ms. [JM] did not assert a solicitor’s lien over S.M.’s file for the payment of her fees. Rather, Ms. [JM] had transferred S.M.’s file to me under the trust condition that I pay her fees, plus interest, upon receipt of settlement funds.

17. On December 28, 2017, I spoke to Conduct Counsel for the LSA, who requested that I return S.M.'s file.
18. I did not take any steps to address the trust condition or S.M.'s request for her file until May 28, 2018, 8 months after S.M.'s request, when I contacted [KH], Legal Assistant at [F] LLP. Ms. [KH] advised me that S.M.'s account had been paid.
19. On May 29, 2018, I advised Conduct Counsel for the LSA that S.M.'s account with [F] LLP had been paid and that I would release S.M.'s file to her.
20. On June 13, 2018, my assistant advised S.M. that she could attend at my office to receive her file.
21. S.M. did not respond to my assistant until December 30, 2018 when she indicated via email that she wanted her file mailed to her. When my assistant advised me in January 2019 that she had received this email, I instructed her to put postage on S.M.'s file package that we had prepared for her and to mail it. After giving these instructions, I assumed the file had been properly mailed and that the matter was concluded.
22. Upon reviewing the December 30, 2018 email S.M. sent to my assistant, I realize and acknowledge that the address S.M. provided to my assistant was incomplete or insufficient and that I did not verify the address in January 2019 prior to instructing my assistant to mail the package out.
23. In July of 2019, I learned that S.M. had paid her outstanding account to [F] LLP on August 25, 2017.
24. In August of 2019, I learned from the LSA that S.M. did not receive the file package that my assistant mailed in January 2019. I am currently working with the LSA to send a copy of S.M.'s file to her.

F. ADMISSIONS OF FACTS

25. I admit as facts the statement contained in this Statement of Facts and acknowledge that they shall be used for the purpose of these proceedings.

G. INDEPENDENT LEGAL ADVICE

26. I agree that I had the opportunity to consult with legal counsel and have elected not to do so. I confirm that I have signed this Statement of Facts voluntarily and without any compulsion or duress.

THIS STATEMENT OF FACTS IS MADE THIS 19th DAY OF AUGUST, 2019.

“Leonard Thom”

LEONARD THOM