

**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 BRIAN FISH  
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**Hearing Committee**

Walter Pavlic, QC – Chair  
Sandra Mah - Adjudicator  
Grace Brittain – Adjudicator

**Appearances**

Kelly Tang – Counsel for the Law Society of Alberta (LSA)  
Simon Renouf, QC – Counsel for Brian Fish

**Hearing Date**

March 24, 2021

**Hearing Location**

Virtual

**HEARING COMMITTEE REPORT**

**Introduction and Background**

1. This matter involves one complaint and one citation. The matter referred by the Conduct Committee Panel to Hearing is an allegation that Brian Fish provided confidential information arising out of a LSA investigation to a third party without the consent or authorization of the LSA or Court Order and that conduct is deserving of sanction.
2. The parties have provided a Statement of Admitted Facts and Exhibits (Statement) and a copy of that Statement is attached as Schedule A.
3. The circumstances giving rise to the current complaint stem from a 2014 complaint. In the 2014 complaint, Mr. Fish received a letter from the LSA emanating from section 53 proceedings pursuant to the *Legal Profession Act*. That letter was marked Personal & Confidential and stated, among other things, that the materials were not to be used in any other proceedings or for any other collateral purpose.
4. An Investigation was subsequently commenced. An Investigation Report was completed on December 14, 2015. That Investigation Report was accompanied by a cover letter marked Personal & Confidential which stated that all materials disclosed as part of the

investigation were subject to an undertaking that they will not be used in any other proceedings, nor for any collateral purpose. That same Investigation Report was then subsequently provided to Mr. Fish on September 12, 2016, along with a cover letter marked Confidential which stated that the contents were not to be disclosed to anyone or used for any other purpose without the express consent of the LSA or a Court Order. On January 18, 2017, the matter proceeded before a single Bencher Hearing Committee. Sometime in 2017 subsequent to the single Bencher Hearing, Mr. Fish shared some or all of the contents of the Investigation Report with a third party, Mr. [GE]. Mr. [GE]'s spouse and Mr. Fish were Defendants in separate lawsuits brought by a common Plaintiff. It was expressly admitted by Mr. Fish that he never sought the consent of the LSA prior to disclosing the contents of the Investigation Report. He also did not obtain a Court Order allowing him to release the Investigation Report.

### **Preliminary Matters**

5. There were no objections to the constitution of the Hearing Committee or its jurisdiction. A private hearing was not requested so a public hearing into Mr. Fish's conduct proceeded.

### **Application for Discontinuance**

#### *Submissions by Parties*

6. The Hearing Committee was advised that Mr. Fish's counsel would bring an Application for a Discontinuance (Application) of the current citation. The grounds in support of the Application are that:
  - A) There are no factual issues in dispute;
  - B) The legal issues involved were not clear at the time of the actions by Mr. Fish and this is not an appropriate case to clarify the legal issues;
  - C) The main issue complained by the complainant was not engaged by Mr. Fish's admitted conduct; and
  - D) Mr. Fish is now retired from practice and is an inactive (retired) member of the LSA.
6. Mr. Fish argues that the case law relied upon by the LSA (*Simon v. Feeney*, 2020 ABQB 641) found that materials generated in the course of the LSA Investigation are subject to an implied undertaking to the Court. Mr. Fish argues that the *Feeney* case is distinguishable on a number of grounds: the actions of Mr. Fish occurred prior to the decision in *Feeney*, there was no solicitor client privilege involved in the material that Mr. Fish forwarded to Mr. [GE], Mr. Fish was the subject of the LSA Investigation, there is no compelled statement by any other lawyer, and the *Feeney* case involved LSA documents that were filed in court proceedings.
7. Mr. Fish further argued that there is no allegation made of breach of solicitor-client confidentiality and that the materials provided by the LSA to Mr. Fish would not meet the

requirement of an undertaking or trust condition and that any undertaking imposed by a professional body on a member must be clear and unequivocal.

8. Mr. Fish also argued that he is now over 80 years of age and has retired.
9. The LSA responded to Mr. Fish's Application by referencing the Conduct Committee Guideline, which sets out the considerations a Hearing Committee ought to apply when hearing discontinuance applications. That Guideline states that while a panel may discontinue a proceeding any time before a hearing has commenced, deference should be shown to the original Conduct Committee Panel that referred the matter to Hearing. The Conduct Committee Guideline further states that there are limited circumstances where a discontinuance application may be considered and references two instances. The first is where counsel for the LSA advises that the Threshold Test is not met or when new information has arisen and that information was not before the original panel and was sufficiently material that it could have had an impact on the decision made by the original panel.
10. The LSA argues that the Threshold Test has been met and that there is no new information and as a result there should be no discontinuation.
11. The LSA also argues that the LSA Pre-Hearing Guideline confirms that the Threshold Test ought to be applied in the context of discontinuance applications. The Threshold Test provides that the panel should consider whether there is a reasonable prospect that a Hearing Committee would find that the lawyer committed the alleged conduct and, if so, whether such conduct would be deserving of sanction. The LSA argues that Mr. Fish has admitted that he shared some or all of the LSA report with a third party, without the consent or authorization of the LSA or a Court Order and as a result, the Threshold Test has been met. The LSA argues that a review of public interest factors including the circumstances of the complaint, the need to maintain public confidence in the profession, the lack of any of appropriate alternative to a hearing and Mr. Fish's disciplinary history, which dealt with previous inappropriate disclosure of confidential information, combine to further satisfy the Threshold Test.
12. The LSA responded to each of Mr. Fish's grounds for the Application as follows:
  - A) It is not a relevant consideration that there are no factual issues in dispute. There ought to be no basis to discontinue the proceedings simply because Mr. Fish made an admission.
  - B) Although the *Feeney* case was decided after Mr. Fish's conduct gave rise to the citation, the *Feeney* case accepted that the implied undertaking of confidentiality for professional disciplinary processes was established by the Alberta Court of Appeal prior to the *Feeney* decision. *Feeney* also determined that the provisions of *the Legal Profession Act* and the Rules of the LSA were subject to confidentiality. While Mr. Fish had not disclosed any materials that were subject

to solicitor-client privilege, the Investigation Report disclosed by Mr. Fish contained numerous privileged documents.

- C) With respect to Mr. Fish's admission that the main issue complained of was not engaged by Mr. Fish's admitted conduct, the LSA states that it is within its authority to deal with any conduct of any member that is incompatible with the best interest of the public and that the LSA may investigate any other conduct of a member that arises in the course of an investigation.
- D) Finally, the LSA argues that retirement and an inactive status should not justify discontinuance of these proceedings. To rely upon that ground fails to consider the public interest and would act to undermine the LSA's ability to pursue inappropriate conduct of lawyers and protect the public.

### *Analysis and Decision*

- 13. We agree with Mr. Fish that there are no factual issues in dispute. However, the lack of a dispute is not necessarily a relevant factor in considering whether proceedings should be discontinued. It is not unusual in discipline matters to have the parties agree to a Statement of Facts or have the cited member make admissions. Neither of those events warrants or supports the discontinuance.
- 14. There is much discussion concerning the impact of the *Feeney* decision and primarily the fact that it was decided after Mr. Fish's cited conduct.
- 15. A careful review of the *Feeney* decision makes it clear that Feeny accepted that there is an implied undertaking of confidentiality in the professional disciplinary process, and that this confidentiality applies to all of the conduct materials. While *Feeney* does reference solicitor-client privilege, it does not limit itself to only those circumstances where solicitor-client privilege is involved. The fact that Mr. Fish did not share solicitor-client privileged materials with Mr. [GE] does not negate the impact of *Feeney*. Mr. Fish's attempt to distinguish the *Feeney* decision on the basis that the Feeney documents had been filed in Court proceedings also does not assist him. We interpret *Feeney* as taking a broader perspective and creating confidentiality in the totality of the LSA materials at issue.
- 16. The fact that the issue ultimately giving rise to the citation was not contained in the original complaint also does not assist Mr. Fish. The LSA has a very clear mandate to investigate any matters that arise during the course of an investigation. The fact that the citation arose as a result of further investigation in no way impacts the validity of the citation.
- 17. Finally, we do not accept that Mr. Fish having retired and now being an inactive, non-practicing member of the LSA in anyway absolves him from the consequences of his action. Such a consideration would allow lawyers facing citations to avoid the consequences of those citations simply by retiring or leaving the practice. Retirement or moving to non-practicing status does not absolve Mr. Fish of the consequences of his

actions.

18. As a result of the above, the Application is dismissed. The matter immediately proceeded to Hearing.

### **Finding on Guilt**

19. As referenced earlier, the Statement, which references the Mr. Fish's admission to the conduct giving rise to the citation, is attached as Schedule A. At the Hearing, Mr. Fish called no further evidence. The LSA reviewed the relevant facts and argued that Mr. Fish's conduct is deserving of sanction as the breach of confidentiality has the ability to erode trust in the disciplinary process and harm the status of the legal profession.
20. Mr. Fish argued that the LSA failed to obtain an undertaking to not disclose the contents of the Investigation Report. He further argued that such undertakings must be unambiguous and in writing similar to those obtained by prosecutors in criminal proceedings. The failure of the LSA to obtain an undertaking ought to absolve Mr. Fish of his responsibility. He further argued that there is no evidence of any negative consequences to any party as a result of his disclosure of the information and that his behaviour did not constitute conduct deserving of sanction.
21. We find that Mr. Fish is guilty on citation 1 and find his conduct is deserving of sanction. He knew or certainly ought to have known that the information provided to him was provided on a confidential basis. If he had any doubt about that he could have sought clarity from the LSA or obtained a Court Order. He did none of those things. It is apparent that Mr. Fish disclosed information to the spouse of a co-defendant. He had no common interest privilege, and he should have known that.

### **Sanction**

22. The LSA sought a sanction of a \$5,000.00 fine and a reprimand against Mr. Fish. Mr. Fish argued that an appropriate sanction would be a reprimand.
23. It is important for the public to have confidence in the professional disciplinary process. That process relies upon confidentiality. Both counsel confirmed that Mr. Fish had been sanctioned previously. Despite the previous disciplinary matter and the finding of guilt, Mr. Fish once again breached confidentiality.
24. Mr. Fish was well aware of the LSA's position on confidentiality given his previous citation. Yet he chose to again reveal confidential information. In all these circumstances the Hearing Committee finds the appropriate penalty to be a reprimand, which was delivered orally at the hearing, as follows:

The Law Society has in place a procedure and a process with respect to investigations, and part of that involves the submission and the provision and the

exchange of confidential information amongst the parties. It's critical to that process that that confidential information be kept confidential.

It's clear from the Statement of Admitted Facts and Exhibits that you were told on three separate occasions that you were not to use any of that information for any collateral purpose and/or that information was not to be disclosed to anyone. That was made clear to you by the Law Society, and as a lawyer, you should understand and appreciate that when the Law Society speaks, you are to listen. You are to listen carefully and you are to follow the express instruction of the Law Society. You failed to do that, and that failure has the very real risk of resulting in harm to the status of the Law Society and the legal profession, and, accordingly, deserving of sanction.

This matter is particularly concerning because you were, not too long prior to this matter, involved in a somewhat similar matter where information was disclosed. Our concern is that you may have become too involved in a particular incident and matter involving [A] and that may have coloured your judgment. We encourage you to be as objective as you can when dealing with matters.

We understand that you will not be practicing; however, if that should change and should you return to practice, we would ask that you exercise caution and mindfulness with respect to disclosure of information and that you reach out to other counsel and/or resources of the Law Society of Alberta if you have any question about that. Thank you.

### **Concluding Matters**

25. In addition to the reprimand the Hearing Committee ordered Mr. Fish to pay costs in the amount of \$5,145.00. Mr. Fish shall have three months from the date of the written decision to pay the ordered costs.
26. A Notice to the Profession is not required and will not be issued, nor is a reference to the Attorney General required and will not be made.
27. The exhibits, other hearing materials, and this report will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than the Member will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege.

Dated at Calgary, Alberta, June 24, 2021.

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Walter Pavlic, QC

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Sandra Mah

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Grace Brittain

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF

**BRIAN FISH**

A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING FILE 20200079

**STATEMENT OF ADMITTED FACTS AND EXHIBITS**

**INTRODUCTION**

1. This hearing arises out of one complaint comprising of one citation.

**BACKGROUND**

2. I was admitted as a member of the Law Society of Alberta on August 22, 1980.
3. My present status with the Law Society of Alberta is Active/Practising.
4. I practise in the area of child welfare law.

**CITATIONS**

5. On April 7, 2020, the Conduct Committee Panel (“CCP”) referred the following conduct to hearing:
  1. It is alleged that Brian Fish provided confidential information arising out of a Law Society investigation to a third party without the consent or authorization of the Law Society or a Court Order, and that such conduct is deserving of sanction.

**FACTS**

6. In 2014, after receiving a complaint, the Law Society of Alberta (“LSA”) initiated a review of my conduct in the handling of a client matter pursuant to section 53 of the *Legal Profession Act*.



7. On October 30, 2014, I received a letter from the LSA marked “PERSONAL AND CONFIDENTIAL” in relation to the section 53 proceedings and which stated, *inter alia*:

All materials provided or to be provided to you by the Law Society are confidential and have been provided or will be provided to you for the purpose of making full answer and defence to this complaint and for no other reason. Therefore, all materials, and the information they contain, are subject to your undertaking that they will not be used in any other proceedings or for any collateral purpose without either the consent of the parties or a court order. Should you decide to retain counsel in relation to this matter, you may disclose the information to your counsel.

**See Hearing Exhibit Binder, Exhibit 5, Tab 5 – Letter, dated October 30, 2014 [at p.291 of PDF]**

8. On August 7, 2015, the LSA commenced an investigation relating to complaint. Subsequently, an Investigation Report was completed on December 14, 2015.
9. The Investigation Report was provided to me by the LSA on December 22, 2015, along with a cover letter marked “PERSONAL AND CONFIDENTIAL” which stated, *inter alia*:

The investigation report and appended materials are being provided to you to enable you to make full answer and defence in these proceedings and for no other purpose. Pursuant to section 78 of the Legal Profession Act, these materials are private. All materials disclosed to you as part of this investigation are subject to an undertaking that they will not be used in any other proceedings, nor for any collateral purpose, without either consent of the parties (which, under the circumstances, includes the Law Society, the author of any record or subject of any interview, the opposing party in any litigation, or any other interested person), or by order of the Court. If you are unable to comply with this undertaking, please return the materials to me or take the appropriate steps to be relieved of this undertaking. Should you decide to retain counsel in this matter, you may disclose the information to your counsel.

**See Hearing Exhibit Binder, Exhibit 11 – Letter, dated December 22, 2015 [at p.840 of PDF]**

No undertaking was provided upon the receipt of this letter.

10. The Investigation Report was again provided to me in a disclosure package by the LSA on September 12, 2016, along with a cover letter marked “CONFIDENTIAL” which stated, *inter alia*:

The contents of the disclosure package are confidential. The exclusive purpose of the disclosure package is to allow you to make a full answer and defence at the Hearing. The contents of the disclosure package may not be disclosed to anyone or used for any

other purpose, including other legal or regulatory proceedings, without the express consent of the Law Society or a court order.

**See Hearing Exhibit Binder, Exhibit 15 – Letter, dated September 21, 2016 [at p.876 of PDF]**

11. On January 18, 2017, a Single Bencher Hearing Committee convened to conduct a hearing with respect to the above-noted conduct. A Hearing Committee Report was subsequently published and is cited as *Law Society of Alberta v Fish*, 2017 ABLS 1.
12. Sometime in 2017, I shared some or all of the contents of the LSA's Investigation Report with a third party, [GE]. The purpose behind my disclosure of this information to Mr. [GE] was because Mr. [GE]'s spouse and I were defendants in separate lawsuits brought by the same Plaintiff ([A]).

**See Hearing Exhibit Binder, Exhibit 13– Statement of Claim, filed October 7, 2009 [at p.850-859 of PDF],  
Exhibit 14 – Statement of Defence and Counterclaim, filed September 28, 2009 [ at p.860-875 of PDF]**

13. I did not seek the consent of the LSA or any other parties prior to disclosing the contents of the Investigation Report to Mr. [GE], nor did I seek a Court Order allowing me to do so.
14. Both parties are at liberty to call additional evidence at the hearing of this matter.

### **EXHIBITS**

15. The above-noted Investigation Report, dated December 14, 2015, is appended as Exhibit “5” to the Hearing Exhibit Binder of this matter.

### **NO DURESS AND INDEPENDENT LEGAL ADVICE**

16. I have had the opportunity to consult with legal counsel and confirm that I have signed this statement voluntarily and without any compulsion or duress.

**THIS STATEMENT OF ADMITTED FACTS IS MADE THIS 4<sup>th</sup> DAY OF November, 2020**

**“Brian Fish”**  
**BRIAN FISH**