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

AND

IN THE MATTER OF AN APPEAL
REGARDING ROBERT BURGENER
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel

Corie Flett, QC – Chair and Bencher
Elizabeth Hak – Lay Bencher
Barbara McKinley – Lay Bencher
Bud Melnyk, QC – Bencher
Deanna Steblyk, QC – Bencher
Margaret Unsworth, QC – Bencher
Louise Wasylenko – Lay Bencher

Appearances

Karen Hansen – Counsel for the Law Society of Alberta (LSA)
Robert Burgener – Self-Represented

Hearing Date

February 18, 2020

Hearing Location

LSA office, at 701, 333 - 11 Avenue SW, Calgary, Alberta

APPEAL PANEL DECISION

Overview

1. Robert Burgener was called to the Bar in Alberta in May of 1982. He had been practicing in Calgary since approximately 2003 and, prior to that, in Edmonton. Citations arose from complaints brought in June 2007 by JM, a former client and friend of Mr. Burgener, as well as other matters that arose as a result of the LSA investigation.

2. March 22, 2016 was the last day of a 14-day hearing into the conduct of Robert Burgener based on 16 citations:

1) It is alleged that Mr. Burgener disclosed confidential information of former clients and that such conduct is deserving of sanction;

2) It is alleged that Mr. Burgener acted when in a conflict of interest and that such conduct is deserving of sanction;

3) It is alleged that Mr. Burgener offered a bribe and that such conduct is deserving of sanction;

4) It is alleged that Mr. Burgener signed false documents and that such conduct is deserving of sanction;

5) It is alleged that Mr. Burgener installed a surreptitious surveillance camera and recorded conversations without first obtaining the consent of the party being recorded and that such conduct is deserving of sanction;

6) It is alleged that Mr. Burgener threatened and attempted to extort money from a client and that such conduct is deserving of sanction;

7) It is alleged that Mr. Burgener failed to account for trust funds and that such conduct is deserving of sanction;

8) It is alleged that Mr. Burgener failed to properly identify on each statement of account the amount attributable to fees and the nature and proper amount of any disbursements and that such conduct is deserving of sanction;

9) It is alleged that Mr. Burgener failed to provide a retainer agreement to his client and that such conduct is deserving of sanction;

10) It is alleged that Mr. Burgener failed to recommend that his client seek independent legal advice before Mr. Burgener entered into a business venture with his client and that such conduct is deserving of sanction;

11) It is alleged that Mr. Burgener failed to protect or act in the best interests of a client by failing to observe a Requirement to Pay issued by the Minister of Finance and that such conduct is deserving of sanction;

12) It is alleged that Mr. Burgener signed letters containing false information and that such conduct is deserving of sanction;

13) It is alleged that Mr. Burgener assisted a client in an improper purpose and that such conduct is deserving of sanction;

14) It is alleged that Mr. Burgener failed to report the issuance of one or more Writs of Enforcement as required by the Rules of the Law Society and that such conduct is deserving of sanction;

15) It is alleged that Mr. Burgener failed to properly supervise his staff and that such conduct is deserving of sanction;

16) It is alleged that Mr. Burgener failed to serve his lender clients and that such conduct is deserving of sanction.

3. The Hearing Committee found Mr. Burgener guilty of 14 citations and ordered his immediate disbarment, a referral to the Minister of Justice and Attorney General and costs in the amount of $171,514.33. The Hearing Committee's full decision and its reasons are detailed in its October 5, 2016 Hearing Report.

4. Pursuant to section 75 of the *Legal Profession Act*, Mr. Burgener appealed the Hearing Committee's decision.

5. Mr. Burgener appealed on the basis of several alleged breaches of natural justice and procedural fairness, particularly delay, in the steps leading to the hearing and adjournments within the hearing.

6. On February 18, 2020, a panel of the Benchers (Appeal Panel) conducted a hearing on the appeal of Robert Burgener.

7. After reviewing the Hearing Report and the hearing record, and considering the representations of the LSA and Mr. Burgener, for the reasons set out below, the Appeal Panel confirms the Hearing Committee's findings of guilt.

8. The Appeal Panel also confirms the Hearing Committee's determination on sanction.

9. In addition, the Appeal Panel orders costs of the appeal to be paid by Mr. Burgener in the amount of $11,970.00 within six months of the issuance of this decision.

Preliminary Matters

10. Between the time of the appointment of the Appeal Panel in May 2019 and the appeal hearing in February 2020, two of the nine appointed Panel members became unavailable for the oral appeal hearing. However, a quorum of seven panel members for the appeal was maintained.

11. Prior to the appeal hearing, Mr. Burgener applied to the Appeal Panel for leave to file fresh evidence in support of his appeal. Mr. Burgener wished to rely on evidence in relation to an alleged conflict of interest resulting in his lack of counsel at the disciplinary hearing, the accuracy of his PCLaw entries, evidence in relation to an Assurance Fund claim against him, allegations against JM's counsel, GS, non-payment of conduct money, and impact on his constitutional and procedural rights. He also made a request for additional disclosure from the LSA.

12. The Appeal Panel determined that the evidence he wished to adduce at the appeal did not satisfy the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, pursuant to which the burden of proof rested on Mr. Burgener to establish the following on a balance of probabilities:

    1) The evidence could not have been adduced by due diligence at the hearing;
    2) The evidence is relevant in the sense that it bears upon a decisive or potentially decisive issue;
    3) The evidence is credible in the sense that is reasonably capable of belief; and
    4) The evidence is such that if believed, it could reasonably, when taken with other evidence adduced at the hearing, be expected to affect the result.

13. Mr. Burgener wished to rely on evidence regarding his former counsel's conduct which he alleged resulted in a conflict such that the counsel was no longer in a position to represent Mr. Burgener. The Appeal Panel found that this evidence was available at the time of the hearing. In addition, it was of little relevance and was unlikely to have affected the result of the hearing.

14. The evidence in relation to Mr. Burgener's PCLaw entries could have been raised at the time of the hearing. A considerable amount of hearing time was spent on the accuracy of the entries, although the inaccuracies were not ultimately found to be relevant to the Hearing Committee's consideration of Mr. Burgener's entitlement to fees. The Appeal Panel found that this information would not have affected the Hearing Committee's decision.

15. The evidence in relation to the Assurance Fund claim relating to Mr. Burgener was available and could have been adduced at the time of the hearing.

16. The evidence in relation to what Mr. Burgener perceived as a "double standard" in the process in relation to complaints he made against JM's lawyer was available to him at the time of the hearing and lacked relevance to the issues.

17. The evidence in relation to conduct monies and the implications on Mr. Burgener's constitutional and procedural rights was available to him at the time of the hearing, but he did not address it. Even if new, the Appeal Panel determined the evidence in relation to these issues was not relevant to the central issues and would not have changed the result.

18. The request for further disclosure was vague and outside the scope of the application seeking leave to adduce fresh evidence. Even if appropriate, there was insufficient detail and the Appeal Panel was unwilling to permit an open-ended fishing expedition into LSA documents.

19. The Appeal Panel's written reasons denying the application to adduce fresh evidence were provided to Mr. Burgener on August 14, 2019. Given the Appeal Panel's conclusions on the request for leave to adduce fresh evidence, any such evidence which was referenced in Mr. Burgener's appeal submissions was disregarded.

20. There were no objections to the constitution of the Appeal Panel or its jurisdiction. A private hearing was not requested, so the appeal proceeded as a public hearing.

Background

21. Mr. Burgener and JM initially met in Edmonton, sometime in early 1980. Initially, they were friends, but at some point, Mr. Burgener also became JM's lawyer, providing a broad assortment of services, both personal and in relation to JM's business. A retainer agreement was never executed between Mr. Burgener and JM to clarify the terms of their relationship. They also became business partners in other endeavours. A written contract was not entered into to delineate their interests as business associates.

22. The relationship between Mr. Burgener and JM began to deteriorate in December 2006. Mr. Burgener filed reports with various authorities, including the Alberta Securities Commission, the Calgary Real Estate Authority, the RCMP, the banks with whom JM had past dealings, the Calgary Police Service, and the Real Estate Council of Alberta in which he disclosed solicitor-client communications between himself, JM, and other persons. As a result of Mr. Burgener's complaint to the Real Estate Council of Alberta, JM's real estate license was suspended.

23. After the deterioration of the relationship with JM, Mr. Burgener rendered accounts to JM's numbered company on February 13, 2007 and May 15, 2007 and paid himself from trust. In addition to legal fees and disbursements, the accounts included charges described as "other charges". There was no retainer agreement executed between the parties that would have authorized such "other charges".

24. During the period that Mr. Burgener paid himself for the invoices rendered to JM's numbered company, he was issued a Requirement to Pay dated January 25, 2007, which required certain entities, including the numbered company, to pay the CRA $370,000.00. Mr. Burgener did not forward payment to the CRA.

25. JM initially filed his formal complaint against Mr. Burgener on June 8, 2007. A follow up to the complaint was sent by JM's counsel, GS, on November 16, 2007. An Investigation Order in relation to these complaints had been issued by the LSA on August 2, 2007.

26. As a result of information arising from the LSA investigation, a new Investigation Order against Mr. Burgener was issued on May 5, 2009 in relation to real estate transactions he facilitated.

27. A Practice Review Panel of the LSA directed an assessment of Mr. Burgener's practice, which he was notified of on May 13, 2009. Mr. Burgener complied with a practice assessment visit on July 16, 2009 and was provided a copy of the report dated August 17, 2009. The practice assessment report outlined various concerns with Mr. Burgener's practice and made several recommendations.

28. A further Investigation Order was issued arising from the ongoing investigation of Mr. Burgener by the LSA on March 10, 2010 in relation to real estate transactions facilitated by Mr. Burgener.

29. Mr. Burgener relocated to Ontario in January 2010. The LSA issued its Final Investigation Reports on April 27, 2010 and March 15, 2011. There were a series of pre-hearing conferences over the next several years. Mr. Burgener suffered a heart attack in January 2013, which resulted in some delay whilst he dealt with his health issues.

30. Mr. Burgener's disciplinary hearing was originally scheduled for February 9-13, 2015. The matters were adjourned at the request of Mr. Burgener. He received notice on March 27, 2015 of his new hearing dates scheduled for May and June 2015. Mr. Burgener received a notice to attend his former associate's disciplinary hearing during part of the time period scheduled for his own hearing. Mr. Burgener was given an Amended Notice to Solicitor revising his hearing dates to August and October 2015. On June 1, 2015, Mr. Burgener received notice to attend his former associate's rescheduled hearing dates, which again conflicted with his own.

31. Mr. Burgener's Assurance Fund claim hearing was scheduled for September 2015, in the middle of the schedule for his discipline hearing. The Assurance Fund hearing proceeded in September, continued into May 2016, and a decision was rendered February 17, 2017.

32. Mr. Burgener's discipline hearing was scheduled for October 5, 6, 7, 19, 20, 2015 and continuing into the final week of November 16, 17, 18, 19 and 20, 2015. The October 19 and 20 dates were adjourned on the first day of the hearing because he was required to attend his former associate's hearing. Ultimately, Mr. Burgener's hearing took place on October 5-7, 2015, November 16-20, 2015, January 7-8, 2016, January 14-15, 2016 and March 21-22, 2016. Mr. Burgener received his notice of disbarment on March 23, 2016. The decision was issued October 5, 2016 by way of the hearing report.

33. Mr. Burgener submitted his notice of appeal on November 7, 2016.

Mr. Burgener's Submissions

34. Mr. Burgener took the position that the period of time from when the investigation commenced in 2007 to when the final hearing commenced in 2015 resulted in delay constituting a breach of natural justice and procedural fairness.

35. He also alleged that his right to a speedy trial was violated. In support of this position, he relied on the decision in *R v. Jordan*, [2016] S.C.J No. 27 (CanLII) (*Jordan)*, which outlines a presumptive ceiling for most cases of 18 months between charges pursuant to the *Criminal Code* and trial in provincial court. Mr. Burgener took the position that the matter of *Law Society of Alberta v. Odishaw,* 2011 ABLS 28, adopted an equal application of section 11(b) of the *Canadian Charter of Rights and Freedoms* in administrative proceedings as in criminal proceedings. Given the ceilings as outlined in *Jordan,* he alleged his section 11(b) rights were infringed and the matter ought to be dismissed.

36. Mr. Burgener alleged that the delay between the initial investigation to the hearing was inordinate delay and prejudiced his right to a fair hearing. He argued that the investigation files were first opened in January 2007 and the hearing commenced nearly eight years later. In his view, a hearing delay of over seven years is, *in itself*, an inordinate delay that would significantly prejudice any respondent's opportunity to have a fair hearing. He submitted that the investigative activity caused emotional stress, interfered with his professional practice, caused economic loss and contributed to the potential for practice errors, all of which he characterized as significant harm. He also attributed his heart attack to the stress exacerbated by the disciplinary process.

37. Mr. Burgener also argued that the joining of separate and distinct matters into one massive hearing created an overwhelming volume of documentation and complexity. He argued that although the LSA informed him that all outstanding matters were to be resolved in one hearing, this did not appear to be the practice for other members. He further argued that this "piling on" of charges caused significant delays, increased the costs, made no difference to the outcome of the hearing and violated his rights.

38. Mr. Burgener also submitted that his right to counsel was effectively denied. He indicated that his counsel resigned due to the time commitment created as a result of the increasing volume of documents and expanding number of hearing days.

39. Mr. Burgener indicated during a pre-hearing conference that his counsel resigned and he was granted a short adjournment, but the new hearing dates were made pre-emptory on him. There was limited time granted to him to find new legal counsel. Due to the complexity of the file, he argued that it was impossible to find new legal counsel from the list of pro bono lawyers maintained at that time by the LSA. During the hearing, he advised the Hearing Committee of this, however, Mr. Burgener acknowledged that he advised the Hearing Committee that he wanted to proceed with the hearing in any event.

40. Mr. Burgener also submitted that he had a reasonable expectation that the LSA, in providing a list of pro bono lawyers, would have vetted the list. He argued that his counsel abandoning him on the eve of trial, the length and complexity of matters being

dealt with, and the time commitment this would have required of legal counsel effectively denied him his right to counsel.

41. Mr. Burgener alleged that the Hearing Committee was tainted by the perception that delays in the hearing process were Mr. Burgener's fault, since the hearing dates were made pre-emptory on him.

42. Mr. Burgener also suggested that his counsel may have withdrawn out of a belief that his counsel was fulfilling his duty to cooperate with the LSA and to preserve his own professional standing. He argued that a defence counsel's duty before an LSA hearing is compromised by the duty to cooperate with the LSA. That inherent conflict of interest creates a perception of unfairness, taints the hearing panel and denies the appellant a reasonable prospect of having a fair, unbiased hearing. He further argued that the LSA breached its duty to cooperate with him by adding an uncontested citation to the large group of additional citations when it could have been heard and resolved separately in a short period of time.

43. Mr. Burgener alleged that the LSA swapped facts to support certain citations after more than eight years. This made answering the citations impossible and resulted in Mr. Burgener declining to continue to negotiate an agreed statement of facts. He argued that LSA counsel then blamed him at the hearing for the volume of material, tainting the Hearing Committee and prejudicing the possibility of a fair hearing.

44. He further alleged that he was not afforded a presumption of innocence. He argued that no wrongdoing was found after an extensive initial investigation of the facts surrounding certain matters, yet years later citations were issued. He further suggested that the Hearing Committee disregarded this evidence by suggesting that the investigators were fallible without any evidence.

45. Mr. Burgener also alleged that the Hearing Committee may have been prejudiced, in that one of the members, Mr. Letourneau, had for a short period of time been appointed to adjudicate the Assurance Fund hearing, although he was no longer involved by the time of the hearing. While Mr. Letourneau was a member of that Assurance Fund panel, a preliminary letter was provided to the panel. Mr. Burgener acknowledged that he was advised of this at the hearing and raised no objection to the composition of the Hearing Committee.

46. However, in his Appeal Submissions, Mr. Burgener queried that while Mr. Letourneau denied seeing the letter referred to above, "why should the Appellant be expected to take Mr. Letourneau's word when Mr. Letourneau didn't believe the Appellant when the Appellant was under oath?" He also argued that allowing regular correspondence by GS's firm with the LSA and Benchers while responding negatively to Mr. Burgener emailing the Hearing Committee shows a double standard and adds another

unnecessary level of doubt about the integrity of the disciplinary process, which brings the administration of justice into disrepute.

47. Mr. Burgener also argued that his hearing was unfairly adjourned without adequate notice to him to accommodate his former associate's disciplinary matters. He further suggested that LSA counsel blamed him for not disclosing the overlap when he was provided his Notice to Attend the other hearing, which tainted the Hearing Committee's perception of him. He further suggested LSA counsel knew that he had financial and health issues that made travelling difficult.

48. In addition, while LSA counsel advised the Hearing Committee that conduct money would be paid, Mr. Burgener submitted that it was not, and that failing to pay him conduct money is another example of him having been treated unfairly. He also suggested that the Hearing Chair indicating that this issue could potentially be considered at a later costs hearing suggested to him that he would lose the hearing.

49. Mr. Burgener also argued that the lock-stepped scheduling and substantial delays for both his and his former associate's hearings significantly prejudiced his right to a fair hearing. It also disclosed that Mr. Burgener had been singled out for unfair special treatment, denying Mr. Burgener the right to natural justice and violating his constitutional rights.

50. Mr. Burgener submitted that the passage of time had affected certain witnesses' recollection of facts. He noted that one witness's memory had to be supplemented by referring to the investigators' reports under the doctrine of "past recollection recorded." He suggested that the witness's "past recollection recorded" was made years after the fact and was not under oath, and further argued that there can be no real cross-examination on past recollection recorded evidence. Accordingly, Mr. Burgener submitted that this testimony denied Mr. Burgener any reasonable prospect of a fair hearing. He argued that the delay in the hearing process and the manner in which the citations were brought forward jeopardized the testimony of witnesses and the presentation of evidence, prejudicing and impairing his right to a fair hearing and causing harm to his legal and non-legal interests.

51. Mr. Burgener also alleged that the Hearing Committee prevented him from asking questions in cross-examination and engaged in discussion in front of the witness that prevented him from defending the allegations.

52. Mr. Burgener also submitted that this appeal process violated the presumptive ceiling in *Jordan*. The Notice of Appeal was dated November 7, 2016. The fees required to be paid by him were paid in July 2017. The appeal record was served in October 2018.

LSA's Submissions

53. LSA counsel noted that Mr. Burgener appeals mainly on the basis of breaches of natural justice and procedural fairness, and he does not dispute the factual conclusions underlying the findings of guilt.

54. The LSA summarized its position as follows:
    - *Jordan* is a criminal case that has no applicability to these proceedings;
    - While there appears to have been some delay prior to the hearing, that delay has not been shown to amount to an abuse of process;
    - Mr. Burgener's claims of other breaches of procedural fairness are without merit; and
    - Mr. Burgener's misconduct was so egregious that a disbarment was necessary in any event.

55. Counsel for the LSA argued that the criminal case of *Jordan* has no applicability to these proceedings pursuant to *R. v. Wigglesworth,* [1987] 2 SCR 541 (CanLII) (*Wigglesworth)*. In *Wigglesworth,* at page 560, the Supreme Court of Canada stated*:*

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity […] There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a license. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

56. The LSA argued that *Jordan* updates the framework for the analysis of rights under section 11(b) considered by *R v. Morin,* [1992] 1 SCR 771, but that neither case addresses the issue of delay by administrative tribunals. Further, in the leading case in this area, *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 (*Blencoe),* the Supreme Court made it clear that section 11(b) has no applicability to administrative proceedings. The LSA also cited *Ouellette v. Law Society of Alberta*, 2019 ABQB 492 in support of this position.

57. The approach to be followed in considering whether delay breaches procedural fairness is set out in *Blencoe*. In *Blencoe*, the Supreme Court advised that delay, without more, will not warrant a stay of proceedings. It identified two circumstances where inordinate delay may amount to an abuse of process:

1) An inordinate delay that significantly impacts a party's ability to answer the complaint; or
2) Unreasonable delay that directly causes significant psychological harm to a person or attaches a stigma to a person's reputation such as to bring the system into disrepute.

58. Further, the delay must be unreasonable or inordinate. The party alleging delay must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings so that the damage to the public interest in the fairness of the administrative process would outweigh the harm to the public interest in the enforcement of the legislation if the proceedings were halted.

59. *Blencoe* also indicates that the determination of whether a delay is inordinate must be based on contextual factors including the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. Further, there must be a causal connection between the delay and actual prejudice.

60. The LSA conceded that although there appeared to be some delay in this case, Mr. Burgener has not met his burden to establish that there has been unreasonable or inordinate delay such that it would constitute an abuse of process.

61. The LSA argued that Mr. Burgener failed to bring up the issue of delay at the hearing, despite discussion on the initial day of the hearing and encouragement by the Chair to assert issues if he felt they were a defence. The LSA submitted that Mr. Burgener did not call evidence on the issue and did not raise it again after those initial discussions on October 5, 2015.

62. In terms of pre-citation delay, the LSA set out a table of actions undertaken in this matter. With regard to one complaint, the LSA argued that it took approximately two years from the Investigation Order to issuance of the Investigation Report, and then nine months thereafter to issue citations. As for another complaint, it took approximately 22 months from the issuance of the Investigation Order to the issuance of the Report, and nine months thereafter until the issuance of citations. The hearing record does not provide the date for the final Investigation Report on the citations related to Mr. Burgener's former associate; however, the LSA submitted that the citations were issued about 14 months after the Investigation Order.

63. The LSA argued that most of the contextual factors are not on the record, and as such there is insufficient evidence on which to base the contextual analysis set out in *Blencoe* for determination of whether the delay was inordinate. The LSA noted that it was clear from the length of the hearing, the number of witnesses called and the volumes of exhibits entered that the complaints required complicated and detailed investigations. Counsel also submitted that it was not known whether Mr. Burgener contributed to or waived any delay during the investigation stage.

64. In relation to delay post-citation, the LSA argued that the Pre-Hearing Conference (PHC) reports are not in evidence, although they could have of been of value. The LSA further submitted that much of the post-citation delay relates to Mr. Burgener and his counsel, including delay as a result of Mr. Burgener's heart attack and a request for an adjournment of the original hearing dates due to his counsel's withdrawal.

65. Further, the LSA argued that there is no evidence of prejudice to the fairness of the hearing caused by the delay. With respect to his concern about relying on "past recollection recorded," the LSA noted that Mr. Burgener did not object at the time, and further, chose not to cross-examine that witness.

66. The LSA submitted that there was no medical evidence to address the alleged health issues Mr. Burgener attributes to the delay of the proceedings, and therefore no causal connection can be found. Counsel argued there was no evidence provided to support any of the alleged stigma or economic consequences of the delay of these proceedings. In addition, the LSA noted that there were other stressors during this same time period, including lengthy litigation proceedings.

67. The LSA further submitted that even if inordinate delay were established, given the nature of Mr. Burgener's misconduct, the damage to the public interest should his misconduct not be addressed would exceed any damage to the public interest caused by any alleged unfairness of LSA proceedings. Mr. Burgener's misconduct was so egregious that a disbarment was necessary in any event. In the LSA's view, the penalty of disbarment could only be set aside in the case of egregious personal prejudice, and there is no evidence of such prejudice in this case.

68. With respect to the scheduling conflict with Mr. Burgener's associate's hearing, the LSA argued that Mr. Burgener did not argue the delay caused by the adjournment of his hearing as a due process issue in the hearing. The LSA noted as well that the hearing required additional days in any event, and therefore there was little effect on the overall length of the hearing by the loss of the two days.

69. With respect to the "lumping together" or "piling on" of citations, the LSA argued that Mr. Burgener could have applied to have the citations severed. The LSA also argued that he contributed to the length of the hearing by refusing to enter into an agreed statement of facts or an agreed exhibit book. The LSA also argued that Mr. Burgener could have

admitted guilt to the non-contested citations and continued to contest the remaining citations.

70. The LSA argued that there was no evidence that the hearing dates being made pre-emptory on Mr. Burgener tainted the Hearing Committee's deliberations.

71. The LSA argued that there was no evidence to support the allegations as to how or why Mr. Burgener retained his counsel. There is no evidence that the pro bono list was intended to be a certification by the LSA of the quality and commitment of such counsel to take pro bono retainers in discipline matters. Further, Mr. Burgener chose to proceed without legal counsel, and cannot now object to the fact that he was self-represented. The LSA submitted that a lawyer's duty to cooperate with the LSA would never prevent the vigorous defence of a client before a discipline panel.

72. Concerning the allegation that facts were swapped, the LSA argued that there was no evidence to support this allegation. Further, Mr. Burgener did not deny that he was aware of the particulars of the citations at the time of the hearing. Therefore, there was no breach of procedural fairness.

73. The LSA also argued that there was no evidence that the Hearing Committee treated Mr. Burgener's failure to enter into an agreed statement of facts or agreed exhibit book as relevant or as an aggravating factor in its decision.

74. In response to Mr. Burgener's claim regarding the presumption of innocence, the LSA argued that the foundation for the Hearing Committee's ruling on citation 7 was supported by the evidence. The LSA also argued that Mr. Burgener could have objected to LSA counsel's comments or called evidence himself.

75. Regarding the issue of conduct money, the LSA submitted that Mr. Burgener raised his concern at the Hearing Committee but did not pursue it. Further, the LSA disputed that the Chair's comments indicated that Mr. Burgener would lose the hearing. She also submitted that Mr. Burgener misconstrued LSA counsel's comments at the hearing, and further, that the issue of conduct money to attend his former associate's hearing was a matter to be addressed at that hearing. It was irrelevant to Mr. Burgener's hearing.

76. LSA counsel also submitted that Mr. Burgener's musings on his former associate's reasons for meeting with practice advisors were speculative, as was his suggestion that the associate and Mr. Burgener's hearings were deliberately scheduled together. There is no evidence to support either claim.

77. The allegations that the Chair improperly interrupted Mr. Burgener's cross-examination was also disputed. The LSA argued that the ruling was proper as Mr. Burgener was attempting to elicit an opinion about the *Criminal Code* from a layperson. Mr. Burgener

could have, but did not, ask for the witness to leave the room during the discussion, nor did he point out any prejudice to his case by having the witness remain.

78. Accordingly, the LSA requested that Mr. Burgener's appeal be dismissed with costs.

Analysis

Burden of Proof and Standard of Proof

79. Mr. Burgener's grounds for the appeal were alleged breaches of procedural fairness, particularly in regard to delay in steps leading up to the hearing. Mr. Burgener has the burden of proof to establish, on a balance of probabilities, that the appeal should be granted.

Standard of Review

80. After the appeal hearing concluded, the Alberta Court of Appeal addressed the standard of review for an internal appeal body in *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 (*Yee*). The Appeal Panel provided the LSA and Mr. Burgener the opportunity to address this new case through additional written submissions.

81. Mr. Burgener declined to provide additional submissions.

82. LSA counsel advised that, at paragraph 35, *Yee* provides that the appeal tribunal may intervene in cases of procedural unfairness, effectively a correctness standard. LSA counsel submitted that, as Mr. Burgener's grounds and arguments relate primarily to alleged failures of procedural fairness and bias, this is the applicable standard.

83. The Appeal Panel agrees. A hearing is required to be fair and the Appeal Panel can overturn the prior decision if the process followed was unfair. As the grounds argued in this appeal relate primarily to these issues, the standard of review is correctness and that is the standard the Appeal Panel has applied.

Applicability of Jordan presumptive timelines and inordinate delay

84. Counsel for the LSA properly identified that, pursuant to *Wigglesworth,* the *Jordan* decision has no applicability in these proceedings. However, that does not mean that delay is not an appropriate ground of appeal. Undue delay can result in a breach of procedural fairness. Counsel for the LSA properly identified the test in *Blencoe* when addressing whether delay in administrative proceedings may amount to an abuse of process.

85. The Appeal Panel agrees with the LSA and Mr. Burgener that there was evidence of delay from the time of the investigations to the final hearing. Such delay was known to

Mr. Burgener at the time of the hearing, yet he failed to call evidence on the issue or raise it as a defence throughout his submissions before the Hearing Committee.

86. Even if the delay could be said to be inordinate, Mr. Burgener failed to prove on a balance of probabilities that it amounted to abuse of process pursuant to *Blencoe.* There was nothing to show that the delay prevented him from answering the complaints as made against him. He was at liberty to call evidence to establish his alleged mental or physical harm and stigma at the hearing, but he did not do so. The burden remained with him and there was no medical or other evidence before the Hearing Committee nor before the Appeal Panel to support his claims of harm or stigma.

87. Mr. Burgener alleged that the delay impacted certain witnesses' recollection of facts. He did not object to the use of the "past recollection recorded" method of assisting a witness's memory during the hearing, nor did he take the opportunity to address these issues through cross-examination of the witness. There was no evidence that the delay impacted his ability to call evidence.

Joining of separate and distinct matters

88. With respect to Mr. Burgener's claim that the joining of the separate and distinct matters into one hearing aided in the inordinate delay, increased costs and violated his rights, the Appeal Panel did not share the same view. The Appeal Panel agreed with counsel for the LSA in that Mr. Burgener was able to apply to sever the citations or admit guilt to the non-contested citations prior to the hearing, thereby decreasing the volume of material and length of the hearing, but that he did not do so. There is no evidence that the failure to address separate and distinct citations in separate hearings prejudiced Mr. Burgener or would have resulted in any different outcome in terms of citation, cost or otherwise.

Right to counsel

89. Mr. Burgener raised the issue of his right to counsel. There is no evidence which substantiates that the conduct of the LSA or the delay in the proceedings impeded his ability to obtain counsel. The Appeal Panel also notes that while Mr. Burgener submitted that he was unable to find a lawyer from the pro bono list, there was nothing restricting his search for counsel to only those on that list.

Right to a fair hearing and prejudice of panel

90. The evidence does not establish a lack of impartiality rising to a level of unfairness. Mr. Burgener alleged that the Hearing Committee cut him off and that he was unable to cross-examine as he intended. In reviewing the record of the hearing, the Appeal Panel does not agree that the alleged interference was of such a degree that it led to unfairness. At some point, the Hearing Committee is tasked with keeping things on track with a level of efficiency and relevance to the issues. The alleged interference did not

prevent the opportunity for useful and relevant questioning by Mr. Burgener or the ability to provide his submissions.

91. Mr. Burgener alleged that the Hearing Committee was tainted by the perception of the delays as being his fault and that the process was tainted overall by the inherent conflict of interest where defence counsel's duty to cooperate with the LSA is compromised in the hearing process. There was no evidence to support these claims.

92. Mr. Burgener alleged that one of the Hearing Committee members, Mr. Letourneau, had been involved for a brief period in the Assurance Fund hearing. Mr. Burgener did not raise the issue at the hearing nor object to the composition of the panel at the time, although aware of Mr. Letourneau's brief involvement in the Assurance Fund hearing. There was no evidence from the hearing record or otherwise to suggest this compromised the impartiality of Mr. Letourneau or the panel and it did not rise to the level of a conflict of interest.

93. Mr. Burgener alleged that there were double standards applied to him and GS, counsel for the complainant. He alleged GS was able to correspond with the LSA and Benchers and that his own attempt to communicate with the Hearing Committee was received negatively. There was no evidence to support this position.

94. Mr. Burgener alleged that he was blamed by the LSA for not disclosing the overlap in the hearing of his former associate and that it tainted the Hearing Committee's perception of him. There was no evidence to support this position.

95. Mr. Burgener alleged that the lock-stepped scheduling and substantial delays of his former associate's hearing prejudiced his right to a fair hearing. There was no evidence to support this position.

Swapping of facts by the LSA

96. Mr. Burgener argued that the LSA swapped facts in relation to citations. There was no evidence to support this allegation.

Presumption of innocence

97. Mr. Burgener alleges that he was denied his right to a presumption of innocence throughout the investigative and hearing process. There was no evidence to support these allegations.

Conduct money

98. Mr. Burgener alleged that he was not paid conduct money and that this was another example of being treated unfairly. There was no evidence to support this claim.

Decision

99. The Appeal is dismissed, and the Hearing Committee's findings and sanctions are confirmed.

Concluding Matters

100. Costs of this appeal are payable by Mr. Burgener in the amount of $11,970.00 within six months of the issuance of this decision.

101. The appeal record and other appeal materials, and this report will be available for public inspection, including providing copies of exhibits for a reasonable copy fee, although redactions will be made to preserve personal information of persons other than Mr. Burgener, client confidentiality and solicitor-client privilege (Rule 101(3)).

Dated at Calgary, Alberta, May 29, 2020.

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Corie Flett, QC - Chair

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Elizabeth Hak

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Barbara McKinley

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Deanna Steblyk, QC

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Margaret Unsworth, QC

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Bud Melnyk, QC

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Louise Wasylenko