

**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 BARRY M. KING
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Single Bencher Hearing Committee

Stacy Petriuk, KC – Chair

Appearances

Karen Hansen – Counsel for the Law Society of Alberta (LSA)

Barry King – Self-represented

Hearing Date

February 10, 2023

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT - SANCTION

Overview

1. On February 10, 2023, a Single Bencher Hearing Committee (Committee) convened a hearing concerning the conduct of Barry M. King, a member of the LSA.
2. By way of a Statement of Admitted Facts, Exhibits and Admission of Guilt (Statement) signed by Mr. King on August 24, 2022, Mr. King admitted his guilt with respect to the following citation (Citation):
 - 1) It is alleged that Barry M. King failed to communicate with an opposing party regarding the release to his clients of construction holdbacks in which the opposing party had a potential interest or claim and that such conduct is deserving of sanction.
3. On October 18, 2022, a panel of the Conduct Committee found the Statement to be in an acceptable form. Accordingly, pursuant to section 60(4) of the *Legal Profession Act* (Act), the Conduct Committee's acceptance of this Statement was deemed to be a

finding of this Committee that Mr. King's conduct was deserving of sanction. The sole remaining issue for the Committee was sanction.

4. After reviewing all the evidence and exhibits and the submissions of LSA Counsel and Mr. King, the Committee determined that the sanction jointly recommended by the parties was appropriate. Mr. King was therefore reprimanded and ordered to pay costs in the agreed amount of \$3,600.00, to be paid by the end of February 2023.

Preliminary Matters

5. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested, so a public hearing into the appropriate sanction proceeded.

Statement of Admitted Facts and Admission of Guilt

6. The Statement is briefly summarized below.
7. In June 2014, RG and SG entered into a contract with I. Ltd to construct a house on their land. Mr. King was retained by RG and SG and their lender to deal with mortgage draws and making payments to I. Ltd. Ultimately, a dispute arose between RG and SG and I. Ltd. as to the amount outstanding with respect to the building of the house. There was a dispute with respect to the Builder's Lien holdback and the total outstanding amount. RG and SG took the position, communicated by Mr. King, that there was change orders, deficiencies to rectify and an offsetting claim for work removed from the scope of the contract.
8. While Mr. King was instructed to offer a certain amount for the release of keys with an additional amount to be retained in trust as holdbacks for the deficiencies to be released upon satisfactory completion of specific items, the offer was not accepted. As such, the trust cheque issued by Mr. King's office was not accepted by I. Ltd. No agreement had been reached between the parties.
9. By the fall of 2015, the relationship between RG and SG and I. Ltd had broken down, and the parties were unable to resolve their dispute through negotiations. In March 2016, the first lien filed by I. Ltd. was lapsed by the Registrar on Mr. King's request. On March 21, 2016, Mr. King released the deficiency holdback to RG and SG. At that time, he did not notify I. Ltd. or their counsel about releasing the funds. On November 24, 2016, Mr. King wrote to counsel for I. Ltd. to advise that the Builder's Lien holdback continued to be held in his law firm's trust account, pursuant to lender instructions. Mr. King did not address the deficiency holdback in the letter.
10. On December 6, 2016, I. Ltd. registered a second Builder's Lien against RG and SG's property. On January 6, 2017, RG and SG and I. Ltd. were advised that there were no

outstanding warrantable deficiencies and the claim had been closed. That same day, Mr. King wrote to I. Ltd.'s counsel indicating that not all defects or deficiencies arising from the construction of RG and SG's home have been corrected or completed and given that additional work was required to correct the deficient work performed by I. Ltd. or its subcontractors, Mr. King could not advise the total costs of the remedial work. Mr. King indicated that those amounts would need to be offset against any amounts that I. Ltd. would otherwise be entitled to under the terms of the contract with RG and SG. Mr. King indicated that I. Ltd.'s lien was improperly registered.

11. On September 26, 2017, the second lien was lapsed by the Registrar at Mr. King's request. By this time, no progress had been made to resolve RG and SG's claims relating to the deficiencies, nor I. Ltd.'s claim for payment.
12. On October 19, 2017, Mr. King released the Builder's Lien Holdback to RG and SG. It was RG and SG's position that no further funds were owed to I. Ltd. under the building contract. The holdback was comprised of funds borrowed by RG and SG from their lender, on which they were paying interest.
13. Mr. King did not notify I. Ltd. or their counsel about releasing these funds. On February 20, 2018, I. Ltd. filed a Statement of Claim against RG and SG claiming damages for breach of contract. A Statement of Defence was filed denying that any amount was owed to I. Ltd. I. Ltd. and their counsel first learned that the deficiency holdback and the Builder's Lien Holdback were released to RG and SG on May 30, 2018, at the Questioning of RG on his affidavit.
14. On November 7, 2018, RG and SG applied for summary dismissal of I. Ltd.'s claim based on the *Limitations Act*. During that application, which was ultimately dismissed, Application Judge Birkett found that the holdback funds were subject to trust conditions, and not to be released until there was an agreement between the parties, and that deficiencies remained outstanding.
15. RG and SG appealed Application Judge Birkett's decision. The appeal was dismissed, but on different reasons than those of Application Judge Birkett. In the Reasons for Judgment, issued on November 9, 2020, the Justice concluded that the ordinary limitation periods for suing on the contract price, breach of contract, and for payment of the Builder's Lien Holdback had expired long before the Statement of Claim was issued. His sole ground for dismissing the appeal was that there was insufficient evidence whether the holdback funds were impressed with some form of trust. The Justice concluded that the sole issue remaining for determination was whether the holdback funds were impressed with a trust.
16. Mr. King indicated in his Statement that the only instance in which he offered to hold funds in trust was in his email of July 31, 2015. However, this offer was rejected, and no trust was ever established by the parties. Accordingly, Mr. King took the position that the

Builder's Lien holdback or deficiency holdback were never impressed with any form of trust. I. Ltd. did not attend the appeal hearing before the Justice, nor have they taken any steps to advance their claim, so this issue has not been tried.

17. In September 2021, I. Ltd. was struck from the register of corporations for a failure to file annual returns. Accordingly, further steps against I. Ltd. have not been taken.
18. Mr. King does not believe that the holdback funds were subject to any trust conditions. He acknowledges that he ought to have communicated with I. Ltd. or their counsel regarding the release of the holdback funds to his clients. Mr. King further acknowledged that in the normal course a Builder's Lien holdback ought to be paid to the builder upon expiry of the lien.

Analysis and Decision on Sanction

19. LSA Counsel and Mr. King made a joint submission on sanction, consisting of a reprimand and agreed costs in the amount of \$3,600.00.
20. Pursuant to the LSA Pre-Hearing and Hearing Guideline, although a hearing committee is not bound by a joint submission on sanction, it must give significant deference to the joint submission. A hearing committee should not depart from a joint submission unless the proposed sanction would bring the administration of justice into disrepute or is otherwise contrary to the public interest.
21. The approach taken by both Mr. King and the LSA in dealing with this matter through an agreed Statement avoided unnecessary contested hearing, witness inconvenience, and increased costs. In her submissions, LSA Counsel emphasized that the seriousness of the misconduct had a potential to affect the reputation of the legal profession and was a risk to the public. However, it did not involve misappropriation of trust funds, deceit, or personal benefit by Mr. King. Therefore, deterrence was required.
22. LSA Counsel did note a few aggravating factors. Mr. King had a prior disciplinary finding in 2010 wherein he was reprimanded. However, the subject matter was different, therefore it did not engage the step-up principle.
23. In her submissions on sanction, LSA Counsel referred the Committee to *Law Society of Alberta v. Thom*, 2020 ABLS 9. In that case, Mr. Thom was found to have breached a trust condition and failed to provide his client's file. Mr. Thom was given a reprimand and ordered to pay costs. It was LSA Counsel's submission that the breach in *Thom* was slightly more serious than in Mr. King's case.
24. In *Law Society of Alberta v. MacKay*, 2016 ABLS 33, Mr. MacKay failed to comply with undertakings and released holdback in face of assertions that landscaping was not

done. Mr. MacKay was sanctioned with reprimand and ordered to pay costs. Mr. MacKay was under the honest belief that he could release the funds.

25. In the case of *Law Society of Alberta v. Koul*, 2016 ABLS 45, Ms. Koul admitted guilt to citations of specifically failing to determine whether any condition or terms on or instructions in relation to trust money and failing to respond in a prompt and complete manner. Ms. Koul had received trust funds from another party and had failed to follow up when the son requested the use of funds. Ms. Koul had released funds to the son when the father only wanted the funds used for a house purchase. Ms. Koul was sanctioned with a reprimand and directed to pay costs.
26. Upon considering Mr. King's cooperation, the aged discipline history, the joint submission on sanction and the cases with similar facts, the Committee found that it was in the public interest to accept the joint submission on sanction. The Committee administered the following reprimand to Mr. King at the Hearing:

Mr. King, the Hearing Guide of the Law Society requires that the Hearing Committee, myself, take a purposeful approach to sanctioning a member who has been found guilty of conduct deserving of a sanction. The fundamental purpose of sanctioning is to protect the interest of the public and protect the reputation and standing of the legal profession generally. Mr. King, I acknowledge your cooperation with the Law Society leading up to today and resolving this complaint by admitting guilt and proceeding with a Single Bench Hearing. Your admissions have permitted the citation to be resolved on a more efficient basis, which is not just a benefit to you, but a benefit to the public and to the Law Society.

Mr. King, you are an experienced lawyer, having practiced for over 40 years. It is clear to me today that you have thought about your actions, thought about what you would have done differently, and how you would do things differently in the future. You mention that you only intend to practice for a couple more years, but it is clear to me that you have taken this to heart, and it has impacted your practice on a go-forward basis. Additionally, I was impressed by your consideration of this citation and your previous citation. It is clear to me that you have thought about this quite a bit. You have thought about the similarities and how you would need to ensure that the steps you take not only take your own client's interests into account, but also obligations that you owe to other parties, counsel, the legal profession and the administration of justice. Even though you have thought about it, your action in this matter did constitute a failure. You have a responsibility to members of the public and to the Law Society to represent their best interest. You failed in this case, and this failure represents what the Law Society strives to avoid. The confidence we need to instill in the public is to ensure they believe and know they will be treated by our members conscientiously and honestly. You failed in this case, and you must do better. But

we have a privileged position, and we have a self-regulated profession. Holding our position and our office requires you to understand the obligation you had to the public, to the Law Society and its members. I am confident that you have thought about the failure that happened in this particular case, what you would do differently in the future, and how you can move forward from it. I also think you have taken your understanding up a level because you did think about your previous citation and the parallels with that, and I was impressed by your consideration and thoughtfulness around that matter.

I hope from today's appearance that you learn from this, and I think that you will. I require you to do more for the members of the public that you serve, opposing counsel, other parties, and the administration of justice. Mr. King, I know you have learned from this particular matter and that you will move forward from it. I wish you the best of luck, sir, in your continued work and practice, even if it is only just a couple more years. I am confident that you will move forward from this matter.

Concluding Matters

27. In addition to the reprimand reproduced above, the Committee also orders that Mr. King pay costs in the amount of \$3,600.00. This amount is payable on or before February 28, 2023,
28. A notice to the Attorney General is not required.
29. A Notice to the Profession is not required.
30. 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 Mr. King will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated April 12, 2023

Stacy Petriuk, KC