



The Law Society of Saskatchewan

TARA DIONNE CHORNOBY

December 3, 2010

Law Society of Saskatchewan v. Chornoby, 2010 SKLSS 8

**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF TARA DIONNE CHORNOBY, OF SASKATOON,
SASKATCHEWAN, A LAWYER**

**DECISION OF THE HEARING COMMITTEE FOR THE
LAW SOCIETY OF SASKATCHEWAN**

Hearing Committee Members:

Victor Dietz, Q.C., Chair
Karen Topolinski
Karen Jones

Members Counsel:
Morris P. Bodnar, Q.C.

Investigation Committee Counsel:
Timothy F. Huber

I. INTRODUCTION:

The Hearing Committee conducted a Hearing in Saskatoon on March 11 and 12, 2010, with respect to three citations of conduct unbecoming against Tara Dionne Chornoby. Ms. Chornoby was admitted to the Saskatchewan Bar in July 1999 and at all material times was a lawyer employed with Rask and Company in the City of Saskatoon.

At the outset of the Hearing, counsel for the parties stated they had no objection to the constitution of the Hearing Committee. Counsel for the Investigation Committee filed the Formal Complaint (Exhibit P1) which stated the citations as follows:

That Tara Dionne Chornoby, of the City of Saskatoon, in the Province of Saskatchewan:

1. Is guilty of conduct unbecoming a lawyer in that she, while employed as an associate of Rask and Company, misappropriated funds from her firm when she received payments from clients and then failed to provide those funds to the firm;
2. Is guilty of conduct unbecoming a lawyer in that she collected GST and PST in relation to legal fees paid to her and failed to remit said GST and PST to the Federal and Provincial Governments as required by law.

Counsel for the Investigation Committee filed a second Formal Complaint (Exhibit P2) which citation was as follows:

That Tara Dionne Chornoby, of the City of Saskatoon, in the Province of Saskatchewan:

1. Is guilty of conduct unbecoming a lawyer in that she, on February 4, 2010, was convicted of the following offence:
 - a. That she, between the 1st day of January, A.D. 2004, and the 31st day of May, A.D. 2007, at or near Saskatoon, Saskatchewan, did willfully evade the payment of taxes imposed by the *Income Tax Act*, for the 2004, 2005, 2006 and 2007 taxation years in the amount of \$4,990.00 by understating her taxable income in the amount of \$25,000.00 contrary to Section 239(1)(d) of the *Income Tax Act*.

Counsel for the Investigation Committee further filed Notice of Hearing (Exhibit P3) setting out the time and the place as above referenced for the Hearing.

With respect to Exhibits P1 – P3, counsel for the Investigation Committee filed proof of service. Counsel for the Member acknowledged service and raised no objection to accepting the Formal Complaints and the Notice of Hearing into evidence.

Prior to the calling of evidence, it was acknowledged and agreed by both counsel that both Formal Complaints (Exhibits 1 and 2) would be before the Hearing Committee.

With respect to the Notice of Hearing, there was a typographical error as to the spelling of Tara Dionne Chornoby's name whereby her middle name "Dionne" was incorrectly referenced as "Dawn" and with the consent of Member's Counsel, the Notice of Hearing was amended to substitute "Dionne" for "Dawn".

II. STANDARD OF PROOF:

The Saskatchewan Court of Appeal in Re: Camgoz (1989) 74 S.R. 73 specifically stated that the criminal standard of proof, proof beyond a reasonable doubt, is not appropriate in professional discipline cases. The Court quoted from Lord Denning in Bater v. Bater [1950] 2 All E.R. 458 (C.A.):

“the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil Court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court, even when it is considering a charge of a criminal nature, but it still does require a degree of probability which is commensurate with the occasion.”

The suggestion of a sliding scale within the context of “balance of probability”, has been followed in the past such that the more serious a citation, the more probable the evidence must be. However, the Supreme Court of Canada in F.H. v. McDougall, [2008] 3 S.C.R. 41 has laid to rest the appropriate standard of proof in civil cases. At paragraph 26, Rothstein J. states:

“much has been written as Judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a Defendant are particularly grave. Such cases include allegations of fraud, professional misconduct and criminal conduct . . .”

At paragraph 40 Rothstein J. states:

“like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a Judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences; however, these considerations do not change the standard of proof.”

Justice Rothstein further at the end of paragraph 44 and through paragraphs 45 and 46 states the following:

“In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is

more likely than not that the event occurred.

. . . There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial Judge.

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.”

It is upon this basis we have reviewed the evidence.

III. CITATION #3:

Inasmuch as there are three formal complaints, the complaint as contained in Exhibit P2 that the Member did willfully evade payment of taxes, is essentially dealt with by the Certificate of Conviction (Exhibit P5) entered into evidence with the consent of the Member’s Counsel. Moreover and further, it is admitted by Member’s Counsel. As a result, we find Tara Dionne Chornoby is guilty of conduct unbecoming of Citation #3 as stated in the Formal Complaint (Exhibit P2).

IV. CITATION #1:

With respect to the other two Formal Complaints, we will first review the matter of the allegation that the Member is guilty of conduct unbecoming a lawyer in that she misappropriated funds from her firm as stated in Formal Complaint filed as Exhibit P1.

Counsel for the Investigation Committee did call evidence with respect to this allegation. The evidence was presented through two witnesses, Brenda Callaghan and Dean Rask. Ms. Callaghan was employed by the Rask and Company Law Firm as a bookkeeper and assistant to Mr. Rask at the material time.

Mr. Rask, for lack of a better description, was the owner and sole partner in the firm of Rask and Company, of Saskatoon, Saskatchewan.

Ms. Callaghan’s evidence in summary was at the time the Member ceased employment with Rask and Company, Ms. Callaghan did discover in a small file cabinet in the Member’s former office, approximately forty files which contained Wills and Powers of Attorney. The Powers of Attorney did not appear to have been billed. She contacted Mr. Rask, who maintained an office in Calgary, Alberta as well, and on his direction did follow up in terms of attempting to bill and/or collect for these services rendered from the particular individuals. These clients were annoyed to have been contacted but many did provide proof of payment which were not payments that were paid to Rask and Company. Member’s Counsel did admit during Ms. Callaghan’s testimony that “It’s not in dispute that Tara had billings for Powers of Attorney and that she took the money and that it went to her not the firm and

directly to her. That's not in dispute." As a result, the Hearing Committee accepts the admission by Member's Counsel that the Member did receive monies directly which were not billed through the Law Firm of Rask and Company, nor did the Law Firm receive the funds.

Before summarizing the evidence of Mr. Rask, it is necessary to, in short, summarize the gist of the Member's testimony. The Member was called by the Member's Counsel to testify and was cross-examined by counsel for the Investigation Committee.

In essence, the Member testified that she had an arrangement with Mr. Rask and thus Rask and Company, whereby she would be entitled to render services to certain clients and both bill and receive the payment directly. This arrangement was known only to her and Mr. Rask and it related to her having attracted a client to the firm which was a financial institution. This financial institution retained Rask and Company by way of the Member to prepare Wills on behalf of its customers. The financial institution would be billed for the Wills, both preparation and execution, and would pay said bills to Rask and Company. The Member in servicing these customers/clients of the financial institution would also often times prepare Powers of Attorney, and as already established, bill them directly and retain the payment. These bills would be outside the accounting system of Rask and Company but would be inclusive of GST and PST.

The Member testified that the basis for this arrangement related to her compensation agreement with Rask and Company in that she received a salary from the firm pursuant to a percentage of monies billed and collected. She indicated, however, that there was a criminal law file on which Mr. Rask had her provide a great deal of services and she was of the view that the firm would not receive full payment from this individual in the end.

The arrangement with Mr. Rask, therefore, was to compensate the Member for work performed on the criminal file for which full payment was not anticipated and to a lesser extent for having obtained the financial institution as a client for the firm.

The Member also indicated that under the terms of the arrangement with Mr. Rask, the Law Firm would remit the applicable taxes on the accounts for which she billed clients directly to the appropriate governmental authorities. She further indicated that she maintained a record of these files and the billings in a journal/log book and did provide Mr. Rask with this information from time to time.

Mr. Rask also testified and in summary his evidence was that no such agreement existed. There was no log book nor any reporting to him as to fees billed and collected by the Member outside the Law Firm's accounting system. In fact, it would be "ludicrous" that he would agree to paying the GST and PST on fees the Member billed directly outside the Law Firm's accounting system.

V. ANALYSIS:

On the one hand the Member is stating there is an agreement while Mr. Rask is saying there was no such agreement. As the Hearing Committee, we are faced with two different versions of the facts and a question of credibility.

Inter alia, in the analysis of credibility the manner in which testimony is given must be considered. We have concluded that the manner in which both the Member and Mr. Rask testified would not lead us to prefer one version of facts over the other and that is with consideration given to Member's Counsel calling witnesses to challenge Mr. Rask's credibility. There are numerous inconsistencies in the evidence presented. We, as the Hearing Committee, are left to some extent wanting some evidence that is indisputable and with the view there is more to this matter than presented. However, there are certain facts which are clear and must be focused upon for the purpose of our conclusion.

Member's Counsel in cross-examination of both Ms. Callaghan and Mr. Rask obtained admissions from those witnesses that had the Member destroyed the forty files there would be no discovery of her having billed and received monies directly from clients outside the Law Firm's accounting system. This fact of the Member having cleaned out her office entirely except for one file cabinet with the files billed by her to clients directly is ponderous. If one were wanting to conceal an activity, destruction of the "evidence" would certainly make sense. On the other hand, the fact of the forty files being left in the office is inconsistent with the Member's testimony that when she left the firm those files were not in her office. The files were in a storage area to eventually be formally reviewed and closed.

Member's Counsel suggested in argument, which by agreement both parties consented to provide in writing after the actual Hearing, that Mr. Rask no doubt used the log book to assemble the files and place them in a cabinet in her office to be found. There is, however, no evidence to substantiate Mr. Rask having conducted himself in this manner or any direct or probable evidence to demonstrate motivation for doing this. This is supposition and not convincingly plausible.

Nonetheless, the fact of the Member not destroying or hiding or doing away with the forty files, whether left in a file cabinet in her office or in a storage area to be closed, is irreconcilable with the probability of her being concerned with having personally billed and retained fees on those files or of her conduct being discovered. It was clear from the testimony of Ms. Callaghan, and Connie Woodland, both of whom worked at Rask and Company while the Member was there, that the Member was very well organized and meticulous. This fact and the fact files were not destroyed or concealed is convincing evidence. But for these forty files Rask and Company would not have likely undertaken a review of the billings nor would there be any likelihood of the discovery of the Member's direct billings. There was insufficient compelling evidence presented otherwise to accept one version of the facts over the other. We can only rely on that which is not in dispute.

As a result, we do not find the evidence sufficiently clear, convincing and cogent to satisfy the balance of probabilities test and, therefore, conclude there was no conduct unbecoming by the Member.

VI. CITATION #2:

With respect to the matter of the failure to remit Goods and Services Tax (GST) and Provincial Sales/Education Tax (PST), the Member admitted that on all the direct billings to clients she charged and collected GST and PST. Furthermore, she admitted no remittance was made by her. Having received the tax, the obligation was on the Member to ensure remittance, notwithstanding her assertion that Mr. Rask had agreed to make such remittances to the appropriate Government agency. As a result, we conclude that there, by the Member's admission, is sufficient evidence on the balance of probabilities that the Member is guilty of conduct unbecoming for failing to remit GST and PST.

The Hearing Committee makes no sentencing recommendation and refers the matter to the Benchers of the Law Society of Saskatchewan at a convocation of their choosing, for sentencing to be concluded.

DISCIPLINE SENTENCING DECISION

INTRODUCTION AND SUMMARY

1. Tara Dionne Chornoby was found guilty of two counts of conduct unbecoming comprising of failure to remit GST and PST and willfully evading payment of Income Taxes.
2. The Discipline Sentencing Committee, after hearing a joint submission as to sentence, imposed a 2 month suspension with costs.

JURISDICTION AND RESPONSIBILITY

3. The Law Society of Saskatchewan was established in 1907 and governs the legal profession in the Province of Saskatchewan under the *Legal Professions Act, 1990*.
4. The disciplinary process is usually undertaken on the basis of complaints received from clients, members of the public or lawyers. However, the Law Society may undertake its own investigation where information comes to its attention which indicates inappropriate or un-professional behavior.
5. Conduct unbecoming is defined as: Any act or conduct, whether or not disgraceful or dishonorable, that; (1) is inimical to the best interest of the public or the members; or (2) tends to harm the standing of the legal profession generally@.

PROCEDURAL HISTORY

6. The Hearing of the Formal Complaints was held on March 11th and 12th at Saskatoon, Saskatchewan before the Hearing Committee comprised of Karen Topolinski, Karen Jones and Victor Deitz, Q.C., as Chair.
7. The parties acknowledged that the Hearing Committee was properly constituted and had jurisdiction to deal with the matters before it.
8. Two Formal Complaints were presented and, with the consent of the parties, a Hearing was held by the Hearing Committee into both Complaints. After hearing the evidence and submissions of counsel, Ms. Chornoby was found guilty of two counts of conduct unbecoming as follows:
 - Count 1) That she collected GST and PST in relation to Legal Fees paid to her and failed to remit said GST and PST to the Federal and Provincial Governments as required by Law; and
 - Count 2) On February 4, 2010, was convicted of the following offense: that she , between the 1st day January A.D 2004 and the 31st day of May A.D. 2007 at or near Saskatoon, Saskatchewan, did willfully evade payment of taxes imposed by the Income Tax Act, for the 2004, 2005, 2006, and 2007 taxation years in the amount of \$4990.00 by understating her taxable income in the amount of \$25,000.00 contrary to Section 239(1)(d) of the Income Tax Act.
9. Pursuant to Section 55 of the *Legal Profession Act, 1990*, the Hearing Committee, not having assessed a penalty, referred the matter to the Chair of Discipline to set a date for sentencing. On the 3rd of December, 2010, the Benchers met as the Discipline Sentencing Committee at Saskatoon, Saskatchewan to conduct a Sentencing Hearing and impose sentence.
10. The Law Society (Discipline Investigation Committee) was represented by Mr. Tim Huber. Ms. Chornoby was present and represented by Mr. Morris P. Bodnar, Q.C.
11. A Discipline Sentencing Committee was established at the hearing and no objection was taken to either the jurisdiction or the composition of the Committee. The Committee received a joint submission as to the appropriate sentence from Mr. Huber and Mr. Bodnar.

FACTS

12. The facts before the Discipline Sentencing Committee were as found by the Hearing Committee and evidenced through the Report of the Hearing Committee. The following is a brief outline of the facts as found by the Hearing Committee:
 - (a) Ms. Chornoby, during the relevant period of time, was employed at Rask and Company, a Law Firm with an office in Saskatoon, Saskatchewan.

- (b) Ms. Chornoby would for most of her work product bill through and be paid by Rask and Company. Her remuneration was calculated on a percentage basis.
- (c) Notwithstanding the above arrangement, the member billed some of her clients directly and received the payments personally without going through the accounting system of Rask and Company. These payments for services included GST and PST. Ms. Chornoby did not remit the GST and PST to the appropriate governments.
- (d) The member did not include income from the direct payments in her Income Tax Returns for the taxation years 2004, 2005, 2006 and 2007, thereby understating her taxable income by \$25000.00 and evading \$4990.00 in taxes.
- (e) The member has paid all the GST and PST owing, and has paid the income tax owing as well as substantial fines and penalties.

DISCIPLINE HISTORY

- 13. The member does not have a discipline history.

JOINT SUBMISSION

- 14. At the hearing, counsel for the Conduct Investigation Committee and Mr. Bodnar submitted that the appropriate sentence in this case was a 2 month suspension with costs set at \$500.00. Mr. Bodnar requested that the 2 month suspension be split into two parts or, failing that, that the implementation of the suspension be delayed until February 15th, 2011. Mr. Huber objected to the splitting of the suspension, but did not object to delaying the onset of the suspension until February 15, 2011.

ANALYSIS

- 15. A Sentencing Committee is required to consider and accept a joint submission unless it is not within the range of sentences, unfit or unreasonable and/or contrary to the public interest. (*Susan Rault and the Law Society of Saskatchewan, 2009, SK CA 81*).
- 16. The Committee considers failure to remit GST and PST serious breaches of conduct. The Statutes which mandate the collection of GST and PST create a trust obligation on the collector and failure to remit is a breach of that trust. The range of sentences appears, at this time, to be reprimands, fines and costs. (*Law Society of B.C. vs. Purvin-Good, 2004 LSBC 5; Law Society of BC vs. Medd, 2004 LSBC 15*).

17. In the case of conduct unbecoming based on Income Tax evasion, the range of penalties is from a reprimand with costs to disbarment, depending on the presence of deceit and the willfulness with which the offence took place (*Law Society of Upper Canada vs. Menzies*, [1999] L.S.D.D. 114). The majority of the authorities in this area suggest a suspension as the most likely penalty.
18. The conduct of the member in this case raises integrity issues. There is a degree of dishonesty involved in submitting Tax Returns which contain false statements as to income. Failing to remit GST and PST raises a number of concerns including breach of a statutory trust and misleading clients. Clients are misled in the sense that, they pay the GST and PST in the expectation it will be remitted and not appropriated for use by the member. Notwithstanding the above observations, we were not urged in the individual or in the joint submissions by counsel to conclude that the member was so dishonest that she could no longer be trusted. The penalty proposed by the joint submission is within the range of outcomes of similar cases.

DECISION

19. Applying the Law as outlined in the Rault decision (*supra*), the Committee accepts the joint submission and imposes a suspension of 2 months with costs set at \$500.00.
20. The Committee, barring exceptional circumstances, does not believe that splitting a suspension is appropriate. Splitting the sentence into two parts could leave the impression that it is the member's interests which are being protected. However, delaying the implementation of a suspension, when it is in the public interest to do so, may in some cases be appropriate. In this case, the member has court cases which have been scheduled for December and January. These cases would have to be delayed if the suspension commenced immediately. In the interests of not inconveniencing the member's clients, the Committee, having been assured that the cases will be resolved by the middle of February 2011 orders that the suspension will commence on February 15th, 2011.

ORDER

21. The Discipline Sentencing Committee orders as follows:
 - 1) That effective February 15th, 2011, the member shall be suspended for a period of 2 months; and
 - 2) That the member shall pay costs in the amount of \$500.00 to the Law Society of Saskatchewan by December 31, 2010.