The Law Society of Saskatchewan

PAULINE DUNCAN-BONNEAU Q.C. (CAN)
HEARING DATE: October 24, 2013
PENALTY HEARING DATE: August 21, 2014
DECISION DATE: September 16, 2014
***Law Society of Saskatchewan v. Duncan-Bonneau*, 2014 SKLSS 11**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF PAULINE DUNCAN-BONNEAU Q.C. (CAN),
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. The Hearing Committee composed of Peter Hryhorchuk (Chair), Thomas Campbell and Lorne Mysko convened on October 24, 2013 in Regina, Sk. to inquire into the conduct of Pauline Duncan-Bonneau. The Hearing was thereafter adjourned to November 22, 2013 for the exchange and filing of written argument as well as final oral presentations. On the 4th of December 2013 the Committee met by conference call and reached a decision. These are the written reasons of that decision.

2. At the Hearing, the Investigation Committee was represented by Mr. Tim Huber. The Member was present and was represented by Mr. Douglas Andrews, Q.C. No objection was taken to the constitution of the Hearing Committee or the jurisdiction of the Committee to hear the Complaint.

3. The Formal Complaint contained three allegations, one of which was withdrawn. The Member was charged that she:

> **(i) did abuse her power as the sole executrix and solicitor of the Estate of Mr. F. by threatening to increase fees charged to the estate if the beneficiaries requested that her fees be taxed by the court; and**
>
> **(ii) did use her position of power as the sole executrix of the Estate of Mr. F in an attempt to compel G.F. to abandon a complaint against her to the Law Society of Saskatchewan.**

4. Five exhibits (L1-5) were tendered by the Investigation Committee and three (M1-3) on behave of the Member.

PRELIMINARY MATTERS

5. The Committee accepts that the standard of proof is on a balance of probabilities. (*F. H. v. McDougall* [2008] 3 S.C.R. 41) The Investigation Committee must prove its case with evidence that is clear, convincing and cogent.

6. The Committee is of the view that matters of lawyer regulation are "strict liability" unless the wording of the allegation or the conduct complained of is of necessity one which imports a specific intention. We do not read the Court of Appeal in *Merchant v. Law of Saskatchewan*, 2009 SKCA 33, as saying anything more than if a certain thing is alleged to be done in a certain way then that is what must be proven. We accept as correct the statement at paragraph 55 of the Report of the Hearing Committee *In The Matter of The Legal Profession Act and in The Matters of Joel Arvid Hesje, Q.C. et al* (October 4,2013) that professional misconduct is considered a strict liability offence.

7. At the Hearing of this matter Counsel for the Investigation Committee sought to have admitted into evidence the Decision of Mr. Justice Barrington-Foote in a related decision of the Court of Queen's Bench. Counsel for the Member objected on various grounds including relevance. We allowed the Judgment into evidence provisionally on the basis that in order to assess relevance we would need to read it.

8. Mr. Huber's position at the Hearing was that the findings of the Court of Queen's Bench could afford prima facie evidence in support of the charges and relies on the case of *Rosenbaum v. Law Society of Manitoba* [1983] 5 W.W.R. 752 (Man. Q.B.). Mr. Huber also argued the doctrine of abuse of process suggesting that the Member should not be allowed to re litigate a matter which has already been determined. *Skender v. Farley* [2008] 4 W.W.R. 241 (B.C.C.A.)

9. Mr. Andrews argued that the Judgment should not be accepted as evidence since it did not deal with the same issues, was the result of Chambers proceeding based presumably on affidavit evidence, and that there is no transcript of the proceedings.

10. After consideration of the arguments we have concluded that we need not resolve the questions raised by Counsel. We find that the issues we have to decide and the issues decided by the Court are sufficiently different so that we are not bound by the Court's findings. In any event, in the result, our view of the evidence and our findings are not in conflict with the Judgment. Except as general background information the Judgment played no part on our decision.

11. A Certificate of Assessment was filed and marked as (L4). It is our view that the certificate is admissible as evidence of what occurred at the Taxation. The Member at the Hearing had an opportunity to dispute its contents.

BACKGROUND OF COMPLAINT

12. On October 8, 2007, R.F. died leaving his wife and the Member as co-executors of his estate. R.F.'s three children were named as beneficiaries of the estate which consisted mainly of

farm land. The estate was however burdened with considerable debt and the bequests could not be carried out without a large injection of cash.

13. The Member became the sole executrix and continued to act as legal counsel.

14. The Will contained a clause directing that the Member as executrix "shall receive remuneration at the hourly rate she is then charging in her legal practice."

15. The Will was changed shortly before the death of R.F. by a Codicil, removing one of the beneficiaries G.F. and replacing her with M.V.

16. The relationship between the beneficiaries and the Member deteriorated rather quickly to the point that they hired their own counsel approximately six months after R.F.'s death.

17. The Member was removed as Executrix in the fall of 2012.

18. On March 30, 2010 beneficiary G.F. filed a complaint with the Law Society in relation to the Member's conduct.

19. The above is only a brief summary of the background circumstances. From the documents and the testimony of the witnesses we have concluded that relationship was beyond strained. The beneficiaries in our view distrusted the Member and believed she was charging excessive fees and delaying the progress of the settling of the estate. The Member appears to have believed that G.F. was trying to usurp her power as executrix and harbored suspicions that her fees would not be paid.

ALLEGATION (1)

20. The facts which the Committee considers relevant to the allegation are as follows:

a) the Member was advised by letter dated March 10, 2010 (L-3 tab 10) that the beneficiaries have concerns about her fees;

b) the Member by letter dated March 11 2010, (L-3 tab 11) writes the following at paragraph 9:

> "I must have the issue of my fees and disbursements fully resolved. Prior to providing your office with transfers, I will require the beneficiaries to execute Releases approving of my accounts. I am not prepared to allow the issue of my fees to be "addressed in due course" as stated in the last paragraph of your letter to me in today's date. I will be rendering another interim account prior to preparing the Releases. I will add payment of future, estimated fees to the holdback amount I will require to be paid by the beneficiaries. I will not leave myself vulnerable to taxation or an accounting. The payment of my fees must be resolved before I will transfer any of the land to the beneficiaries."

c) the Member is advised by letter dated March 15, 2010 (L-3 tab 12) that the beneficiaries want the Members Account taxed;

d) the Members Interim Statement of Account for $14,850.00 dated 6/1/2009 (L-3 tab 2) paid from trust;

e) the Members account in the amount of $6,634.66 dated 11/17/2009 paid from trust;

f) the Member sent a letter dated April 19, 2010 enclosing revised statements of account and indicating increased amounts will be claimed if the matter proceeds to taxation.(L-3 tab16);

g) revised itemized account respecting June 1, 2009 (L-3 tab 17);

h) revised account respecting November 17, 2009 (L-3 tab 18);

i) Certificate of Assessment.

POSITION OF THE PARTIES

21. Mr. Huber for the Investigation Committee argues that the Member as executrix and counsel had control of all the levers of power. She could and did apply pressure to the beneficiaries to, among other things, approve her past and future fees by refusing to move the administration of the estate forward. He points to the revised invoices as an increase in fees as an example of this pressure.

22. Mr. Andrews takes the position that the revised invoices were corrections of errors and not a threat to increase fees if the beneficiaries proceeded with the taxation. He further submits that these actions were done in the open and suggest that there is no element of dishonesty or lack of integrity committed with the writing of the letter or the statements in the revised invoices. He suggests that the Investigation Committee must prove that the Member threatened to increase her fees to prevent taxation from proceeding.

ANALYSIS

23. The Committee is of the opinion that the Member's first duty should have been to the estate and the beneficiaries and not to the collection of her fees. This is not to say that there is anything wrong with ensuring proper payment for services rendered.

24. The concern in this case is not that the Member pursued her self-interest by desiring to be paid for her work but that the Member in our view lost sight of where her responsibilities lay and became involved in an unseemly struggle over fees and the payment of same.

25. On the evidence we are convinced that the Member wanted to avoid taxation when she sent the April 19, 2010 letter with the revised accounts. There could be no other interpretation of the phrases "if this matter proceeds to taxation Pauline Duncan-Bonneau, Q.C. (Can) will render a revised account charging $15,420.00, a difference in her favor of $1,920.00" and further "Note:

Rule 745 prescribes that the solicitor's fees be reduced by 40%. My account rendered on November 17, 2009 allowed for a 60% reduction. If my account is taxed, I will be submitting an account for $4,718.00.If my account is not taxed, I will agree that the prior amount billed for fees, namely $3,725.00, is appropriate." other than that the fees will be increased. These invoices had been paid many months earlier. This in our view is not an attempt at some type of courtesy discount. Further, if the Member wanted to correct the invoices all she had to do was to so state, with no mention of the taxation. We do not see this as an offer of a settlement of the fees issue. In the context of the ongoing dispute over fees and other matters, it can only been seen as a threat to increase the fees.

26. As previously stated ensuring payment of an account for services rendered is not objectionable. However, if the method by which it is done is by abusing one's power or by threats of action or inaction it becomes sanctionable.

27. If we are in error in concluding that the Member wanted to avoid taxation we would still find that the conduct was highly inappropriate. In our view the focus of the inquiry is not solely on the intention of the Member but how the actions of the Member impacted on the beneficiaries. There can be no doubt that they believed they were being pressured to abandon their right to taxation of fees that, in their view, were grossly exaggerated and that the Member had overcharged and knew it. The results of the subsequent taxation which reduced the fees by more than fifty percent would have reinforced these beliefs. Threats or the appearance of threats that have the effect of attempting to dissuade members of the public from exercising a right granted by law, in our view, damages the reputation of the profession.

28. We hold that the Member's conduct as described above is "inimical to the best interests of the public or the Members; or tends to harm the standing of the legal profession generally and therefore constitutes conduct unbecoming". This allegation is well founded.

ALLEGATION (2)

29. The evidence in support of this allegation, in addition to the general background consists of the following:

a. Letter dated June 9, 2010 from the Member to Charlene Richmond, Counsel for the beneficiaries with attachments which included transfer authorizations for land, approval of accounts and releases and an Indemnification Agreement. The letter in part indicates that the attached transfers were sent to counsel for the beneficiaries on trust conditions which included the following: "You will provide me with a copy of a letter signed by G.F and directed to the Law Society for Saskatchewan where she confirms that all of her concerns have been addressed and that she withdraws her complaint against me."

b. The aforementioned Indemnification Agreement contained the following term "Concurrent with the execution of this Indemnification Agreement the Indemnitors will provide the Executrix with their Release and advise the Law Society of Saskatchewan that they are withdrawing their complaint against the Executrix and are satisfied with the manner in which the Executrix has carried out her duties to date."

30. It should be noted that the above mentioned transfers are only for land related to two beneficiaries and did not include the transfer related to G.F.

31. On June 11, 2010 the beneficiary G.F. complained to the Law Society regarding the aforementioned trust conditions.

32. On June 14, 2010 the Law Society advised the Member of the June 11, 2010 complaint and that attempting to bargain away a Law Society complaint may be conduct unbecoming.

33. On June 14, 2010 the Member contacted the Law Society by email and by letter explaining her actions.

34. On June 14, 2010 Counsel for the beneficiaries advised the Member by letter that her trust conditions were unacceptable.

35. On June 15, 2010 the Member, by letter, advised Counsel for the Beneficiary that the offending trust condition was withdrawn. The clause in the Indemnification Agreement requiring the withdrawal of the Law Society complaint was not addressed.

36. On April 6, 2011 an Indemnification Agreement was again sent to Counsel for the Beneficiaries which had some changes but still contained the requirement that the complaint to the Law Society be withdrawn as a term of settlement. At the Hearing the Member testified that the resubmission of the Indemnification Agreement on April 6, 2011 with the same objectionable term was an error on the part of her staff and was not deliberate. We accept that explanation as accurate.

POSITION OF THE INVESTIGATION COMMITTEE

37. In brief, the Argument of the Investigation Committee is that bargaining away a complaint for personal gain is conduct unbecoming. *Law Society of Saskatchewan v. Segal* [1999] L.S.D.D. No. 20 (affirmed SKCA); *Law Society of Saskatchewan v. Wilson* 2011 SKLSS 8. Mr. Huber on behalf of the Investigation Committee argues that as a matter of public policy the condition that a complaint be withdrawn is unenforceable, improper and unethical. See *Sandra Thompson Family Trust (Re),* [2011] O.J. No. 5398.

POSITION OF THE MEMBER

38. The argument presented on behalf of the Member is summarized as follows:

a) There is not an absolute prohibition against such a request;

b) The actions of the Member must exhibit dishonesty, untrustworthiness, or some such of similar type of conduct so as to demonstrate a lack of integrity;

c) The intention to settle matters in totality is a legitimate reason to request such a withdrawal;

d) That the Member's actions were open and transparent;

e) The Member relies on the case of the *Law Society of Saskatchewan v. Lawyer X*, 2010 LSS 5 and the Report of the Investigation Committee dated September 3, 1998.

ANALYSIS

39. Based on the evidence which is largely documentary and undisputed it is clear that the Member wished to have the complaint against her withdrawn.

40 The effect of the June 9, 2010 letter's trust conditions and the Indemnification Agreement is unambiguous in that the position of the Member was that unless the Beneficiaries agreed to her demands the land would not be transferred. It follows that the estate would not be settled, the matters would continue with interest charges accumulating and creditors demanding payment. Further added to this was the possibility that the land would be sold.

41. We therefore conclude that the Investigation Committee has proven that the Member did attempt to compel G.F. to abandon a complaint against her to the Law Society of Saskatchewan.

THE LAW

42. Conduct unbecoming is defined in the *Legal Profession Act*, 1990 SS 1990-91 as follows:

> d) "Conduct unbecoming" means any act or conduct, whether or not disgraceful or dishonorable, that:
>
> > (i) is inimical to the best interests of the public or the members: or
> > (ii) tends to harm the standing of the legal profession generally; and includes the practice of law in an incompetent manner where it is within the scope of sub-clause (i) or (ii).

43. In our view it is not necessary that the conduct demonstrate a lack of integrity in order for it to be conduct unbecoming. In the Report of the Hearing Committee in the *Matter of The legal Profession Act and Steve Connelly et al,* the following is stated: ". . . we would still be prepared to find conduct unbecoming if presented with sufficient evidence of behaviour contrary to the public interest or the interest of the legal profession, or evidence of behaviour that tends to harm the standing of the legal profession, even in absence of dishonesty and bad faith."

44. The Hearing committee is of the view that the bargaining away of a Law Society complaint is contrary to public policy and we adopt the reasons expressed in the case of *Sandra Thompson Family Trust (Re),* (supra). We are further persuaded that the correct law is as stated in *Law Society of Saskatchewan v. Segal*, (supra) and *Law Society of Saskatchewan v. Wilson*, (supra). In regard to the decision of the Investigation Committee dated September 3, 1998 presented to us by Counsel for the Member we are not persuaded that it can be given any weight since it is not a public document, and the issue therein was never litigated.

45. In the *Law Society of Saskatchewan v. Lawyer X* (supra), lawyer X presented a proposal to settle an outstanding civil action against his client, on the instructions of that client, which included a payment of monies and a withdrawal of the complaint against his client to the Law

Society. In the particular circumstances of the complaint, the Hearing Committee found that Lawyer X did not act in a manner which was unbecoming.

46. Under the regulatory regime prior to the amendments to The Legal Profession Act in 2010 a Hearing Committee decision could not be appealed by the Law Society and therefore the correctness of those decisions could not be challenged. To the extent the case in Lawyer X appears to be in conflict with the Decision of *Segal,* we accept the latter case as more persuasive. In any event, the present matter is a distinguishable from the case in Lawyer X in that part of the reasoning in that case was that Lawyer X gained no personal benefit, and that he was proposing to settle in totality an outstanding complaint against his client, on the instructions of his client. In this case, the Member was attempting to gain personal benefit which was the withdrawal of a complaint against herself. Further this was not a comprehensive proposal of settlement. If the beneficiaries had accepted the trust conditions and the Indemnification Agreement all that would have occurred would have been that the transfers would have occurred in relation to two of the beneficiaries but not in relation to G.F. In this case the Member was not acting on instructions of a client but appearing to act in her role as Executrix and Counsel. The Member's duty as Executor was to move the resolution of the estate forward and not to use her power to exact concessions from the Beneficiaries. Further the Member not only asked for withdrawal of the complaint to the Law Society but also a statement that the Beneficiaries were satisfied with the manner in which the Executrix had carried out her duties and specifically in relation to G.F that she confirmed that all of her concerns have been addressed. In our view it is obvious that the Member knew that such was not the case and that what she was asking the Beneficiaries to do was compromise their integrity by communicating a falsehood.

47. The *Legal Profession Act* and the *Rules* of the Law Society set up a procedure by which complaints against Members of the Law Society can be investigated and adjudicated. In our view it will be a rare circumstance where it is not contrary to the public interest to have that elaborate system circumvented by Members attempting to have complaints withdrawn as part of a settlement scheme. Not only does this conduct have the appearance of avoiding regulation it may also promote false complaints in the hope of getting a larger settlement by agreeing to withdraw them later. In our view complaints are not just private matters between the Law Society and a complainant but part of a larger regulatory scheme in the public interest.

48. We are aware and have considered the assertion of the Member that she did not know what she was doing was wrong and that when she was advised of same, the trust condition was withdrawn. While these may be relevant for the purposes of sentencing, they, in our view, do not constitute a defence.

49. In conclusion, we find the conduct herein is inimical to the best interests of the public and the Members. The allegation is well founded.

50. The Matter is referred to the Chair of Discipline for the imposition of sentence.

Dated at the city of Prince Albert this 6th day of January 2014.

"Peter Hryhorchuk, Q.C."
Peter Hryhorchuk Q.C. (Chair)
On behalf of the Committee

DISCIPLINE PENALTY DECISION

51. The Committee, having determined that the allegations above noted were well founded reconvened on August 21, 2014 by telephone conference call to hear representations from counsel as to the appropriate penalty to be imposed. Mr. Tim Huber appeared for the Investigation Committee (IC) and Mr. Douglas Andrews, Q.C. appeared with the Member. The Notice of Penalty Hearing and Statement of costs were filed as exhibits at the Hearing.

52. The jurisdiction of the Committee to impose a penalty is found in Section 53(3) of *The Legal Profession Act, 1990* (pre 2010 amendments) and is dependent on the consent of the parties. Where sentencing proceeds in this manner the Committee is restricted to imposing any one or any combination of a fine, costs and a reprimand.

53. Mr. Huber asked the Committee to impose a fine of $5,000.00 in respect of Allegation number 1, a reprimand in respect of Allegation number 2 and globally costs in the amount of $15,579.50 as particularized in the Statement of Costs.

54. Mr. Andrews, Q.C. disagreed that a fine was appropriate and suggested a reprimand for both Allegations. He took issue with the amount of the costs on a number of grounds as follows:

a) The amount of time attributed to obtaining an Agreed Statement of Facts;

b) The time attributed to dealing with the Decision of Mr. Justice Barrington-Foote;

c) The time attributed to the preparation and testimony of Mr. Dauncey; and

d) Since one of the allegations was withdrawn the costs should be reduced by a third.

ALLEGATION 1

55. Counsel for the Investigation Committee referred to two decisions from Saskatchewan which suggest that a suspension may be appropriate for conduct analogous to these circumstances. (See: *LSS v. Tapp*, 2011 SKLSS 1; *LSS v. Laporte,* 2005 [unreported]. In *LSA v. Rothecker,* [1998] L.S.D.D. No. 19 a $1,000.00 fine and $2,238.90 in costs were imposed for behavior which could be described as threatening to withhold service.

56. Since the Conduct Hearing of this matter the Member has been placed on interim suspension (on unrelated matters), has not practiced since December of 2013 and continues to be

suspended as of the writing of this decision. The Committee was advised by Counsel for the Member that she does not intend to return to practice. As a result of all of the above Mr. Huber submits that a suspension would be an ineffective penalty and a fine should be assessed in lieu of suspension.

57. Counsel for the Member asked the Committee to impose a reprimand in regard to Allegation 1. We were not referred to any authority supporting such a penalty. Mr. Andrews Q.C. suggested that the authorities cited dealt with much different and more serious allegations.

ANALYSIS

58. In the decision of *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17 a number of factors are set out which must be considered in arriving at a penalty. Depending on the circumstances some of these factors will be given more weight than others. In this case the emphasis will be placed on the need for general deterrence and the need to insure the public confidence in the integrity of the profession. Other factors considered are the range of penalties imposed in similar case, the impact on the complainant, the advantage sought to be gained, the prior discipline record of the member and generally the nature and gravity of the conduct proven.

59. Based on a review of the authorities we are of the opinion that a compelling argument could be made that a suspension is warranted albeit perhaps not for the length in time imposed in Tapp (45days). We are also of the view that even if we had jurisdiction to impose a suspension given the Member's current circumstances a suspension would be an ineffective disposition.

60. Counsel for the Member submitted that a reprimand should be considered. Taking into account the circumstances of this case, the prior record and the apparent lack of authorities supporting such a penalty we do not view a reprimand as appropriate.

61. After careful consideration we are of the view that a fine in the amount suggested by counsel for the Investigation Committee is an appropriate penalty and we therefore impose a fine in the sum of $5,000.00. In coming to this conclusion we have considered the following circumstances:

a) The Member used her power and authority to attempt to prevent the complainant(s) from exercising a right provided by law;

b) The Member placed her own financial interests above her duty to the beneficiaries (clients);

c) While the Committee did not hear evidence that the fees were excessive in the sense that the work was not done or the time expended, the fact remains that the taxation officer reduced the Member's fees by over 50%. Looking at the matter in retrospect, it is clear that had the Member succeeded in having her client(s) withdraw their request to have her account taxed and the taxation had not taken place, the Member would have benefited financially from her conduct.

d) The Member's conduct caused stress to the beneficiaries and at least potentially placed family assets at risk;

e) The Member has a prior discipline record which, while dated, bears some similarity to the present conduct in that it involved using leverage against a client to obtain payment. The Member was given a reprimand and ordered to pay costs;

f) At the penalty hearing no specific mitigating factors were presented to the Committee. We do note that the Member was admitted in 1980 and apparently has practiced without incident other than as mentioned above.

ALLEGATION 2

62. Counsel for the Investigation Committee suggested the penalty of a reprimand citing *LSS v. Segal*, [1999] L.S.D.D. No. 20 and *LSS v. Wilson*, 2011 SKLSS 8. In both these cases a reprimand and costs were ordered by the Sentencing Committee. Counsel for the Member did not take issue with this position.

63. Based on the submissions of Counsel and the cases presented, we are of the opinion that a reprimand is appropriate and therefore order that the Member be reprimanded for this Allegation.

COSTS

64. At the Hearing an itemized Statement of Costs was filed with the Committee. Counsel for the Member had a number of concerns and suggested reductions accordingly, as previously outlined at paragraph 54 above.

65. The Committee has carefully reviewed the Statement of Costs. There does not appear to be any obviously excessive claims and we in general are satisfied that the amounts related each activity are reasonable.

66. In regard to the claims to which there was an objection (the time associated with attempting to arrive at an Agreed Statement of Facts, the Decision of Mr. Justice Barrington Foote and the evidence of Mr. Dauncey) we do not agree that they should be deducted from the total. Counsel for the Member essentially argued that the time expended on matters which ultimately do not produce the expected results should not be allowed as costs. The Committee is of the opinion that to link the assessment of costs to the success of individual pieces of evidence or arguments is an unwarranted intrusion into the prosecution process.

67. With respect to the allegation which was withdrawn, we are of the view that there is merit to the suggestion that a reduction in costs be allowed. Mr. Andrews, Q.C. suggested a reduction of one third. Mr. Huber did not oppose a reduction in principle.

68. No specific method for calculating the reduction was suggested to us. Given the nature of the Costs attributable to all three allegations, which is principally Mr. Huber's time, it is unlikely that the withdrawn allegation consumed one third of it. We have concluded that $3,000.00 which is approximately 25% of Mr. Huber's time adequately reflects the time attributable to the withdrawn allegation. The Costs allowed will be $12,579.50.

69. We accordingly direct that the Member pay a fine in the amount of $5,000.00 in relation to Allegation 1, impose a reprimand in relation to Allegation 2 and, in relation to both, pay costs in the amount of $12,579.50. The Member is given until June 1, 2015, to pay both the fine and costs.

September 8th, 2014

"PETER A. HRYHORCHUK, Q.C."
CHAIR

"THOMAS CAMPBELL"

"LORNE MYSKO"