THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

JAMES GRAEME EARL YOUNG

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

REASONS FOR DECISION

ON MOTION OF MEMBER MADE JANUARY 23, 2017

THE LAW SOCIETY OF MANITOBA

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REASONS FOR DECISION

1. The Law Society of Manitoba (the "Society") served two Citations on James Graeme Earl Young in 2016. The hearing of the Citations began on Monday, January 23, 2017.

2. Following the entry of the Citations as Exhibits, Mr. Young made a motion that the Panel order that the Society be prohibited from tendering any evidence with respect to Counts 6 and 8 of the Citation dated March 29, 2016 on the grounds that to permit the Society to do so would be a breach of natural justice.

3. Count 6 of the Citation dated March 29, 2016 alleges that on three separate occasions in 2014, Mr. Young misappropriated trust funds in that he is said to have caused his clients Mr. S. D. and Ms. S. C. to pay into his personal bank account monies on account of unbilled fees instead of into trust at one or other of the two firms with which he was practicing at different times in 2014.

4. Count 8 of the Citation dated March 29, 2016, alleges with respect to the same two clients that Mr. Young provided false information to the Society in that he told the Society that the funds he had received from Mr. S.D. and Ms. S.C. were repayment of monies advanced to Ms. S.C. at an earlier date and that he was acting pro bono for them in 2014.

5. Mr. Young denies the allegations in Counts 6 and 8.

6. Mr. Young admitted at the outset of the hearing that he was admitting to certain other counts in the two citations involving other clients and other allegations.

7. We were advised that the Society's counsel had subpoenaed Mr. S.D. and Ms. S.C. but there was an expectation that neither would obey the subpoena.

8. We were advised by Mr. Young's counsel that shortly after complaining to the Society about Mr. Young and his receipt of monies from them, Mr. S.D. and Ms. S.C. had sent emails to the Society asking that their complaint be withdrawn. We were told that in one of the emails Mr. S.D. and Ms. S.C. advised that they "accepted" Mr. Young's version of events.

9. As a consequence of the foregoing, Mr. Young's counsel submitted that it was apparent that the Society would be left with only hearsay evidence to prove counts 6 and 8. He told us that relying on hearsay evidence to prove professional misconduct would be unfair to Mr. Young. It would constitute a fundamental breach of natural justice and was contrary to a number of authorities which he asked us to read, consider and apply. He observed that an "accused" person has a fundamental right to 'confront' his accusers. Given that it was apparent that neither Mr. S.D. nor Ms. S.C. was going to appear, Mr. Young would have no opportunity to cross-examine them, though, in this case, it seems that the two former clients might give testimony favourable to Mr. Young. He told us that in a hearing where the Member was admitting to liability on some matters, it would be difficult, perhaps impossible, for a panel to consider fairly charges that were disputed where the complainants were not appearing. He said he feared panel members would be inclined to discount explanations from the Member about the

disputed charges because the Member in the same hearing was conceding to unprofessional conduct with respect to other clients and actions.

10. We were provided with copies of three emails from Mr. S.D. and Ms. S.C. We declined to read them until we heard from counsel for the Society.

11. Counsel for the Society submitted that he had no intention of entering hearsay evidence. He told us he would tender written documents from the two clients to show that a complaint had been made, but not for the purpose of proving the truth of the complaint in question. He expressed confidence that he could prove counts 6 and 8 with the evidence he had available to him. He observed that the Society is not the 'agent' of citizens who file complaints with the Society regarding its Members. Rather, the Society he said has a duty to prosecute charges where the Society believes it is in the public interest to do so. The Society is the "accuser" in prosecuting Members for professional misconduct. Members of the Society do not have a "right" to remain silent when complaints about their conduct are placed before them. Accordingly, he anticipated that Mr. Young would have to testify in response to the facts alleged in Counts 6 and 8. Finally, he observed that if Mr. Young was concerned that some prejudice might flow as a consequence of Counts 6 and 8 being heard in conjunction with other counts, his remedy was a motion to sever, not a motion to suppress the hearing of the counts in question.

12. Counsel for the Society asked, if we found ourselves inclined to grant the motion, for time to lead viva voce evidence on the three emails so that they could be considered "in the context" in which they had been received.

13. Counsel for Mr. Young, in rebuttal, asserted that it was sheer "balderdash" for the Society to claim that it could prove Counts 6 and 8 without relying on hearsay evidence and commended to us, again, the authorities we were asked to read.

14. We reserved our decision so as to have time to review the authorities -- six cases and an excerpt from a textbook. As Counsel were able to proceed with evidence on other counts, the hearing continued.

15. Having reviewed the authorities in question, we advised the parties on the morning of January 24, 2017 that the motion brought by Mr. Young was dismissed. We said that written reasons for our decision would follow. These are the reasons.

16. James T. Casey, *The Regulation of Professions in Canada*, (2016) at page 11-11 warns "that the acceptance of hearsay evidence can result in there being a denial of natural justice such that the decision of the disciplinary committee must be overturned." The selection provided to us provides support for that statement, though Casey notes that the "rule" regarding the use of hearsay evidence varies depending upon the administrative tribunal in question. In our case, we are obliged to follow the rules of evidence applicable in civil trials before the Manitoba Court of Queen's Bench.

17. In *Gilbert v. The Commissioner of the Ontario Provincial Police Force et al*, 2000 CanLII 16843 (Ont CA), the Court reviewed a disciplinary proceeding against a police officer who was alleged to have sexually assaulted a woman. The incident under review had also been the subject of criminal proceedings. The complainant had testified at a preliminary enquiry and had been cross-examined. The charges had not gone to trial. In the disciplinary proceeding, the prosecution relied solely on the transcript from the preliminary hearing. The Court found that the transcript was hearsay evidence and ought not to have been admitted in the disciplinary hearing. As the complainant was not available to be called as a witness in the disciplinary hearing, there was no opportunity to cross-examine her on certain aspects of her testimony at the preliminary hearing that had not been fully canvassed. The Court said that there was no point to the disciplinary hearing proceeding in the absence of the prosecution leading any other evidence beside the transcript which, to repeat, it found was hearsay evidence.

18. In *Crandell v. Manitoba Association of Registered Nurses*, 1976 CarswellMan 81, Justice Solomon of the Court of Queen's Bench observed, in a discipline matter involving the suspension of a nurse's certificate of registration on the grounds of incompetence, that "to proceed with the hearing and actually suspend appellant's registration on hearsay evidence cannot be justified under any circumstances." The Court proceeded to hear the matter de novo and declined on the evidence it heard to

suspend the nurse's certificate. The board which suspended the nurse did so on the basis of a report from a registrar and heard no testimony from patients, other nurses or doctors.

19. In *Carlin v. Registered Psychiatric Nurses' Association of Alberta,* 1996 CarswellAlta 568, the Alberta Court of Queen's Bench quashed a decision of the Conduct and Competency Committee that had decided, on a preliminary motion, that it had the jurisdiction to consider an ethical complaint regarding a nurse. The Court found that the committee in question had failed in several ways to follow the legislation that governed its procedures. The Court commented adversely on the fact that the committee in question had not planned to call any witnesses and intended to rely solely on a report. When an individual's right to continue to practice his or her profession is at stake, the Court indicated that there must be a "full hearing" and an opportunity to cross-examine on "the complaint". At 37, the Court concludes:

> The Respondent had and has a duty generally to ensure that all persons material to any complaint are present, give evidence at and from the commencement of the hearing, and that the "investigated person" is allowed the opportunity to cross-examine them. Failure to do so, may well taint the hearing to the extent that it must be quashed.

20. In *Woodley v. Yellowknife Education District No.1*, 1999 NWTSC 1, the Court concluded that a superintendent of education was entitled to notice that his suspension was to be considered by the respondent's Board and that he be given a chance to answer the allegations made against him. The Court reiterates some general observations made in most of the authorities given us about the right of an individual or professional person to be heard in his or her own defence and to have a fair opportunity to defend himself or herself and that "public bodies" have a duty to ensure that there is procedural fairness in making any decision that affects the "rights, privileges or interests of individuals". The Court also determined that the Board in the case before it did not have a duty to hold an oral hearing.

21. The decision in *Kuntz v. The College of Physicians and Surgeons of British Columbia*, 1987 CarswellBC 694 is not of assistance to Mr. Young on this motion. The

Court was "unable" to conclude on the facts before it that the admission of hearsay evidence would be a denial of natural justice. Under the governing legislation there was no prohibition against the use of hearsay evidence. The Court declined to order the College to produce, for cross-examination, several doctors who were the authors of a report into the plaintiff's practice. The report in question was being used as evidence. The Court found that the procedure that the Council was intending to use was a fair procedure and that the plaintiff could argue at the conclusion of a hearing that the evidence being relied upon against him should carry no weight because it was hearsay.

22. We do not take issue with the general proposition that Members of the Society are entitled to full hearings when their right to continue in practice is at issue and that it would be inappropriate to prosecute a Member if the only evidence to be presented was a "report" summarizing an investigation. Here, counsel for the Society directly advised that with respect to the proof of Counts 6 and 8, he did not intend to present and rely solely upon hearsay evidence. Indeed, as we understood him, he did not intend to rely at all on hearsay evidence. Moreover, unlike several of the decisions we were asked to read, this is not a case where the Society had been asked to call a certain witness, or witnesses, and was refusing to do so. The witness Mr. S.D. and Ms. S.C. we were assured had been subpoenaed, notwithstanding the acknowledgment by the Society's counsel that he was anticipating that their evidence might prove to be unhelpful in proving counts 6 and 8.

23. We do note that hearsay evidence is now 'permissible' for use before Courts and certainly before any administrative tribunal within the limits set out by the Supreme Court of Canada in 1990 in *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.). James Casey in his text acknowledges this. Provided that counsel can establish that use of such evidence is both necessary and reliable, it can be entered. However, to repeat, the Society did not suggest that the evidence it will rely upon to prosecute Counts 6 and 8 is hearsay. It said the opposite.

24. We do not think on a preliminary motion it is appropriate for a panel to second guess counsel and conclude that assertions that hearsay will not be relied upon are

"balderdash". In criminal prosecutions, crown attorneys have an obligation to stay charges where they determine that there is no reasonable expectation of conviction. Similarly, we believe that counsel charged with the prosecution in matters of professional discipline have a duty to consider whether conviction on the evidence they can lead is reasonably foreseeable. We are not prepared to find at the outset of a hearing that counsel for the Society has misdirected himself and is proceeding unfairly and unreasonably in prosecuting Counts 6 and 8.

25. We accept the general observations in *Carlin* to the effect that professional governing bodies have a general duty to ensure that all persons material to a complaint are present and give evidence. In our view, with respect to the former clients Mr. S.D. and Ms. S.C., the Society and its counsel have fulfilled that obligation by serving subpoenas on the two persons in question. No facts are put forward that would give rise to any conclusion that this was not done in timely fashion or that the Society has somehow communicated to either Mr. S.D. or Ms. S.C. that his or her appearance at this hearing is "optional". Indeed, counsel for Mr. Young did not say so. Where the Society has taken all reasonable steps to ensure persons material to a complaint are present, we are not persuaded that the counts based at least in part on the evidence of such persons must automatically be 'stayed'. And, we note again, with respect to Mr. S.D. and Ms. S.C., it seems at this stage that the evidence that it was anticipated they would give would be helpful to Mr. Young and not the reverse.

26. We are certainly not persuaded that our ability to consider fairly and impartially the evidence pertinent to counts 6 and 8 will in some fashion be 'tainted' by the fact that we are also called upon to consider other counts to which Mr. Young is admitting liability.

27. Accordingly, we dismissed the motion as stated above.

DATED this 17th day of March, 2017.

Douglas A. Bedford, Chairperson

Wendy Stewart

Maureen Morrison