

## **Transcribed Reasons for Decision of the Ontario Superior Court of Justice**

Citation: Law Society of Upper Canada v. Fingold, 2012 ONSC 2850

Court File Number CV-10-0100008-00

Date: May 18, 2012

Applicant: The Law Society of Upper Canada (Represented by Dennis J Reeve)

And

Respondent: Lee Edward Fingold (Represented by Harvey J Ash)

Heard by the Honourable Justice DiTomaso

Heard on May 3, 2012

### **Reasons For Decision**

#### The Motion

1. The applicant, The Law Society of Upper Canada (“LSUC”) seeks an Order finding the respondent Lee Edward Fingold (“Fingold”) in contempt of the Order of the Honourable Mr. Justice Boswell, dated September 2, 2010. In addition, the LSUC seeks the imposition of a term of incarceration against Mr. Fingold.

#### The Parties

2. The LSUC is statutorily responsible for the licensing and regulation of lawyers and paralegals in Ontario. Mr. Fingold is not licensed by the LSUC as either a lawyer or a paralegal.

3. The “Background” section in the Affidavit of Alan R. Grant sets out a long history of conflict between Mr. Fingold and the LSUC. Such conflict includes discipline and disbarment proceedings. Mr. Fingold was disbarred on January 25, 1996. The Background also refers to Mr. Fingold’s criminal convictions, numerous proceedings in this Court and the Ontario Court of Justice brought by the LSUC prohibiting Mr. Fingold from contravening the *Law Society Act* by acting, holding himself out as, representing himself or practicing as a barrister or solicitor or by providing legal services in Ontario. There were also numerous proceedings for contempt Orders resulting in findings of contempt and orders that Mr. Fingold pay fines and costs.

4. I do not propose to detail the extensive history involving Mr. Fingold, the LSUC and the Courts. Suffice it to say, the history is extensive and serious.<sup>1</sup>

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<sup>1</sup> Applicant Motion Record, Affidavit of Alan R. Grant, sworn November 2, 2011, paras. 7-33 inclusive.

### The Order of Boswell J. Dated September 2, 2010

5. On September 2, 2010 Boswell J. prohibited Mr. Fingold from contravening the provisions of 26.1 of the *Law Society Act* by holding himself out as, or representing himself to be a person who may practice law or who may provide legal services in Ontario, or by practicing law or by providing legal services in Ontario.<sup>2</sup>

### The Present Complaint

6. Mr. Mihail-Andrei Lezau is a lawyer licensee who represented the Plaintiff. The Plaintiff, the Toronto-Dominion Bank in Ontario Superior Court of Justice Action #CV-11-003490-SR wherein the Plaintiff claimed against the Defendants, 1792866 Ontario Limited O/A Great Life Wrap N Vibes, Beau Scott and Christian S. Salazar in a commercial litigation dispute for recovery of the proceeds of a loan in default. The Statement of Claim was filed with the Court in Newmarket on March 28, 2011.<sup>3</sup>

7. On April 20, 2011 Mr. Lezau received a facsimile correspondence from Mr. Fingold on the letter head of "The Blessed Paralegal". The cover page included Mr. Fingold's name and contact information and included the following narrative: "I am a paralegal assisting Beau Scott and Christian Salazar in resolving your Newmarket Action for TD CV-11-1-3490-SR".

8. Further, Mr. Fingold made an offer to settle the action and at the bottom of the page is a handwritten notation that reads: "signed auth to talk to me attached".<sup>4</sup>

9. Mr. Lezau checked the LSUC directory for lawyers and paralegals and discovered Mr. Fingold was not listed as a licensee. Mr. Lezau then notified the LSUC and an investigation was authorized and commenced.

10. Mr. Fingold submits that one day while golfing with his "golfing buddy" Beau Scott, Mr. Scott mentioned to Mr. Fingold that he was being sued by the Toronto-Dominion Bank. Mr. Scott was aware of Mr. Fingold's past and knew that he was a disbarred lawyer and that he had general legal knowledge. Mr. Scott asserts he asked for Mr. Fingold's assistance as a friend and not as a lawyer or paralegal. Further, Mr. Fingold did not charge Mr. Scott a fee nor did he give him any legal advice. Mr. Fingold wrote a letter to try to resolve the matter for a "nuisance" claim amount and did use the word "paralegal" in his letter.

### Positions of the Parties

#### *Position of the LSUC*

11. The LSUC alleges that Mr. Fingold represented and held himself out to be a paralegal, provided legal services by negotiating the legal interests, rights or responsibilities of a person and represented a person in a proceeding, all contrary to s. 26.1 of the *Law Society Act* and contrary to the set Order of Boswell J. Mr. Fingold should be found in contempt of the Order of Boswell J. and should be incarcerated for a period of six months.

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<sup>2</sup> Affidavit of Alan R. Grant, *supra*, Exhibit "K".

<sup>3</sup> Affidavit of Alan R. Grant, *supra*, Exhibit "M".

<sup>4</sup> Affidavit of Alan R. Grant, *supra*, Exhibit "N".

*Position of Mr. Fingold*

12. Mr. Fingold submits that at no time did he hold himself out as being a lawyer or registered paralegal. Other than sending one letter, the matter was settled by Mr. Scott without further involvement by Mr. Fingold. In the past, when Mr. Scott brought legal matters to Mr. Fingold, Mr. Fingold referred Mr. Scott and other family members to lawyers.

13. Mr. Fingold submits that the motion ought to be dismissed. He asserts that the notice of motion is deficient and cannot be cured by way of amendment. Further, the conduct complained of does not meet the test for a finding of civil contempt. If the Court should make a finding of contempt, such contempt was purged prior to the LSUC commencing these proceedings. Insofar as penalty is concerned, the conduct of Mr. Fingold giving rise to the breach of Boswell J.'s Order was minor and *de minimis* certainly not warranting incarceration. Mr. Fingold submits that the motion should be dismissed with costs.

Issue

14. The issue to be determined is whether Mr. Fingold breached the Order of Boswell J. Is Mr. Fingold in contempt by his breach? If so, did he purge his contempt and what, if any, should be the appropriate penalty in this case?

Analysis

15. Mr. Fingold in seeking to have this motion dismissed mounts a twofold attack on the notice of motion. He submits that the notice of motion is deficient and cannot be cured by way of amendment. Firstly, the notice of motion does not set out the date, place or other sufficient facts to identify the particular acts alleged that constitute contempt. Secondly, he contends that Rule 60.11(3) of the *Rules of Civil Procedure* allows Affidavit evidence to contain statements of an affiant's information and belief only with respect to matters that are non-contentious. He asserts that paragraphs 34-36 of the Affidavit of Alan R. Grant forms the only evidence proffered by the LSUC in support of the deficient allegations of contempt as set out on the notice of motion. They are by their very nature contentious and offend this rule as those paragraphs are based solely on information and belief.

16. I do not agree with either argument advanced on behalf of Mr. Fingold and for the following reasons they both fail.

17. I find that the notice of motion is not deficient. At page two of the notice of motion the grounds to be argued provide:

...that the Respondent has been prohibited by an Order of this Honourable Court made by Mr. Justice Boswell on September 2, 2010 from breaching section 26.1 of the Law Society Act and has subsequently breached the Order by holding himself out as, representing himself to be a person who may practice law or who may provide legal services in Ontario and by practicing law or providing legal services in Ontario by subsequently representing a party in an action in the Superior Court of Justice, to wit: #CV-11-103490-SR.

18. I find the notice of motion contains sufficient information to identify the transaction forming the subject matter of the motion and that Mr. Fingold has not been misled or prejudiced. Exhibit "P" attached to the Affidavit of Alan R. Grant is the written response of Mr. Fingold dated July 15, 2011 to the letter of July 13, 2011 sent to him by Mr. Grant. The content of Mr. Fingold's letter clearly shows his knowledge of the complaint prior to the filing of the notice of motion. It is noteworthy that Mr. Fingold has deleted from his letter head the reference to "The Blessed Paralegal" previously used by him.

19. Further, Mr. Fingold in his Affidavit sworn March 29, 2012 at paragraphs 15 and 16 specifically refers to Exhibit N attached Mr. Grant's Affidavit which is the subject matter of the complaint.

20. As well, Mr. Fingold has provided additional evidence in the form of the Affidavit of Beau Scott, sworn January 22, 2012, which also addresses the subject matter of the complaint. I find that Mr. Fingold has not been prejudiced or misled or that his right to make full answer and defence has been impaired by any lack of particularity.

21. It is important to note that Mr. Fingold does not allege that he has been prejudiced or misled or that he is not fully aware of the full nature of the allegations against him. Neither has he alleged that he is unable to make full answer and defence. As a result, I find that the first branch of Mr. Fingold's attack on the notice of motion fails.

22. In respect of the second branch of his argument, Mr. Fingold claims that the contents of paragraphs of 34-36 inclusive in the Affidavit of Alan R. Grant are both hearsay and contentious.

23. Paragraph 34 introduces a Statement of Claim in Court File No. CV-11-103490-SR which is set out as Exhibit "M". The Statement of Claim is a court document of which this Court can take judicial notice. This is not hearsay nor is it contentious as Mr. Fingold does not dispute the existence of this Court record.

24. Paragraph 35 introduces the letter of Mr. Fingold which forms the subject matter of this motion, set out at Exhibit "N". While this letter is introduced by means of hearsay, I find existence and content are not contentious. Rather, Mr. Fingold makes numerous admissions in his filed materials, as follows:

- a. Affidavit of Fingold paragraphs 15 & 16:

Mr. Fingold admits that he wrote the letter marked as Exhibit "N" that he attempted to resolve the matter and that he used the word, "paralegal".

- b. Affidavit of Fingold paragraphs 17 & 18:

Mr. Fingold admits that he was using the name "The Blessed Paralegal" by swearing that he stopped using it and admits he had a website which he has since shut down.

- c. Affidavit of Scott paragraph 4:

Mr. Scott states that Mr. Fingold indicated we had nothing to worry about. He suggested it could be settled. He volunteered to write to the bank's solicitors

and offer a settlement, if it could be shown to the lawyers that the action was futile.

d. Respondent's Factum paragraphs 3 to 5:

The Respondent sets out in the "Facts" section that "Mr. Fingold did write a letter to try to resolve the matter for the nuisance claim amount and did use the word paralegal in his letter" and that he had involvement by writing the letter.

25. In paragraph 36, it is alleged that Mr. Fingold is not a member/licensee of the Law Society of Upper Canada. Although this is hearsay, the contents of paragraphs 4 and 7 to 11 inclusive of the affidavit of Alan R. Grant are not. In paragraphs 7 to 11 inclusive, Mr. Grant sets out the process and its conclusion in 1996 resulting in Mr. Fingold be disbarred as a Barrister, his name being struck off the Roll of Solicitors and that his membership in the Law Society of Upper Canada was cancelled. In paragraph 4 Mr. Grant states that Mr. Fingold has not applied for licensing as a paralegal nor has he sought re-admission as a lawyer licensee. This sworn statement of fact has not been disputed.

26. Further, the fact that Mr. Fingold is neither a licensed paralegal nor lawyer is not contentious. Mr. Fingold admits under oath in his filed Affidavit that:

Paragraph 9: I am fully aware and accept that I am no longer a lawyer and I am not allowed to practice law.

Paragraph 10: I have made my livelihood as a paralegal since I was disbarred for financial fraud in 1995.

Paragraph 11: In addition to acting as a paralegal...

Paragraph 12: Mr. Grant is correct that I have never re-applied for my license to practice law nor have I applied under the new legislation to be regulated by the Law Society as a paralegal.

27. As a result, I find that Rule 60.11(3) of the *Rules of Civil Procedure* is not offended. The matters complained of are neither hearsay nor contentious. The evidence is properly before the Court and the LSUC's materials have been properly presented without prejudice to Mr. Fingold.

Should Mr. Fingold be found in contempt on the grounds that he breached the Order of Boswell J. dated September 2, 2010?

28. This question is answered in the affirmative for the following reasons.

29. There is no dispute that the test for a finding of civil contempt has three constituent elements. The test has been concisely stated by the Ontario Court of Appeal at paragraph 27 in *Prescott-Russell Services for Children and Adults v. G.(N.)* (2006), 82 O.R. (3d) 686. First, the Order that was breached must state clearly and unequivocally what should and should not be done. Second, the party who disobeys the Order must do so deliberately and wilfully. Third, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the Order.

30. In *Anthes v. Wilson Estate*, the Ontario Court of Appeal at paragraph 4 held:

A contempt process – even a civil contempt process is criminal in nature and requires proof of the contemptuous conduct beyond a reasonable doubt. The conduct must be wilful, deliberate and of a contumacious and egregious nature.<sup>5</sup>

31. Mr. Fingold admits that he used the word “paralegal” in his letter. He admits that he should not have used that word. However, he submits that if this single incident is the extent of his contempt, such is not sufficient evidence that Mr. Fingold disobeyed the Order of Boswell J. deliberately and wilfully and beyond a reasonable doubt. Neither is it evidence that Mr. Fingold’s actions were contumacious and egregious.

32. I disagree.

33. Starting first with the Order of Boswell J., the Order is clear and unequivocal. Mr. Fingold not being a licensee of the LSUC is prohibited from contravening the provisions of section 26.1 of the *Law Society Act* by holding himself out as, or representing himself to be, a person who may practice law or may provide legal services in Ontario, or by practicing law or by providing legal services in Ontario. Nowhere in Mr. Fingold’s materials does it state that he did not understand the Order of Justice Boswell. I find the Order is clear and unambiguous as to what conduct on the part of Mr. Fingold is prohibited. The Order also shows an admission of service of a true copy by Mr. Fingold on September 2, 2010. There is no doubt that he has a copy of this Order in his possession on September the 2, 2010 and that he knew what it meant.

34. As to the second part of the test, I find that Mr. Fingold disobeyed the Order of Boswell J. in a wilful and deliberate manner. Mr. Fingold knew exactly what he was doing. I reject any notion that the incorporation of the word, “paralegal” in his letter was an unfortunate misuse of the word or that the use of the word, “assisting” Mr. Scott and Mr. Salazar somehow would not be the same as representing them in resolving their dispute with the Bank. He refers to Mr. Scott and Mr. Salazar as his clients. He further has added a notation to the letter, “signed auth to talk to me attached”. In addition, the letter appears on Mr. Fingold’s letterhead which in bold type states: “Fax from: The Blessed Paralegal”. The letter also is emblazoned at the top with what one could interpret to be the scales of justice.

35. I find this letter (Exhibit “N”) was neither casually worded nor mistakenly presented to the solicitor acting for the Toronto-Dominion Bank. To the contrary, I find the letter is carefully drafted and presented on the stationery of Mr. Fingold, who identified himself as a paralegal. The letter is no accident but is designed to impress upon the recipient that Mr. Fingold is clothed with the legal authority to represent two clients being sued by the bank and in so doing is authorized to present an offer to settle. I have no doubt that Mr. Fingold’s conduct was wilful and deliberate when he sent this letter. He knew that he was bound by the Order of Boswell J. and he also knew that as a term of probation, by Order of Favret J. dated December 6, 2010, he was prohibited from contravening section 26.1 of the *Law Society Act*.<sup>6</sup>

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<sup>5</sup> *Anthes v. Wilson Estate*, 2005 CarswellONT 1742, 197 OAC 110, 25 CPC (6<sup>th</sup>) 216 at para. 4 (Ont. C.A.)

<sup>6</sup> Affidavit of Alan R. Grant, *supra*, Exhibit “L”.

36. Notwithstanding this clear condition on his probation order, within four months Mr. Fingold sent his letter dated April 20<sup>th</sup>, 2011 to the Bank's solicitor. I cannot believe that he would have forgotten the term of his probation set by Favret J. nor would he have forgotten the Order of Boswell J. dated September 2, 2010.

37. I strongly reject the argument all that Mr. Fingold was doing was trying to help a "golfing buddy" to resolve a problem with the Toronto-Dominion Bank by sending a letter offering to settle the claim on nuisance value. There is no doubt that what Mr. Fingold actually did by sending his letter dated April 20<sup>th</sup>, 2011 (Exhibit "N") was exactly what was prohibited by Boswell J. and for that matter by Favret J. four months prior.

38. I have also considered the provisions of *the Law Society Act*, R.S.O 1990, C.L.8 arriving at my determination.

39. The *Law Society Act* provides in section 26.1(1) that:

No person, other than a licensee whose license is not suspended, shall practice law in Ontario or **provide legal services in Ontario**. [emphasis added]

Transcription Note: the phrase "provide legal services in Ontario" is bolded by the Court

40. The *Law Society Act* provides in section 26.1(2) that:

no person, other than a licensee whose licence is not suspended, shall **hold themselves out** as, or represent themselves to be, a person who may practise law in Ontario or a person who may provide legal services in Ontario. [emphasis added]

Transcription Note: the phrase "hold themselves out" is bolded by the Court

41. The *Law Society Act* provides that a definition of the provision of legal services in section 1(5) as follows:

a person provides legal services if the person engages in conduct that involves **the application of legal principles and legal judgment** with regard to the circumstances or objectives of a person." [emphasis added]

Transcription Note: the phrase "the application of legal principles and legal judgment" is bolded by the Court

42. Further, section 1(6) of the *Law Society Act* provides that:

Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

(iii) **Represents a person in a proceeding before an adjudicative body**. [emphasis added]

(iv) **Negotiates the legal interests, rights or responsibilities of a person**. [emphasis added]

Transcription Note: the phrases "Represents a person in a proceeding before an adjudicative body" and "Negotiates the legal interests, rights or responsibilities of a person" are bolded by the Court

43. The *Law Society Act* further provides in section 1(7) and specifically refers to representation in a proceeding as follows:

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

(i) Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.

(ii) Conducting an examination for discovery.

(iii) **Engaging in any other conduct necessary to the conduct of the proceeding.** (emphasis added)

Transcription Note: the phrase “Engaging in any other conduct necessary to the conduct of the proceeding” is bolded by the Court

44. I have no doubt that Mr. Fingold represented and held himself out to be a paralegal, provided legal services by negotiating the legal interests, rights or responsibilities of a person and represented a person in a proceeding, all contrary section 26.1 of the *Law Society Act* and contrary to the Order of Boswell J.

45. Given my findings, I also conclude that Mr. Fingold’s conduct was of a contumacious and egregious nature. What he did was very serious and cannot be explained away by the unfortunate use of a word or doing a favour for a “golfing buddy”. In the context of these proceedings and within the context of Mr. Fingold’s history with the LSUC and the Courts, his was not conduct that could be characterised or excused as a “one off” or a single mistake or error in judgment. Quite to the contrary, Mr. Fingold by his conduct was in effect thumbing his nose at the LSUC and at the Courts that had specifically prohibited him from the very conduct in which he was determined to engage. Mr. Fingold’s letter, dated July 15, 2011 (Exhibit “P”)<sup>7</sup> also supports my finding that Mr. Fingold’s conduct was wilful, deliberate and of a contumacious and egregious nature.

46. In respect of the third branch of the test, on all the evidence before me and given my preceding findings, there is proof of Mr. Fingold’s contemptuous conduct beyond a reasonable doubt. I therefore find Mr. Fingold in contempt in breaching the Order of Boswell J.

#### Has Mr. Fingold purged his contempt?

47. Mr. Fingold submits that he has purged his contempt immediately upon receipt of notification of the complaint from the LSUC. He shut down his website and dropped the letterhead “The Blessed Paralegal”. He did so without any threat of proceedings by the LSUC. Further, he sent no further letters on behalf of Mr. Scott and Mr. Salazar.

48. The LSUC submits that Mr. Fingold has done nothing to purge his contempt. He is unrepentant and unapologetic. His letter dated, July 15, 2011 (Exhibit “P”) demonstrates his true attitude, which is one of arrogance and defiance. He states, “You’re being given charge over paralegals is bogus legislation and I will not be governed by your society.” A

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<sup>7</sup> Affidavit of Alan R. Grant, *supra*, Exhibit “P”.

reading of the entire letter provides the true flavour of Mr. Fingold's thinking and attitude towards the LSUC.

49. I do find that Mr. Fingold sent no further letters to the Toronto-Dominion Bank and that he did immediately stop using his website and the heading "The Blessed Paralegal". However, this particular motion is just one proceeding in a long-running battle between Mr. Fingold and the LSUC and the Courts. His letter dated July 15, 2011 (Exhibit "P") is disturbing and not unpredictable. It is not something that can be explained away by the submission that Fingold was angry when he wrote this letter. He goes on to say, "I don't go around saying I am a licensed paralegal or lawyer, and I don't require your blessing to help people, even though you and sometimes the judiciary may wrongly THINK I do. When people need a lawyer I send them to one." Clearly, Mr. Fingold did not make any such referral in this case.

50. While I find that Mr. Fingold has partially purged his contempt, he has not completely done so. His letter of July 15, 2011 is evidence consistent with his contempt of the Court Order of Boswell J. and his general attitude towards the LSUC.

#### Penalty

51. The LSUC seeks the imposition of a term of imprisonment. No costs are sought in respect of this motion. Given Mr. Fingold's history, it is submitted such an Order would be useless. Mr. Fingold has a history of not paying cost Orders. Therefore, the LSUC does not seek to participate in yet another fruitless exercise.

52. It is the position of Mr. Fingold that if successful on this motion, he should be entitled to substantial indemnity costs in the amount of \$13,000. I find that he is not the successful party in respect of this motion. Rather, I find the LSUC is the successful party on this motion and I am satisfied beyond a reasonable doubt that Mr. Fingold is in contempt of the Order of Boswell J. dated September 2, 2010.

53. Having so found, I now consider the appropriate penalty. It is submitted on behalf of Mr. Fingold that an appropriate penalty would be something in the nature of a reprimand or a "slap" for such *de minimis* conduct. There should not be any incarceration and if a fine is imposed, it ought to be a proportionate one.

54. I disagree with counsel's position on behalf of Mr. Fingold. A period of incarceration is required, but not for six months. A short but sharp jail sentence is appropriate in this case given Mr. Fingold's antecedents and his expressed intention not to be governed by the LSUC. He has demonstrated an unrepentant and an unapologetic attitude regarding governance by the LSUC and Orders of the Courts.

55. Financial penalty appears to be ineffective as Mr. Fingold simply does not pay fines ordered by the Court. I am aware that Mr. Fingold is being penalized for the breach of Boswell, J's Order and not for something that happened years ago. I am also aware that the punishment must be proportional to the contemptuous conduct. However, I am not oblivious to Mr. Fingold's contemptuous conduct taking place within a period of probation, a condition of which was not to engage in the very prohibited conduct which was at the heart of Boswell, J's Order.

56. In all the circumstances, I find that a fit and appropriate penalty is incarceration. A short but sharp jail term is necessary to impress upon Mr. Fingold the seriousness of his contempt and, ultimately, how his contemptuous conduct is further rejected and denounced by the Court. Both general and specific deterrence are primary factors in arriving at the appropriate penalty. Court Orders are meant to be obeyed.

57. Having found Mr. Fingold in contempt of the Order of Boswell J. dated September 2, 2010, I hereby order that Mr. Fingold serve a term of imprisonment of fourteen days commencing immediately.

Transcription Note: signed by the judge

Released: May 18, 2012

Transcription is not an official court document.