

THE FUNERAL BOARD OF MANITOBA UNDER THE FUNERAL DIRECTORS AND EMBALMERS ACT

WINNIPEG, MANITOBA

IN THE MATTER OF: *The Funeral Directors and Embalmers Act C.C.S.M. c. E70*

IN THE MATTER OF: A complaint by _____ and _____ dated
September 24, 2010 concerning the conduct of Richard Wojcik, a funeral
director (the "Licensee").

DISPOSITION AND REASONS

Hearing Date: September 22, 2011

Panel: Susan Boulter, Chair
Bob Clarke
Reverend Beth Rutherford

Licensee: Richard Wojcik

Counsel: Michael Stienstra, for the Licensee
Allison Pejovic, for the Attorney General of Manitoba
Victor E. Bargaen, for the witnesses
Sean Boyd, for the Board

Board Inspector: John Delaney

Witnesses:

Disposition:

- The Panel finds that the Licensee, by his conduct while he was at the _____ church to provide professional services on September 23, 2010, breached his ethical obligation to represent the profession in an honourable manner.
 - The Panel finds it appropriate that in this case, the Board issue a letter of reprimand, and order that the Licensee pay a fine of \$1,000.00, plus the cost of the hearing room and the reporter in the amount of \$490.00.
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Reasons

Background

On September 24, 2010, _____ wrote to the Board with a complaint about the Licensee's conduct. The Board's Inspector contacted the witnesses and the Licensee. As a result of the investigation, on January 28, 2011, the Inspector recommended that the Board hold a hearing concerning the complaint. The Board directed a hearing be held.

The hearing was held on September 22, 2011.

At the hearing, the Licensee did not appear but was represented by his counsel, Michael Stienstra. Two witnesses, _____ and _____, were assisted by their counsel, Victor E. Bargaen.

The Evidence

_____ testified that on September 23, 2010, she was volunteering at the _____ church in Winnipeg and assisting with a funeral. She testified that she is a member at this church and frequently volunteers to assist at funerals and other events. She testified that the Licensee appeared at 10:30 am at the church to direct the funeral. The witness indicates he was loud and aggressive when he determined the funeral was occurring a half-hour earlier than he had expected.

_____ who is also a volunteer and who was overseeing parking in the church parking lot testified that just before the funeral started on September 23, 2010, he entered the church and observed that the Licensee was being loud, abrupt and unprofessional in his discussions.

_____ is the church's secretary. She has an office in the basement of the church. She testified that just before the funeral ceremony started on September 23, 2010 she was standing near the bottom of the stairs in the church basement. The family and the _____ were in the basement. She testified that the Licensee entered the church at approximately 10:30 am very aggressively and was angry. He asked to speak to the _____ and she offered to see if the _____ was available. However, when she checked, the _____ was deep in prayer with the family, and could not be interrupted. The Licensee demanded to be part of the prayer. _____ told him that this was not possible as the _____ and the family wanted the prayer to be private.

The funeral procession into the church then began, lead by the cross-bearer, the lay readers, the _____ and the choir. The family was following the choir, but the Licensee blocked their way. _____ who was standing nearby to ensure no one tripped on a small rise in the floor, asked him to move and let the family go to the service. The Licensee was loud and questioned _____ actions. He then left the building after the family entered the main church, _____ and _____ returned to _____ office. The witnesses confirmed that _____ wanted _____ to stay with her in the office because she was nervous about being alone after the angry and aggressive display by the Licensee.

_____ and _____ both testified that after they entered the basement office, they heard, through the church audio security system, the Licensee make profane remarks and a denigrating comment about _____ while standing on the steps of the church. _____ speaking through the security system, cautioned the Licensee that they could hear his remarks and Licensee moved away from that area. The Licensee argued that the evidence of what the witnesses heard was inadmissible under *The Privacy Act* as it was obtained in violation of his privacy. This issue and the

evidence that is relevant to it, are discussed separately in these reasons.

The Licensee was not present, did not testify to refute any of the evidence that was heard. On cross-examination, counsel suggested that _____ liked to have things done in a certain way and suggested that her inflexibility caused the conflict with Mr. Wojcik.

Findings

The Panel finds that the actions of the Licensee within the church demonstrated a lack of respect for the family of the deceased, the church employee and the church volunteer. As a funeral director, it is the Licensee's professional duty to be calm and respectful, and to ensure that even if there are problems, difficulties or unexpected complications, his conduct does not interfere with or disrupt the solemnity of the funeral. The Panel also notes that there was no evidence that the Licensee offered an apology to any party for his actions.

The Panel finds that these actions are in breach of the Licensee's duty to represent the profession in an honourable manner and as such constitutes a breach of the Funeral Directors' Code of Ethics. As a result the Licensee will be issued a reprimand and is required to pay a fine of \$1000 plus the costs of the hearing in the amount of \$490.00.

The Panel also is of the view that the Licensee showed poor judgement in making profane comments in the phone call on church property, where there was a reasonable possibility that his remarks might be heard by others. However, the Board accepts that he did not intend for his conversation to be overheard.

Other Matters

Chair recusal

The Licensee's representative asked the Panel's Chair to consider recusal on the grounds that there was a reasonable apprehension that she might be biased against the Licensee. The Licensee alleged that the Chair had investigated previous complaints about the Licensee, and that a reasonable person would question her impartiality. He presented a September 20, 2010 letter which he indicated showed the Chair's previous interaction with the Licensee.

After reviewing the letter in question and the submissions of counsel, and after consulting with other Panel members, the Chair declined the request to recuse herself.

The letter in question was signed by both the Chair and another Board member; and was confirmation of a Board decision not to proceed to a hearing on a previous complaint against the Licensee.

Constitutional Issue

The Licensee raised a constitutional issue and provided the Board and counsel for the Attorney General of Manitoba with a Notice of Constitutional question dated May 24, 2011.

He alleged that the requirement in the Board's Code of Ethics, for a licensee to represent the profession in an honourable manner were unconstitutional because they were too vague and thus violated section 7 of the *Canadian Charter of Rights and Freedoms*, which protects the rights of citizens to life, liberty and security of the person.

The Attorney General, through counsel, took the position that the Board does not have jurisdiction to decide constitutional issues. Counsel submitted that the test for whether a tribunal can decide constitutional issues is whether the legislature intended for the Board to be able to decide questions of law. Counsel pointed out that there is no express authority in the Act for the Board to consider questions of law. Further, in looking at the provisions of the Act, this authority could not be implied. Counsel submitted that the Board is disciplinary and regulatory, and can perform its function without deciding questions of law. The Board's function is to apply the Act and the Code of Ethics to the evidence. It does not need to be able to determine questions of law to do this.

Counsel for the Licensee argued that the Board could consider questions of law. He argued that the Board must determine questions of law, such as the admissibility of evidence. He also noted that *The Funeral Directors and Embalmers Act* does not allow for appeals beyond Queen's Bench. He argued that this indicates that the legislature intended for the Board to consider questions of law, otherwise an appellant would only have one chance to argue a constitutional issue at the Queen's Bench level and that this is contrary to the principles of Canadian law that support appeal rights.

The Board accepts the submission of the Attorney General that the legislature did not intend it to decide questions of law in relation to the Code of Ethics and therefore it cannot consider constitutional issues. As the Board has determined that it cannot determine constitutional issues, it is unnecessary to consider the arguments that counsel made regarding section 7 of the *Charter*.

Admissibility of Witnesses' Testimony

The Licensee's representative requested the Panel evaluate the admissibility of the part of the witnesses' testimony that entailed details of the conversation the Licensee held on the church exterior step. The representative argued that since the witnesses heard the conversation over the church audio/video monitoring system, this was an invasion of the Licensee's privacy and should thus be ruled inadmissible under section 7 of the *The Privacy Act*. Section 7 states:

Effect on law of evidence

7 No evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

Examples of invasions of privacy are set out at section 3 of *The Privacy Act*. Section 3 states:

Examples of violation of privacy

3 Without limiting the generality of section 2, privacy of a person may be violated

- (a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;
- (b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;
- (c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

- (d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

What constitutes an actionable invasion of privacy is set out at section 2(1) of *The Privacy Act*. Section 2(1) states:

Violation of privacy

2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

The Board had to determine whether, by overhearing the Licensee's conversation on the church steps through the audio system, the witnesses substantially, unreasonably and without claim of right, violated the Licensee's privacy.

The Board heard from [redacted] first. She testified that the audio/visual system is always on while the church is open, and is used to control access to the building and provide security for the property and the office secretary. She indicated that there had been break-ins and thefts; and aggressive individuals have approached the sole female employee which caused concerns for safety. Having the audio system on was a way for the office secretary to be aware of what was going on outside on the church doorstep while she worked. She also testified that she and [redacted] did not intentionally listen in on the Licensee's conversation. Rather, they had gone into the office together as [redacted] was nervous to be alone after the Licensee's aggressive conduct. They overheard the conversation simply because the audio system was turned on. [redacted] very quickly informed the Licensee that they could hear him and he moved away from the church entrance.

The Licensee's counsel was given an opportunity to cross examine [redacted]. He suggested that normally one does not assume that someone is listening in on the other end of an entry system, for example at an apartment complex. He also confirmed that there were no signs on the outside of the church indicating that the audio system could be operating and picking up conversations outside the church. Counsel argued that Mr. Wojcik had left the church and should not reasonably anticipate that he would be heard over the audio system.

The Board determined that when [redacted] and [redacted] overheard the Licensee's conversation it did not substantially, unreasonably and without claim of right, violate the Licensee's privacy. [redacted] was permitted to relate what she had heard. When [redacted] testified, the Licensee did not challenge the admissibility of her testimony, though the Licensee's counsel did cross examine [redacted] on the audio system, which the Board found to be helpful.

The Board found that the evidence was admissible based on a number of considerations. It is significant that the witnesses did not intentionally use the system to listen in on the Licensee's conversation. There were also valid safety reasons for having the audio system turned on i.e. so [redacted] could hear any activities or commotion outside while she was alone in the basement. In addition, the Board considered that Mr. Wojcik was in a public place, just outside the doors of the church, where his expectation of privacy should generally be lower than if he were in a private location. These factors taken together cause the Board to conclude that any violation of the Licensee's privacy that may have occurred did not rise to the level of unreasonable, substantial and without claim or right.

In addition, *The Privacy Act* contains several defences at section 5. The Board finds that the defence at section 5(c) would be applicable in this case. Section 5(c) states:

5 In an action for violation of privacy of a person, it is a defence for the defendant to show

...

(c) that the act, conduct or publication in issue was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant or any other person by whom the defendant was instructed or for whose benefit the defendant committed the act, conduct or publication constituting the violation;

The Board accepts that the audio system was installed and is used to protect the safety of the office secretary who works alone in the basement. The Board finds that this is reasonable, necessary for and incidental to right to a safe workplace and the church's right to protect its staff.

Nov. 7/11
Date

NOV 02 2011
Date

Nov. 3, 2011
Date

Susan Boulter
Susan Boulter, Chair

Bob Clarke
Bob Clarke, Panel Member

Beth Rutherford
Reverend Beth Rutherford, Panel Member

Under section 12(5) of *The Funeral Directors and Embalmers Act*, this decision may be appealed to the Court of Queen's Bench within 30 days after receipt of these reasons.