

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*;
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF JAMES BURKINSHAW,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Joshua Hawkes, Q.C., Chair (Bencher)
Don Cranston, QC (Bencher)
Nancy Brook (Public Adjudicator)

Appearances:

Counsel for the Law Society of Alberta (LSA) - Lois MacLean
Counsel for James Burkinshaw - Simon Renouf, QC

Hearing Date:

July 20, 2016

Hearing Location:

Law Society of Alberta at 800 Bell Tower, 10104 – 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT

Introduction

1. James Burkinshaw was facing one citation of failing to follow the instructions of his client. The citation specified three allegations. Mr. Burkinshaw admitted one of those allegations, and conceded that it constituted conduct deserving of sanction through a Statement of

Admitted Facts and Admission of Guilt, coupled with the submissions of his counsel. LSA counsel did not pursue the other two allegations. A joint submission on sanction was made. For the reasons given below, that submission was accepted, and a reprimand given. Mr. Burkinshaw was also ordered to pay the costs of the hearing.

Jurisdiction, Preliminary Matters and Exhibits

2. On July 20, 2016, a Hearing Committee (Committee) convened at the office of the LSA regarding one citation against James Burkinshaw. Both counsel for Mr. Burkinshaw and LSA counsel advised that there was no objection to the constitution of the Committee. They also acknowledged that the jurisdiction of the Committee had been properly established through the tendering of Exhibits 1-4 (the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act*, the Notice to Attend to Mr. Burkinshaw and the Certificate of Status of Mr. Burkinshaw).
3. The Certificate of Exercise of Discretion pursuant to Rule 96(2)(b) of the *Rules of the Law Society of Alberta* (“Rules”) pursuant to which the Deputy Executive Director and Director, Regulation of the LSA, determined that there were 2 persons to be served with a private hearing application, was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Accordingly, the Chair directed that the hearing be held in public. However, these reasons have been written so as to protect the confidentiality of the client, referred to in this matter as A.K.
4. The balance of the exhibits were entered by consent, including the Statement of Admitted Facts and Admission of Guilt, referenced above. While only some of these exhibits are referred to in this report, all were considered in arriving at the decisions described below.

Citation

5. The member was facing the following citation:

[1] It is alleged that in representing A.K. in a divorce and matrimonial property matter in 2013-2014, Mr. Burkinshaw failed to follow his client’s instructions by:

1. Failing to appeal the November 7, 2013 court order;

2. Failing to file A.K.'s affidavit sworn in January 2014; and
3. Failing to claim an unequal division of the matrimonial property and that such conduct is deserving of sanction.

Agreed Statement of Facts and Admission of Guilt

6. A Statement of Admitted Facts and Admission of Guilt to Citation 1(1), dated July 20, 2016, was entered as Exhibit 27. As this exhibit was signed and admitted at the hearing, the Committee had to ensure that it satisfied the requirements of section 60(2)(b) of the *Legal Profession Act*. The Committee was satisfied that the statutory requirements were satisfied: that the admissions were made voluntarily, unconditionally, and unequivocally. (*LSA v. Flynn* 2013 ABL 19, CanLII, at para. 10) The nature and consequences of these admissions were fully explained to Mr. Burkinshaw by his counsel.
7. Pursuant to the operation of section 60(4) of the *Legal Profession Act*, if a statement of admission of guilt is accepted by a Hearing Committee at a hearing, each admission is deemed to be a finding by the Committee that the conduct of the member is deserving of sanction. The Committee is then to determine the appropriate sanction. In this matter, the relevant admitted facts which we have considered in arriving at our decision may be summarized as follows:
 - a. That A.K. was self-represented at the morning chambers hearing on November 7, 2013. Although the transcript of those proceedings is ambiguous, it is clear that the trial judge could have taken other steps to clarify and ensure that she was aware of the fact that the order sought could only be granted with her express consent, and that she had a right to refuse that consent. A.K.'s concern, later expressed to Mr. Burkinshaw, was that she was never really granted that opportunity, and felt that the Chambers Justice "basically said that the matter would be going to [binding] JDR"
 - b. That she subsequently retained Mr. Burkinshaw on November 25, 2013. She had made it clear to him in a previous e-mail, dated November 15, that one of her

main concerns was the November 7, 2013 order and what could be done to “stop it” or to appeal the order.

- c. Mr. Burkinshaw did not initiate an appeal, nor have a clear discussion with A.K. regarding any other options she may have had in relation to her concerns about the order.
- d. These failures significantly impacted A.K.’s confidence in both Mr. Burkinshaw and in the legal profession generally.
- e. Mr. Burkinshaw admitted that this was conduct deserving of sanction.

The Submissions of the Parties

- 8. Counsel proposed a joint submission on sanction – that a reprimand should be issued. While there was agreement that Mr. Burkinshaw should pay costs, there was disagreement as to whether he should pay the costs of the hearing determined by the LSA, or some reduced portion of that amount in light of the fact that he was to be sanctioned on only one of the three allegations, of failing to follow instructions.
- 9. The ultimate responsibility to determine and impose sanction remains with the Committee. However, a joint submission by counsel must be given careful consideration, and should only be rejected where it is unfit, unreasonable, or contrary to the public interest (*LSA v. Pearson* 2011 ABLs 17, CanLII).
- 10. We find the joint submission appropriate in this case.

Sanctioning

- 11. The primary purpose of disciplinary proceedings is the protection of the best interests of the public and protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession (*Law Society of Alberta v. Elgert*, 2012 ABLs 9 (CanLII), at para 37).

12. In *McKee v. College of Psychologists (British Columbia)*, 1994 CanLII 1404 (BC CA), [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree or risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science.

13. It follows that the purpose of law society proceedings is not to punish an offender and exact retribution, but it is to protect the public and maintain high professional standings and to preserve the public confidence in the profession (*Law Society of Alberta v. Elgert*, *supra*, at para 39).
14. The Hearing Guide, at paragraphs 69 and 70, articulates several relevant factors to be considered in determining the appropriate sanction:
- a. The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.
 - b. Specific deterrence of the member in further misconduct.
 - c. Incapacitation of the member (through disbarment or suspension).
 - d. General deterrence of other members.
 - e. Denunciation of the conduct.
 - f. Rehabilitation of the member.
 - g. Avoiding undue disparity with the sanctions imposed in other cases.

15. In the circumstances of this case, we conclude that the determinative factors in imposing this sanction are:
- a. The maintenance of public confidence in the profession;
 - b. Specific deterrence of the member;
 - c. Denunciation of the conduct and a reaffirmation of the fundamental importance of providing meaningful and clear advice and direction in the course of acting on the instructions of a client; and,
 - d. Ensuring that there are measures in place to prevent recurrence of this or other sanctionable conduct.
16. We have also considered the significant impact that this conduct has had on A.K.'s reasonable perception of, and confidence in, the legal profession and the broader justice system.
17. Balancing all of these factors, we conclude that a reprimand pursuant to section 72(1)(c) of the *Legal Profession Act* is the appropriate sanction in this matter. Reprimand is a serious sanction. That is particularly so where, as here, the member has no prior record. The significance of a reprimand has been succinctly summarized in *LSA v. King* (2010 ABLS 9, CanLII) in terms applicable here:
- A reprimand has serious consequences for a lawyer. It is a public expression of the profession's denunciation of the lawyer's conduct. For a professional person, whose day-to-day sense of self-worth, accomplishment and belonging is inextricably linked to the profession, and the ethical tenets of that profession, it is a lasting reminder of failure. And it remains a lasting admonition to avoid repetition of that failure. Deterrence and the future protection of the public interest are therefore served accordingly.
18. Counsel have confirmed that Mr. Burkinshaw has engaged with the Practice Review Department to address those aspects of his practice that contributed to his conduct in this case. We are assured that he will continue to work with Practice Review. As a result, no further formal direction to that effect is necessary.

19. With respect to costs, we recognize discretion to reduce an order to pay the costs of the hearing in appropriate cases. However, we conclude that no reduction from the costs of the hearing is warranted in this case. They are payable within three months of service on Mr. Burkinshaw or his counsel by the LSA of the Statement of Costs.
20. While the member admitted only one of the three instances of failing to follow instructions, we note that this was part of an agreed disposition and joint submission. This is not a circumstance where the members of the profession generally should effectively be asked to pay some of those costs of the hearing. Further, a payment of these reasonable costs is an appropriate additional consequence of the conduct in this case.

Reprimand

21. As Chair of the Committee, Joshua Hawkes, QC, delivered the following reprimand:

Reprimand is a serious sanction. We have carefully considered the matter, and the anxiety and turmoil that the admitted conduct has caused the complainant. Careful and clear communication is the cornerstone of effective representation. That communication did not happen here, and regardless of the ultimate merits of the course of action she instructed, she was entitled to clear, careful and confirmed advice and direction as to the action taken regarding those instructions. She did not receive that, which undermined not only the solicitor client relationship, but her confidence in the profession generally.

We have been advised that you are engaged in Practice Review, and would encourage that to continue. This lapse in the essence of the role of counsel must not happen again.

Concluding Matters

22. No notices pursuant to the *Legal Profession Act* are required or appropriate in this matter, either pursuant to section 78(5) (to the Attorney General) or section 85(3) (to the profession).

23. In the event of any request for public access to the evidence in these proceedings, all exhibits may be made available. The exhibits shall be redacted to protect the identity of A.K. and any other third parties, and to protect any information which may otherwise be subject to any claim of privilege or as otherwise required by law.

Dated at the City of Edmonton in the Province of Alberta, this 5th day of August, 2016.

Joshua Hawkes, QC

Donald Cranston, QC

Nancy Brook