

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF STEPHEN KACZKOWSKI
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Single Bencher Hearing Committee

Nathan Whitting – Chair

Appearances

Karen Hansen – Counsel for the Law Society of Alberta (LSA)
Stephen Kaczkowski – Self-Represented

Hearing Date

November 1, 2018

Hearing Location

LSA office, at 500, 919 - 11 Avenue SW, Calgary, Alberta

HEARING COMMITTEE REPORT

Overview

1. Mr. Stephen Kaczkowski has been a member of the Law Society of Alberta since 2005. The conduct at issue in this hearing arose from two separate complaints – one in connection with Mr. Kaczkowski’s representation of a client in a civil claim, which resulted in two citations, and the second with respect to Mr. Kaczkowski’s non-compliance with the LSA’s accounting rules, which resulted in six citations.
2. The LSA and Mr. Kaczkowski entered into an Agreed Statement of Facts and Admission of Guilt (the Agreed Statement) in relation to Mr. Kaczkowski’s conduct. The redacted Agreed Statement, appended to this Report, sets out the relevant facts related to this matter.
3. In the Agreed Statement, Mr. Kaczkowski admitted guilt to five of the eight original citations (three citations were previously withdrawn). He admitted that he failed to comply with Rules 118.3, 118.4, 118.6, 118.7, 119.20, 119.25, 119.36(4)(d) and 119.40 of the Rules of the Law Society of Alberta, and that this was conduct deserving of sanction. He further admitted that he was in error when he advised his client that a Consent Order could not be appealed, and that this conduct deserved sanction.
4. The Conduct Committee found the Agreed Statement acceptable, pursuant to subsection 60(2) of the *Legal Profession Act* (the *Act*).

5. Pursuant to subsection 60(4) of the *Act*, the Agreed Statement is deemed to be a finding of this single Bencher Hearing Committee (the Committee) that Mr. Kaczowski's conduct is deserving of sanction. Accordingly, on November 1, 2018, the Committee convened a hearing into the appropriate sanction.
6. After reviewing all of the evidence and exhibits, hearing the arguments of the LSA, and after according Mr. Kaczowski an opportunity to present submissions, and considering the appropriateness of the parties' joint submission on sanction, for the reasons set out below, the Committee determined the appropriate sanction is a reprimand, and a fine of \$2,500. Mr. Kaczowski must also pay \$4,403.05 in hearing costs. The reprimand was delivered orally at the hearing, and has been included in this Report. Mr. Kaczowski will have six months from November 1, 2018, to pay the fine and the costs.

Preliminary Matters

7. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested, so a public hearing into the appropriate sanction proceeded.
8. As provided by subsection 60(3) of the *Act*, once the Agreed Statement was accepted by the Conduct Committee, the hearing into the appropriate sanction could be conducted by a single Bencher. As a result, I was appointed to conduct this sanction hearing.

Submissions on Sanction

9. Counsel for the LSA indicated that the parties agreed on making a joint submission on sanction.
10. Counsel for the LSA noted that Mr. Kaczowski was disciplined by the LSA in July of 2017, at which time he was found guilty of five counts of various client service failures, and fined \$1,500. Also, in April of 2016, Mr. Kaczowski was found guilty of eight citations, which again related primarily to client service failures, but which also included a citation for compounding, and citations for failing to respond to the LSA. Counsel for the LSA argued that this prior record is an aggravating factor when considering sanction, and cited the step principle in this regard.
11. Counsel for the LSA also argued that Mr. Kaczowski's relative seniority is an aggravating factor since he had ample time to become familiar with the rules and ample time to become a fully-competent practitioner.
12. As a mitigating factor, LSA counsel noted that Mr. Kaczowski cooperated with the LSA and admitted his wrongdoing, which avoided the need for a contested hearing. Also, Mr. Kaczowski has acknowledged his weaknesses and deficiencies in his trust accounting abilities, has closed out his trust accounts, and has agreed that he will not apply again to operate a trust account.

13. In support of the proposed sanction, the LSA provided the Committee with copies of a number of precedents, including *Law Society of Alberta v Jensen*, 2018 ABLS 5 (CanLII) and *Law Society of Alberta v. Kraft*, 2010 ABLS 26 (CanLII).
14. Mr. Kaczowski elected not to present arguments in response to those of the LSA, and confirmed in answer to a question from the Committee that he did not contest the LSA's summary of the underlying facts.

Decision on Sanction

15. As noted above, the Committee was provided with a joint submission as to the appropriate sanction to be imposed in this matter. Joint submissions have been addressed by the Supreme Court of Canada in several cases, the most important of which is *R. v. Anthony-Cook*, 2016 SCC 43. The Supreme Court and many other courts have emphasized the importance of joint submissions. They provide the parties with certainty, and greatly reduce the costs of legal proceedings. Although *Anthony-Cook* is a criminal case, it has been applied many times to professional disciplinary proceedings, such as these.
16. At paragraph 5 of *Anthony-Cook*, Justice Moldaver held that a joint submission ought to be accepted unless "the proposed sentence would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest". He went on to write at paragraph 34 that: "Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."
17. In the present case, I do not find that the concerns identified in *Anthony-Cook* would arise from an acceptance of the sanction proposed by the parties.
18. Although the joint submission is accepted, the Committee ought not to be understood as having accepted the LSA's submission that Mr. Kaczowski's prior record constitutes an aggravating factor in the present case. In *Jaswal v. Newfoundland Medical Board* (1996), 138 Nfld. & P.E.I.R. 181 (Nfld. S.C.(T.D.)), it was recognized that aggravating factors in professional disciplinary proceedings include "the presence or absence of any prior complaints or convictions". The list of factors in *Jaswal* has been adopted in many subsequent cases, including *Visconti v. College of Physicians and Surgeons (Alberta)*, 2010 ABCA 250.
19. However, *Jaswal* must be read in light of the fundamental principle that a prior finding of guilt is only relevant to sentencing if the conduct underlying the later offence was committed after the pronouncement of the previous conviction and sentence. This principle dates back at least as far as the publication of *Coke's Institutes* in 1628, and was affirmed by the Supreme Court of Canada in *R. v. Skolnick*, [1982] 2 S.C.R. 47 at pp. 58-59. See also: Clayton C. Ruby, *Sentencing*, 9th ed., at p. 436, §8.70 - 8.72.
20. In the present case, the conduct underlying the citations occurred during the intervals September 1, 2011, to January 25, 2017, and April, 2015, to August, 2015. The prior

sanctions were imposed upon Mr. Kaczkowski in July of 2017, and April of 2016. Given the minimal period of overlap, the Committee would put little, if any, weight upon Mr. Kaczkowski's prior disciplinary record.

21. In terms of mitigating factors, the approach taken by both Mr. Kaczkowski and the LSA in dealing with this matter through a sanction hearing before a single Benchler avoided an unnecessary contested hearing, witness inconvenience, and process costs.
22. In terms of the previous cases relied upon by the LSA as precedents, the Alberta Court of Appeal has recently held in *R. v. Belakziz*, 2018 ABCA 370 at para. 21, that "the joint submission can only be compared (if at all) to other joint submissions relating to similarly situated offenders, in cases with similar strengths and weaknesses, not to sentences generally." Both the *Jensen* and *Kraft* cases dealt with somewhat different circumstances, but did deal with sanctions that were imposed on the basis of joint submissions. As such, they do offer some support for the proposed sanction in the present case.
23. Taking all of the factors and submissions into account, the Committee was satisfied that the proposed sanction would not bring the administration of justice into disrepute and would not otherwise be contrary to the public interest. The proposed sanction is therefore adopted and imposed.
24. The following reprimand was delivered orally at the hearing:

Mr. Kaczkowski, the conduct on your part, which has been the subject of this proceeding, is cause for concern to the Law Society of Alberta. You have a responsibility to members of the public and to the profession to follow the rules and the practices which govern all of the members of our profession. Your conduct fell short of those expected standards of performance.

The conduct that is reflected in the Statement of Admitted Facts is the type of thing that the Law Society strives to avoid. We, as a profession, need to instill confidence in the public, and we need to ensure that they believe and know that they will be treated by our Members conscientiously and honestly. You need to do better in working towards these objectives in the future.

As a Member of the Law Society of Alberta, you will be expected to look at what has occurred in the past to determine whether or not you can improve for the future and learn from these particular events. And, of course, to move forward with your practice and your career.

As you move forward, I ask you to keep in mind that holding the office of barrister and solicitor in the Province of Alberta requires you to understand the obligation that you have to the public and to the Law Society and to the profession, and I ask that you work towards becoming the type of exemplary individual who represents the best interest of the public and profession.

So I hope, from today's appearance, and from the rest of these proceedings, that you

can and will do more for yourself, and we at the Law Society require you to do more for the members of the public that you serve.

Mr. Kaczkowski, I hope you can learn from this matter, and to work towards ensuring that similar events do not reoccur.

25. Mr. Kaczkowski is also ordered to pay a fine of \$2,500, and he will have six months from November 1, 2018, to pay those costs, being May 1, 2019.

Concluding Matters

26. Also pursuant to the joint submission, Mr. Kaczkowski is directed to pay investigation and hearing costs in the amount of \$4,403.05, by May 1, 2019.
27. There shall be no Notice to the Profession or the Attorney General in this case.
28. The exhibits and other hearing materials, transcripts, and this report will be available for public inspection, including providing copies of exhibits for a reasonable copy fee, although redactions will be made to preserve personal information, client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at Calgary, Alberta, January 14, 2019.

Nathan Whiting

IN THE MATTER OF *THE LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
STEPHEN KACZKOWSKI,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS, ADMISSION OF GUILT, AND UNDERTAKING

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta in July 2005.
2. My present status with the Law Society of Alberta is Active/Practicing.
3. I have practiced in Calgary, Alberta from 2005 to present.
4. My practice comprises Civil Litigation (70%), Matrimonial/Family Law (15%) Estate Planning & Administration (9%), Corporate (2%), Bankruptcy/Insolvency/Receivership (2%) and Real Estate Conveyancing (2%).

CITATIONS

5. On February 13, 2018, the Conduct Committee Panel (CCP) referred the following conduct to hearing:

Complaint #1 - CO20171081

1. It is alleged Mr. Kaczkowski failed to comply with Rules 118.3, 118.4, 118.6, 118.7 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction;
2. It is alleged that Stephen Kaczkowski failed to comply with Rule 119.37 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction;
3. It is alleged that Stephen Kaczkowski failed to comply with Rules 119.36(4)(d) and 119.40 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction;

4. It is alleged that Stephen Kaczkowski failed to comply with Rule 119.20 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction;
5. It is alleged that Stephen Kaczkowski failed to comply with Rule 119.27 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction; and
6. It is alleged that Stephen Kaczkowski failed to comply with Rule 119.25 of the *Rules of the Law Society of Alberta* and that such conduct is deserving of sanction.

Complaint #2 - CO20170675

1. It is alleged that Stephen Kaczkowski consent to a Court Order without his client's full understanding and consent and that such conduct is deserving of sanction; and
 2. It is alleged that Stephen Kaczkowski advised his clients that the April 23, 2015 Consent Order could not be appealed and that such conduct is deserving of sanction.
6. On June 14, 2018, [RP], Pre-Hearing Conference Chair of the matter, granted withdrawal of Citation 2 and Citation 5 of Complaint #1-CO20170181, and Citation 1 of Complaint #2 – CO20170675.

ADMITTED FACTS

Complaint #1 - CO201701081

7. From May of 2011 to March of 2018, I was a sole practitioner and responsible for ensuring that my practice complied with the *Rules of the Law Society of Alberta*.
8. In January 2017, my firm was the subject of a Compliance Audit. The period covered by the audit was from September 1, 2011 to January 25, 2017.
9. The audit found several instances of non-compliance with the accounting Rules of the Law Society of Alberta.
10. The random sampling of client files reviewed by the auditor did not contain the client identification and verification information required by Rules 118.3, 118.4, 118.6 and 118.7.
11. My pooled trust account and general account reconciliations for September, October, and November 2016 were not completed until January 2017, thereby breaching Rules 119.36(4)(d) and 119.40.

12. I breached Rule 119.20 regarding a Separate Interest-Bearing Account (the "SIBA") in that the SIBA did not reference the specific client in name of the account, I failed to report the SIBA in two of my annual self-reports, and the monthly reconciliations for the SIBA were completed a year late for the periods from October 2013 to July 2014 and September 2014 to July 2015.
13. I failed to comply with rule 119.25 in that transfers between client ledgers were not supported by a transfer document signed by myself which showed the date of transfer, source file, destination file and amount.
14. In 2017 I began transitioning my practice to [L] Law. It took me some time to wind up my outstanding accounting, however my trust account is now closed and all outstanding accounting reports have been provided to the Law Society. Effective March 15, 2018 I am no longer a Responsible Lawyer, I do not have my own trust account and instead I operate my practice as a member of [L] Law.

Complaint #2 - CO20170675

15. In April of 2015, I was retained by T.K. to defend against a civil claim brought by E.H. regarding funds held by T.K. in an account in Switzerland. I was retained two weeks prior to a Special Chambers application brought by E.H. to seek Summary Judgment.
16. Following negotiations with E.H.'s counsel, I signed a Consent Order which declared T.K. to be a Resulting and Constructive Trustee of certain funds held in a bank account in Switzerland, and which required T.K. to provide an accounting of the funds within 30 days of the order.
17. The Consent Order was granted by a Master and filed with the Court on April 23, 2015. T.K. was unable to provide an accounting with 30 days, which eventually resulted in E.H. bringing an application for Summary Judgment.
18. On August 4, 2015, Justice [C] granted E.H.'s application for summary judgment, despite my submissions that there was uncertainty around the amount of funds owing and money should be paid into court pending a cross-examination on Affidavit, and other steps in the litigation. Justice [C] responded to my submissions by stating that it was too late to question the amount owing given the Consent Order, and suggesting that if T.K. wanted to dispute the amount owing, the Consent Order should have been appealed.
19. T.K. obtained a copy of the transcript of the August 4, 2015 Court proceedings, and then questioned me as to why the Consent Order had not been appealed. I responded to his enquiries by an email on August 31, 2015 in part by stating that the Consent Order was not appealed "because it is a consent order and there is no appeal from them." I now admit that this statement was in error, and that a consent order can be appealed in some circumstances.

ADMISSIONS OF FACT AND GUILT

20. I admit as facts the statements in this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.
21. I admit that I failed to comply with Rules 118.3, 118.4, 118.6, 118.7, 119.36(4)(d), 119.40, 119.20, and 119.25 of the Rules of the Law Society of Alberta.
22. I admit that I was in error when I advised my client that the April 23, 2015 Consent Order could not be appealed and that such conduct is deserving of sanction.
23. I acknowledge that I have had the opportunity to consult legal counsel and provide this Statement of Admitted Facts and Admission of Guilt on a voluntary basis.
24. For the purposes of Section 60 of the *Legal Profession Act*, I admit my guilt to Citations 1,3,4, and 6 from Complaint CO20171081 and Citation 2 from Complaint CO20170675.

UNDERTAKING

25. I hereby undertake to that I will not make any further application for Responsible Lawyer status or to operate a trust account. I further undertake that I will make no application to withdraw this undertaking until I have provided evidence to the satisfaction of the Practice Review Committee that I have the competence and resources necessary to operate a trust account.

THIS AGREED STATEMENT OF FACTS, ADMISSION OF GUILT AND UNDERTAKING IS MADE THIS 31 DAY OF August , 2018.

“Stephen Kaczowski”

STEPHEN KACZKOWSKI