

**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 CLINTON YARSHENKO
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Single Bencher Hearing Committee

Stacy Petriuk – Chair

Appearances

Nicholas Maggisano – Counsel for the Law Society of Alberta (LSA)
Lyndon Heidinger – Counsel for Clinton Yarshenko

Hearing Date

August 10, 2018

Hearing Location

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

HEARING COMMITTEE REPORT

Overview

1. Clinton Yarshenko's client, MA, was charged with, and convicted of, sexual assault. Mr. Yarshenko represented MA at trial and at the preliminary inquiry. MA was incarcerated as a result of his conviction. MA retained new legal counsel following his trial and conviction. One of the grounds of appeal was that Mr. Yarshenko failed to provide competent and effective legal assistance to MA in representing him at trial, resulting in a miscarriage of justice.
2. A Special Commissioner was appointed and issued a report. The Special Commissioner found that Mr. Yarshenko failed to provide MA with the effective assistance of counsel in certain areas which, individually and collectively, demonstrated a lack of professional judgment and constituted professional incompetence. There was a re-trial. MA was acquitted. MA filed a complaint against Mr. Yarshenko with the LSA.
3. The LSA and Mr. Yarshenko entered into an Agreed Statement of Facts and Admission of Guilt (the Agreed Statement) in relation to Mr. Yarshenko's conduct. The Conduct

Committee found the Agreed Statement acceptable. The Agreed Statement is appended to this Report as Schedule A.

4. Pursuant to subsection 60(4) of the *Legal Profession Act* (the *Act*), it is deemed to be a finding of the Committee that Mr. Yarshenko's conduct is deserving of sanction in relation to the following citations:
 - 1) Clinton G. Yarshenko failed to represent his client, MA, in a competent matter by failing to properly apply the law of sexual assault, and that such conduct is deserving of sanction;
 - 2) Clinton G. Yarshenko failed to obtain instructions from his client, MA, on all matters not falling within his express or implied authority, and that such conduct is deserving of sanction; and
 - 3) Clinton G. Yarshenko failed to respond in a timely manner to communications from other lawyers during MA's appeal, and that such conduct is deserving of sanction.
5. On August 10, 2018, the Hearing Committee (Committee) convened a hearing into the appropriate sanction related to the conduct of Mr. Yarshenko.
6. After reviewing all of the evidence and exhibits, and hearing the testimony and arguments of counsel for the LSA and counsel for Mr. Yarshenko, for the reasons set out below, the Committee has determined that the following sanction is appropriate:
 - 1) A reprimand;
 - 2) Costs of \$3,000;
 - 3) Fine of \$7,000;
 - 4) Referral to practice review; and
 - 5) Mr. Yarshenko's given time to pay the costs and fine of six months from the date of the hearing.
7. The above sanction was presented as a joint submission by both counsel for the LSA and counsel for Mr. Yarshenko. While the Hearing Committee is not bound by the joint submission, the Hearing Committee is to give it serious consideration and to accept it, unless it considers it unfit, unreasonable or contrary to the public interest.

Preliminary Matters

8. 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.

Agreed Statement of Facts/Background

9. On April 11, 2018, Mr. Yarshenko executed the Agreed Statement. On May 15, 2018, the Committee found the Agreed Statement to be acceptable. Pursuant to subsection 60(4) of the *Act*, each admission of guilt in the Agreed Statement is deemed to be a finding by this Committee that Mr. Yarshenko's conduct is deserving of sanction under section 49 of the *Act*.
10. As provided by subsection 60(3) of the *Act*, once the Agreed Statement was accepted by the Committee, the hearing into the appropriate sanction could be conducted by a single Bencher. As a result, I was appointed to conduct the sanction hearing.
11. In the Agreed Statement, Mr. Yarshenko admitted the following:
 - 1) He failed to represent MA in a competent manner – Mr. Yarshenko did not properly apply the law relating to the issues of consent and honest but mistaken belief in consent. He argued at trial that there was implied consent, despite there being no defence of implied consent to a charge of sexual assault. Even though credibility was a central issue in this matter, Mr. Yarshenko did not fully cross-examine the complainant on MA's version of the events, which weakened his defence. In addition, Mr. Yarshenko elicited evidence of MA's prior conduct, which was ultimately relied upon by the Court, to MA's detriment, to find that he had a pattern of sexual touching without permission and only stopping when told to do so.
 - 2) Mr. Yarshenko failed to obtain instructions from MA – Mr. Yarshenko admitted on behalf of MA that the complainant's credibility was not an issue. As a result of the Crown's objection, Mr. Yarshenko did not explain the issue raised by the Crown's objection to MA, explain the consequences of making the admission on behalf of MA, or seek or obtain MA's instructions to make the admission. By making this admission, Mr. Yarshenko weakened MA's evidence and the ability to argue both the defence of consent and the defence of honest but mistaken belief in consent.
 - 3) Mr. Yarshenko failed to respond to counsel in a timely manner – Mr. Yarshenko did not respond to MA's new counsel on the appeal. Mr. Yarshenko also did not respond to the Crown prosecutor handling the appeal. As a result of the non-responsiveness, a commission hearing was required. Although Mr. Yarshenko ultimately did appear at the commission hearing after being subpoenaed, the need for a commission hearing delayed MA's appeal.

Submissions on Sanction

12. Counsel for the LSA and counsel for Mr. Yarshenko submitted a joint submission on sanction, as outlined above. In addition to the Agreed Exhibit Book, counsel also provided three additional exhibits. Counsel for the LSA provided a letter dated July 17, 2018 indicating that Mr. Yarshenko did not have a discipline record with the LSA. Counsel for

the LSA also provided a copy of *Law Society of Alberta v. Walia*, [2017 ABLs 54 \(CanLII\)](#). Counsel for Mr. Yarshenko provided evidence of Mr. Yarshenko's registration at the 2018 National Criminal Law Program and indicated that Mr. Yarshenko attended.

Decision on Sanction

13. Counsel for the LSA and counsel for Mr. Yarshenko confirmed their understanding that the Committee is not bound by a joint submission on sanction. However, a Committee is required to give serious consideration to a joint submission, should not lightly disregard it and should accept it unless it is unfit or unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting it.
14. In considering the joint submission on sanction, it is important to consider the purpose of disciplinary proceedings. As outlined in section 49(1) of the *Act*, they are:
 - 1) Protection of the best interests of the public (including members of the LSA); and
 - 2) Protecting the standing of the legal profession generally.
15. It is important to ensure the public is protected and the public maintains a high degree of confidence in the legal system.
16. In this instance, Mr. Yarshenko failed to represent his client in a competent manner by failing to properly apply the law of sexual assault. He failed to obtain instructions from his client on all matters not falling within his express or implied authority, and he failed to respond in a timely manner to communications from other lawyers.
17. Mr. Yarshenko's conduct deserving of sanction impacted his client, who was incarcerated for a period of time as a result of the conviction, incurred extra expense in hiring a new lawyer and had his matter delayed as a result of the non-responsiveness of Mr. Yarshenko, impacted the complainant who was required to participate in multiple legal proceedings, impacted the justice system by requiring additional legal proceedings, impacted the legal system by requiring a Special Commissioner to be appointed and a Special Commission Hearing to be held, and impacted the public's impression of the legal system, amongst other things.
18. The citations to which Mr. Yarshenko has admitted guilt are serious. However, the Committee must also take into account Mr. Yarshenko's long, unblemished up to this point legal career, his pro-active continuing legal education initiatives, the absence of a disciplinary history with the LSA and the fact that Mr. Yarshenko agreed to an Agreed Statement to the citations, shortening the proceedings against him at the LSA.
19. The approach taken by both Mr. Yarshenko and the LSA in dealing with this matter through a Single Bench hearing also avoided an unnecessary contested hearing,

witness inconvenience, and process costs. After reviewing the *Walia* case, the Agreed Statement, the submissions by LSA counsel, the submissions by Mr. Yarshenko's counsel, the purpose of disciplinary proceedings as outlined in the *Act*, and the factors as outlined above, the Committee finds that the joint submission on sanction is appropriate in this instance.

20. The following reprimand was delivered at the conclusion of the hearing:

Mr. Yarshenko, you have admitted guilt to three citations.

You failed to represent your client in a serious criminal manner and in a competent fashion, and failed to obtain instructions. Your client was convicted and incarcerated for a period of time. Your conduct had serious repercussions on your client, the complainant, the justice system and the public. You also failed to communicate in a timely manner with other counsel.

These failures are serious and have serious consequences. For these failures you are here today reprimanded.

You have begun to address these issues by beginning to engage in continuing legal education.

In making these comments and delivering this reprimand today, I urge you to constantly remember what is required of you, the faith your clients put in you to represent them competently and with instructions, and the seriousness of any breach of this faith. You understand that this must never be repeated.

Sir, I wish you the best as you move forward from these difficult circumstances and thank you for your attendance today.

Concluding Matters

21. Mr. Yarshenko is ordered to pay costs in the amount of \$3000.00 and a fine in the amount of \$7000.00, both within six months of the date of the hearing.
22. The Committee also refers Mr. Yarshenko to Practice Review.
23. No Notice to the Attorney General or Notice to the Profession is required.

24. 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)).

Calgary, Alberta, September 21, 2018.

Stacy Petriuk

IN THE MATTER OF *THE LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF CLINTON G.
YARSHENKO,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta on June 15, 1983.
2. My present status with the Law Society is Active/Practicing.
3. I practice law in Medicine Hat, Alberta. I practice solely criminal law.

BACKGROUND

4. M.A. was charged under s.271 of the *Criminal Code* with sexual assault. He pleaded not guilty. I represented him at the preliminary inquiry and the judge alone trial. The trial involved contradictory versions of events by the sexual assault complainant (the “complainant”) and the accused, M.A. Prior to this trial I represented accused persons in dozens of sexual assault trials involving contradictory versions of events.
5. The complainant alleged she was asleep and remembered nothing until she awoke to find M.A. having intercourse with her. M.A. asserted that the complainant was awake and verbally consented to sexual intercourse.
6. M.A. was ultimately convicted on [date]. He was sentenced to jail and served time in custody from [date] to [date]. After he was released from jail he was subject to release conditions.
7. M.A. appealed. One ground of appeal was that I failed to provide him competent and effective legal assistance. A Special Commissioner was appointed by the Court of Appeal, who found that I did fail to provide him competent and effective legal assistance. As a result, by Consent Judgment on [date], M.A.’s conviction was quashed, and a new trial was ordered.
8. The new trial occurred on [date], and M.A. was acquitted.

FAILING TO REPRESENT MY CLIENT IN A COMPETENT MANNER

9. I did not properly apply the law relating to the issues of consent and honest but mistaken belief in consent. I argued at trial that there was implied consent despite there being no defence of implied consent to a charge of sexual assault.
10. I advanced the theory that there was consent because the complainant was murmuring words of consent in a sleep-like state, despite there being no evidence that that occurred. In any event, the Special Commissioner found that the argument did not meet the legal threshold for mistaken belief in consent.
11. Credibility was a central issue in this matter. I did not fully cross-examine the complainant on M.A.'s version of events, which weakened his defence. My view was to give a hostile witness a second opportunity to contradict anticipated evidence of the accused in no way advances one's defence. I did not cross-examine the complainant on other issues that went to her credibility.
12. I elicited evidence of M.A.'s prior conduct, which was ultimately relied on by the Court, to M.A.'s detriment, to find that he had a pattern of sexual touching without permission and only stopping when told to do so. I did so to avoid offending the rule in *Browne v. Dunn*, to put the entire evening in context, and to demonstrate that the accused would have no particular reason to believe that the complainant would not allow physical contact.

FAILING TO OBTAIN INSTRUCTIONS

13. The Crown objected to M.A. testifying to a portion of his version of events, as I had not cross-examined the complainant on them. In response to this objection I admitted on behalf of M.A. that the complainant's credibility was not in issue and that she was not lying when she said she was asleep and remembered nothing until she awoke to find M.A. having intercourse with her.
14. The Special Commissioner found that this admission contradicted M.A.'s version of events and his anticipated evidence. To my mind, this admission did not contradict M.A.'s version of events and his anticipated evidence, on the basis that the accused is testifying to a clear recollection while the complainant cannot credibly confirm or deny what she might have "murmured" if she was partially asleep. I felt the Court would not find that the accused perceived her to be asleep. In my experience, once one perceives that the Court appears to find a complainant truthful, it is prudent to avoid direct contradiction where possible.
15. I did not explain to M.A. the issue raised by the Crown's objection, explain the consequences of making the admission, or seek or obtain his instructions to make the admission.
16. By making this admission I weakened M.A.'s evidence and the ability to argue both the defence of consent and the defence of honest but mistaken belief in consent.

17. In hindsight, less prejudicial options were available, including applying to further cross-examine the complainant, applying for a mistrial, or applying for an adjournment to better prepare argument and to explain the issues and obtain instructions from my client.

FAILING TO RESPOND IN A TIMELY MANNER

18. M.A.'s new counsel on the appeal attempted to contact me and invited me to respond to the allegation that I failed to provide competent and effective legal assistance. I did not respond. The Crown prosecutor handling the appeal also attempted to contact me. I did not respond.
19. Because I did not respond a commission hearing was required so that I could be subpoenaed to give evidence. I was served with the application to appoint a Special Commissioner, but did not respond or attend the application. After the order appointing a Special Commissioner was granted in [date] the Crown prosecutor again wrote to me inviting me to contact counsel and potentially save the need for a hearing. I did not respond. I did ultimately appear at the commission hearing after being subpoenaed.
20. The need for a commission hearing delayed M.A.'s appeal, which was originally set for [date].
21. I had never been in a situation where a trial conducted by me was appealed on the basis of ineffective assistance of counsel. My feeling was that to be too defensive of my own position and strategy, in response to counsel, would run counter to the interests of the accused, despite his waiver of solicitor/client privilege. My uncertainty led to procrastination whenever I turned my attention to possible responses during the appeal process.

CONCLUSION - ADMISSIONS

22. I admit as facts the statements in this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.
23. I acknowledge that I have consulted 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 guilt to the following conduct:
 1. It is alleged that Clinton G. Yarshenko failed to represent his client, M.A., in a competent manner by failing to properly apply the law of sexual assault, and that such conduct is deserving of sanction;
 2. It is alleged that Clinton G. Yarshenko failed to obtain instructions from his client, M.A., on all matters not falling within his express or implied authority, and that such conduct is deserving of sanction; and
 3. It is alleged that Clinton G. Yarshenko failed to respond in a timely manner to communications from other lawyers during M.A.'s appeal and that such conduct is deserving of sanction.

THIS AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT IS MADE THIS 11 DAY OF APRIL, 2018.

"Clinton G. Yarshenko"

CLINTON G. YARSHENKO