

**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 NESTOR MAKUCH
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

ORDER OF THE HEARING COMMITTEE

UPON THE ISSUANCE OF CITATIONS by the Law Society of Alberta (LSA) to Nestor Makuch pursuant to section 56 of the *Legal Profession Act* (the Act);

AND WHEREAS:

- a) Nestor Makuch signed a Statement of Admitted Facts and Admission of Guilt (the Statement, attached to this Order) in relation to his conduct on April 23, 2020;
- b) Nestor Makuch admits in the Statement that the conduct set out in the Statement is deserving of sanction;
- c) On May 12, 2020, the Conduct Committee found the Statement acceptable, pursuant to subsection 60(2) of the Act;
- d) On June 15, 2020, the Chair of the Conduct Committee appointed a single Bencher as the Hearing Committee (Committee) for this matter, pursuant to subsection 60(3) of the Act;
- e) Pursuant to subsection 60(4) of the Act, it is deemed to be a finding of this Committee that Nestor Makuch's conduct is deserving of sanction;
- f) On July 21, 2020, the Committee convened a public hearing into the appropriate sanction related to the conduct of Nestor Makuch;
- g) The LSA and Nestor Makuch have provided a joint submission on sanction for the Committee's consideration, seeking a reprimand and a fine of \$8,000.00;
- h) The parties have also agreed that it is reasonable for Nestor Makuch to pay \$1,500.00 in costs in relation to this matter;
- i) The Committee has determined that the joint submission is reasonable, consistent with sanctions in similar cases, does not bring the administration of justice into disrepute and is therefore in the public interest;

- j) The Committee has accepted the joint submission on sanction, and accepted the submission with respect to the payment of costs.

IT IS HEREBY ORDERED THAT:

1. The appropriate sanction with respect to Nestor Makuch's conduct is a reprimand, which was delivered orally by the Committee to Nestor Makuch and a fine of \$8,000.00
2. The text of the reprimand will be attached to this Order as a schedule prior to the Order being published.
3. Nestor Makuch must pay costs in the amount of \$1,500.00.
4. The fine of \$8,000.00 and costs of \$1,500.00 are due and payable by July 21, 2021.
5. No Notice to the Profession or Notice to the Attorney General is to be made.
6. The exhibits and this order will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than Nestor Makuch will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at Calgary, Alberta, on July 27, 2020.

Linda Long, QC

IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE
CONDUCT OF NESTOR H. MAKUCH
A MEMBER OF THE LAW SOCIETY OF
ALBERTA HEARING FILE NUMBER
HE20190240

STATEMENT OF ADMITTED FACTS AND ADMISSION OF
GUILT

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta on July 6, 1984, and since that time I have practiced in Edmonton, Alberta.
2. My present status with the Law Society of Alberta is Active/Practicing.
3. I am a sole practitioner, carrying on a general practice, which includes about 40% real estate conveyancing.

CITATIONS

1. On September 17, 2019, a Conduct Committee Panel referred the following conduct to a hearing:
 2. It is alleged that Nestor H. Makuch acted while in a conflict of interest and that such conduct is deserving of sanction.
 3. It is alleged that Nestor H. Makuch failed to serve his clients and that such conduct is deserving of sanction.
4. On April 22, 2020 the PHC Chair [DS] approved a withdrawal of citation 2 and an amendment of citation 1 to read:

1. It is alleged that Nestor H. Makuch acted while in a conflict of interest and failed to refer his clients for independent legal advice or take adequate steps to protect his clients' interest and that such conduct is deserving of sanction.

FACTS

5. C.R. and several of his corporations had been my clients since 2005. In 2008, C.R. created a plan to develop land it had acquired in Northern Alberta into an industrial park ("the Land") A C.R. related corporation ("the General Partner") formed a limited partnership ("the Limited Partnership") to develop the Land.
6. Units in the Limited Partnership were promoted to potential investors with promises of high rates of return and with an appraisal of the Land done by an appraisal company ("the appraisers"). R.C., an investment advisor, and J.R., a licensed realtor and C.R.'s son, were involved in promoting the investment.
7. I had no role in the formation, promotion, management, or operation of the Limited Partnership.
8. M.A. and A.A. were an elderly farm couple. In November of 2009, after meeting with R.C. and C.R., M.A. and A.A. invested \$400,000 in the Limited Partnership.
9. In February of 2010, acting on instructions from C.R., I filed a caveat in favour of M.A. and A.A. against lands owned personally by C.R., to act as collateral security for their \$400,000 investment in the Limited Partnership. The caveat was the second financial charge on title, being behind a 2007 mortgage with a face value of \$100,000. On January 29, 2008 these lands had been appraised by a licensed appraiser at \$498,000, that value being conditional on the lands being subdivided. The lands were in fact subdivided on April 1, 2010.
10. In June of 2010, R.C. contacted me to inquire if I could prepare wills for M.A. and A.A. On July 2, 2010, I met with M.A. and A.A. for the first time and received instructions on the preparation of their wills. I made an appointment at that meeting for M.A. and A.A. to return on July 16, 2010 to sign the wills.
11. On July 14, 2010, I received a call from C.R. instructing me to prepare and file a second caveat for M.A. and A.A. ("the second caveat") against lands personally owned by C.R.,

as collateral security for a further investment in the Limited Partnership.

12. On July 15, 2010, I received a call from C.R. asking if the wills for M.A. and A.A. were ready because they were already in the city that day and wanted to avoid another trip back to the city the next day if possible.
13. On July 15, 2010, M.A. and A.A. arrived at my office along with C.R. and R.C. C.R. brought along subscription agreements signed by M.A. and A.A. wherein they invested a further \$400,000 in the Limited Partnership, and two bank drafts each in the amount of \$200,000, representing M.A. and A.A.'s second investment and payable to my firm in trust. Prior to this meeting I was not aware they were bringing these bank drafts with them., nor did I instruct them to do so.
14. With respect to the M.A. and A.A.'s second investment in the Limited Partnership project in July 2010, M.A. and A.A. had already decided to make the second investment prior to speaking with or having any dealings with me about that investment.
15. During my meeting with M.A. and A.A. on July 15, 2010, they executed their wills with R.C. acting as a second witness.
16. The bank drafts from M.A. and A.A. for \$200,000 each were deposited in my firm's trust account and the funds disbursed the same day to the Limited Partner. M.A. and A.A. received their units in the Limited Partnership flowing from their second \$400,000 investment.
17. I filed the second caveat on July 20, 2010. That caveat was the second financial charge on title, behind a 2007 mortgage with a face value of \$125,000. On January 31, 2008 these lands had been appraised by a licensed appraiser at \$507,000, that value conditional on the lands being subdivided. The lands were to have been subdivided in 2010 but M.A. and A.A. declined to consent to the registration of the subdivision plan.
18. The development failed, and the Limited Partnership became insolvent. M.A. and A.A. lost all of their \$800,000 investment as well as their promised returns on the investment.
19. The estate of M.A. and A.A. commenced action against a number of parties, including C.R., R.C., J.R., the appraisers, and myself ("the action").
20. A trial of the action was held over 21 days in 2016 and 2017. I was a witness at the trial.
21. On April 20, 2018, the Trial Judge issued his decision in the action, which decision is

attached hereto as [<http://canlii.ca/t/hrp97>]. The decision includes the following findings regarding the claim against me:

- a. I was in a solicitor-client relationship with M.A. and A.A. and owed them a fiduciary duty as to their second \$400,000 investment in the Limited Partnership and the second caveat;
 - b. I was in a conflict of interest in acting for M.A. and A.A. in that I was also the solicitor for C.R.;
 - c. I did not advise M.A. and A.A. that I was C.R.'s lawyer, and that I was in a conflict of interest;
 - d. I did not advise M.A. and A.A. that their security by way of the second caveat was subject to the prior registered mortgage;
 - e. I did not take taking proper steps to protect M.A. and A.A.;
 - f. I had a duty to M.A. and A.A. to refer them for independent legal advice prior to accepting their \$400,000 investment;
 - g. Had M.A. and A.A. received independent legal advice on the priority of their second caveat, it was more probable than not that they would not have made their second investment;
 - h. I was liable to M.A. and A.A. for damages for \$400,000 plus interest calculated at 4% from July 15, 2010 until paid.
22. The Trial Judge also found C.R., R.C., the General Partner and the appraisers liable for damages. Those parties appealed the decision of the Trial Judge.
23. On the advice of counsel, I did not appeal the decision of the Trial Judge, and the amounts owing pursuant to the judgment against me have been paid.

ADMISSION OF FACTS AND GUILT

24. I admit as facts the statements in this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.

25. I admit that I acted while in a conflict of interest and failed to refer my clients M.A. and A.A. for independent legal advice or take adequate steps to protect my clients' interest and that such conduct is deserving of sanction.

ACKNOWLEDGEMENTS

26. I acknowledge that I have had the opportunity to consult legal counsel.
28. I acknowledge that I have signed this Statement of Facts and Admission of Guilt freely and voluntarily.
29. I acknowledge that I understand the nature and consequences of this Admission.
30. I acknowledge that, although entitled to deference, a Hearing Committee is not bound to accept a joint submission on sanction.

DATED THE 23rd DAY OF April, 2020

"Nestor Makuch"
Nestor H. Makuch

Reprimand

The Hearing Guide of the Law Society requires that Hearing Committees take a purposeful approach to sanctioning a member who has been found guilty of conduct deserving of sanction. The fundamental purpose of sanctioning is the protection of the best interests of the public and the protection of the reputation and standing of the legal profession generally.

Mr. Makuch, I acknowledge your co-operation with the Law Society leading up to today and resolving these citations by admitting guilt and by proceeding with a single Benchers hearing. Your admissions have permitted these citations to be resolved on a more efficient basis, which is not just a benefit to you, but is a benefit to the public and to the Law Society. This is a mitigating factor in determining an appropriate sanction.

There are, however, serious aggravating factors, including your discipline history. Mr. Makuch, you are an experienced lawyer, having practiced now for 36 years. It is clear to me that you have had a long and principled career. You have made significant contributions to the administration of justice in Alberta until your inattention to your ethical responsibilities, and your carelessness in determining whether a solicitor client relationship had been established, even after receiving very significant funds from the clients into your trust account, resulted in this citation.

You have faced citations in 2013 and now in 2020 arising from conduct between roughly 2008 and 2010. In each case you were very senior counsel who ought to have known better. In each case clients were harmed by your failure to protect their interests in a conscientious, diligent and efficient manner. That the clients were made whole through having to initiate legal proceedings against their trusted legal counsel is hardly a comfort to them or the manner in which this profession should protect the public interest.

I expect that facing citations now, and for the second time, at this stage of your career, is an enormous disappointment.

In this case you have admitted guilt on 1 citation. The citation is serious and had serious consequences. There was loss, litigation, a complaint, an investigation.

Although there is a joint submission on sanction from you and the Law Society of Alberta today, I struggled to accept it because of the seriousness of your conduct, and the earlier conduct as an aggravating factor.

However, the sanctioning function is not one of punishment; it is designed to protect the public interest and deter future conduct of this nature. Specifically, the sanction should deter you from repeating the conduct and it should generally deter members of our profession from emulating it; it should engender public confidence that you are a governable member whose commitment to client protection is first and foremost in your mind in each and every case, and that you have learned to do better.

I understand that there has been no repetition or further complaints of this nature. Therefore, given the joint submission on sanction, I agree to accept it and impose the agreed upon sanction of a reprimand, an \$8000 fine and \$1500 costs, as set out in the Hearing Order.

In making these comments today and in expressing this reprimand today, I urge you to constantly have at the forefront of your mind and your practice the integrity required of all of us as members of this profession and the diligence that we all must demonstrate to protect our clients' interests and to maintain our reputation and the reputation of this profession.

In concluding, while I wish you the best as you move forward from these very difficult circumstances and thank you for your attendance today, I also urge you to examine your practice and attention to ethics in every client case that you handle going forward. Exemplary conduct in the past can take you only so far. It is today's clients and your future practice which must be protected from the type of conduct which has you here before me today. I hope you take my words to heart and I wish you well as you do so.

Good day Sir.