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 JASON MCKEN
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee
Deanna Steblyk, QC – Chair
Barbara McKinley – Lay Bencher
Nick Tywoniuk – Adjudicator

Appearances
Miriam Staav – Counsel for the Law Society of Alberta (LSA)
Jordan Stuffco – Counsel for Jason McKen

Hearing Date
November 25 and December 22, 2020

Hearing Location
Virtual Hearing

HEARING COMMITTEE REPORT

(Reasons for the majority, Deanna Steblyk, QC; Nick Tywoniuk concurring)

Introduction and Overview

1. Jason McKen is a lawyer practicing criminal law in Alberta. By way of a Statement of Admitted Facts, Exhibits, and Admissions of Guilt (Statement), he admitted his guilt in respect of a single citation referred to a hearing by a panel of the LSA Conduct Committee on January 14, 2020 (Admitted Citation). The Admitted Citation is:

   > It is alleged that Jason McKen failed to provide competent, conscientious and diligent service to his client, R.S., and that such conduct is deserving of sanction.

2. The Admitted Citation arose from the legal advice Mr. McKen gave to R.S. on May 19, 2013, when Mr. McKen was acting as Brydges duty counsel. The term "Brydges duty counsel" derives from the Supreme Court of Canada's decision in *R. v. Brydges*, [1990] 1 S.C.R. 190, in which the Court held that the right to retain and instruct counsel under section 10(b) of the Canadian *Charter of Rights and Freedoms* imposes a duty on the police to provide detainees information and access to a legal aid lawyer if needed.

"Brydges duty counsel" refers to those legal aid lawyers who assist recently arrested individuals, usually on a summary basis.

3. The Statement was provided to a panel of the Conduct Committee for consideration on August 18, 2020. The panel accepted the Statement as being in the appropriate form pursuant to section 60 of the *Act*. Since the admissions in the Statement were accepted, each admission was deemed to be a finding of this Hearing Committee (Committee) that Mr. McKen's conduct was conduct deserving of sanction.

4. On November 25, 2020 and December 22, 2020, the Committee convened a hearing to determine the appropriate sanction for Mr. McKen's conduct based on the Admitted Citation.

5. The Statement was entered into the hearing record as an exhibit, and the parties made a joint submission on sanction and costs. In addition, LSA counsel submitted that a referral should be made to the Minister of Justice and Solicitor General (Solicitor General) pursuant to subsection 78(6) of the *Legal Profession Act* (*Act*). Mr. McKen took no position with respect to that issue.

6. A majority of the Committee (Majority) found that based on the facts of this case, the appropriate sanction was, as jointly recommended by the parties, a two-week suspension. In accordance with section 72 of the *Act*, the Majority ordered that Mr. McKen be suspended for two weeks commencing on a date to be agreed by the parties, but no later than 90 days from December 22, 2020.

7. In addition, pursuant to subsection 72(2) of the *Act*, the Committee ordered Mr. McKen to pay the LSA $3500 in costs. He was ordered to pay the costs commencing January 15, 2021 at the rate of $500 per month until fully paid.

8. Finally, the Committee determined that the matter shall be referred to the Solicitor General.

9. This report provides the Majority's reasons for the sanction order and the Committee's reasons for the costs order and the referral to the Solicitor General.

Preliminary Matters

10. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested. Accordingly, a public hearing into Mr. McKen’s conduct proceeded.

11. There were no other preliminary matters raised.

Statement of Admitted Facts, Exhibits, and Admissions of Guilt

12. The Statement set out the following background facts.

13. Mr. McKen was admitted to the Alberta bar in July 2007. At the time of the matter that gave rise to the Admitted Citation, he had been in practice for less than six years. He has no discipline record with the LSA.

14. On May 19, 2013, Mr. McKen was on contract to act as Brydges duty counsel and to provide summary legal advice by telephone to individuals who had been arrested or detained. In that capacity, he received a telephone call from R.S. (Phone Call), who had just been arrested after driving his vehicle into the patio of a restaurant in Edmonton (Incident). R.S. struck a family of four and a server. A two-and-a-half-year-old boy was killed, and everyone else who had been struck was injured. On arrest, the police demanded that R.S. provide a breath sample to determine if he was impaired.

15. According to Mr. McKen, the Phone Call lasted approximately seven minutes. He did most of the talking, and did not ask R.S. if he had been drinking.

16. Mr. McKen advised R.S. that the penalty for failing to provide a breath sample would be less than the penalty for impaired driving causing death (Erroneous Advice). Mr. McKen admitted that the Erroneous Advice was incorrect because:

    1) Prior to 2008, the maximum sentence for refusing to provide a breath sample was the same as that for impaired driving. However, the maximum sentence for failing to provide a breath sample was lower than the potential sentence for impaired driving causing death or bodily harm.

    2) In 2008, a new offence under section 255(3.2) of the *Criminal Code of Canada* (*Criminal Code*) was created (Refusal Following Death). This section provided that the maximum sentence for failing or refusing to provide a breath sample after a collision causing death was life in prison. At that time, this was the same maximum sentence as the maximum sentence for impaired driving causing death.

    3) Mr. McKen was unaware of this change in the law.

17. On the basis of Mr. McKen's advice, R.S. refused to provide a breath sample to the police. R.S. was charged with the offence of Refusal Following Death, impaired driving causing death (pursuant to section 255(3) of the *Criminal Code*), and impaired driving causing bodily harm (pursuant to section 255(2) of the *Criminal Code*). He pled guilty to the offence of Refusal Following Death and the other two charges were withdrawn.

18. Both R.S. and Mr. McKen testified at R.S.'s sentencing hearing. The sentencing judge found that while he could not be sure whether Mr. McKen expressly told R.S. to refuse to give a breath sample, he "probably" did and, "[i]n any event, [R.S.] clearly got the intended message" (*R. v. [R.S.]*, 2015 ABPC 269 [Sentencing Decision] at paragraph 41). The sentencing judge then found that the Incident had been caused by a non-impaired driving error, and sentenced R.S. to four months imprisonment.

19. On appeal, the Alberta Court of Appeal set aside the sentence of four months imprisonment and replaced it with a sentence of 26 months imprisonment. On further appeal, the Supreme Court of Canada replaced the sentence imposed by the Alberta Court of Appeal with a sentence of time served. R.S. ultimately served approximately 10 and a half months in custody.

20. The consequences to R.S. and his family were not confined to his conviction and jail sentence. At the scene of the Incident, a mob assumed R.S. was impaired, dragged him from his vehicle, and assaulted him before the police arrived. Sometime following the Incident, R.S. was abducted from his home in the middle of the night by vigilantes who drove him to a secluded area, cut off his thumb with pruning shears, and left him unconscious in the snow. His wife was attacked by vigilantes in a shopping mall parking lot, breaking her nose and teeth.

21. Mr. McKen admitted that in providing the Erroneous Advice to R.S., he failed to provide competent, conscientious and diligent service to his client and failed to meet the standard of conduct expected of a member of the LSA. He further admitted that this conduct was "conduct deserving of sanction" as defined in section 49 of the *Act*.

Findings on Liability

22. For an admission of guilt to be acceptable, the admission must have the following elements:

    1) the admission must be made voluntarily and free of undue coercion;
    2) the lawyer must unequivocally admit guilt to the essential elements of the citations;
    3) the lawyer must understand the nature and consequences of the admission; and
    4) the lawyer must understand that the Committee is not bound by any submission advanced jointly by the lawyer and the LSA.

23. As mentioned, on August 18, 2020, a panel of the LSA Conduct Committee accepted the Statement as being in the appropriate form pursuant to section 60 of the *Act*. Since the admissions in the Statement were accepted, each admission was deemed to be a finding of this Committee that Mr. McKen's conduct was conduct deserving of sanction.

Joint Submission as to Sanction and Sanction Principles

24. The parties agreed that the appropriate sanction was a two-week suspension. In addition, they agreed that Mr. McKen should be ordered to pay $3500 in costs.

25. While hearing committees are not bound to accept joint submissions as to sanction, such submissions carry significant weight, and the case authorities indicate that they should be accepted unless they are demonstrably unfit and contrary to the public interest. In *Law Society of Alberta v. Llewellyn* (2018 ABLS 11), the hearing committee described this as a "high standard" (at paragraph 11), and made the following observations (at paragraph 10):

> The Committee is not bound by joint submissions on sanctions. However, the Committee is required to give serious consideration to jointly tendered submissions, and accept, unless they are found to be unfit, unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting the joint submissions.

26. This is in accordance with the leading authority, *R. v. Anthony-Cook* (2016 SCC 43). In that decision, the Supreme Court of Canada held that a joint submission should be accepted unless the proposed sanction "would bring the administration of justice into disrepute or is otherwise contrary to the public interest" (at paragraph 32). While *Anthony-Cook* is a criminal law case, it has been applied in the regulatory context, including in other LSA conduct matters.

27. According to paragraph 57 of the LSA Hearing Guide, February 2013 (Guide), 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". The Guide sets out a number of factors that should be taken into account when determining sanction, including, among others, the goals of specific and general deterrence and denunciation of the misconduct (at paragraph 69).

28. Another factor set out at paragraph 69 of the Guide that has particular relevance to this matter is "[t]he 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." Similarly, paragraph 70 of the Guide suggests that in considering the nature of the misconduct, a hearing committee should consider whether it "raise[s] concerns about maintaining public confidence in the legal profession". Other relevant factors at paragraph 70 include, among others, the "[i]mpact or injury caused by the conduct" and any aggravating or mitigating circumstances.

LSA Submissions

29. After referring to some of the foregoing principles, counsel for the LSA argued that there are both aggravating and mitigating circumstances in this matter. In her view, the aggravating considerations include:

    1) the nature of the misconduct (as Mr. McKen counselled R.S. to commit an offence),
    2) the harm caused to R.S. as a result of the Erroneous Advice,
    3) the harm caused to the public's confidence in the Brydges duty counsel program, and
    4) the seriousness of Mr. McKen's failure to know the applicable law in his sole area of practice.

30. With respect to the last point, the LSA emphasized that Mr. McKen's failure to know the law was particularly serious in these circumstances, where his practice focused solely on criminal law. Counsel cited a footnote to the Supreme Court of Canada's decision with respect to R.S., which stated, "the lawyer's advice was not only incorrect, it represented a serious failure to keep abreast of the governing law" (*R. v. [R.S.]*, 2018 SCC 34 [Supreme Court of Canada Decision] at paragraph 74, note 4).

31. According to LSA counsel, the mitigating considerations include that Mr. McKen:

    1) has no prior discipline history with the LSA,
    2) cooperated with LSA staff in admitting the facts and his guilt,
    3) does not appear to have a pattern of professional misconduct,
    4) received no personal benefit from his misconduct, and
    5) has already faced repercussions associated with his misconduct (including having to testify at R.S.'s sentencing hearing).

32. In addition, the evidence included three letters of support for Mr. McKen: two from fellow lawyers in his community and one from a community leader who is the parent of two adult children who are among Mr. McKen's satisfied clients.

33. In the interest of proportionality in sanctioning (which the Guide describes at paragraph 69 as "[a]voiding undue disparity with the sanctions imposed in other cases"), LSA counsel referred to two comparable past decisions that she and counsel for Mr. McKen agreed to put before the Committee.

34. In the first, *Law Society of Alberta v. Yarshenko* (2018 ABLS 18), the lawyer admitted that he failed to represent his client competently in a sexual assault trial, failed to obtain instructions from his client, and failed to respond to other lawyers during his client's appeal. The hearing committee accepted a joint submission on sanction, which included a reprimand, a $7000 fine, and a referral to the LSA's Practice Review department. In

addition, the lawyer was ordered to pay $3000 in costs. The LSA pointed to this as an example of another case in which the lawyer failed to know the applicable law, with negative consequences to his client.

35. In the second, *Law Society of British Columbia v. MacGregor* (2019 LSBC 26), the lawyer was found to have counselled his client to breach a separation agreement that was, in effect, a court order. The lawyer had what the hearing committee described as "a reasonably substantial conduct record" (at paragraph 18). He was suspended for 15 days and ordered to pay costs of approximately $7000. The LSA submitted that this was another case in which a lawyer counselled his client to commit an offence.

36. With respect to costs, LSA counsel noted that the LSA's actual estimated costs were $5145. In light of Mr. McKen's cooperation, the LSA was prepared to accept $3500 paid over time at the rate of $500 per month.

37. Finally, the LSA argued that the mandatory language of section 78(6) of the *Act* necessitates a referral to the Solicitor General. That section states as follows:

> Notwithstanding subsections (1) to (4), if following a hearing under this Division, the Hearing Committee or the panel of Benchers is of the opinion that there are reasonable and probable grounds to believe that the member has committed a criminal offence, the Hearing Committee or the panel, as the case may be, shall forthwith direct the Executive Director to send a copy of the hearing record to the Minister of Justice and Solicitor General. [emphasis added]

38. In the LSA's submission, there are reasonable and probable grounds to believe that Mr. McKen contravened section 22 of the *Criminal Code*, which states:

> (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of [the *Criminal Code*], "counsel" includes procure, solicit or incite.

Mr. McKen's Submissions

39. In support of the jointly recommended sanction, Mr. McKen's counsel emphasized that Mr. McKen has been consistently forthright with respect to his mistake in giving the Erroneous Advice. In addition, he cooperated with R.S.'s counsel throughout R.S.'s

sentencing hearing and appeals. As his counsel described it, Mr. McKen "fell on his sword" to accept responsibility. In counsel's submission, it enhances the credibility of the legal profession when a lawyer is forthright and does not attempt to conceal a mistake.

40. Counsel also pointed out that at the time of the Erroneous Advice, Mr. McKen had only been at the bar for approximately six years. As noted by R.S.'s sentencing judge, Mr. McKen was confused about the state of the law at the time, and testified that if he had known the law, he would have advised R.S. differently (Sentencing Decision at paragraphs 40-41).

41. Counsel therefore argued that the misconduct in the *Yarshenko* matter was worse: the lawyer in that case was more senior, had had more time with the client, and delayed responding to or dealing with the consequences of his misconduct after it occurred.

42. Furthermore, counsel advised us that since giving the Erroneous Advice, Mr. McKen has made extensive efforts to rehabilitate himself by pursuing various avenues of continuing legal education, including an intensive advocacy course, a Legal Education Society of Alberta course on impaired driving offences, and a national criminal law program. Mr. McKen has had no conduct issues since giving the Erroneous Advice.

43. According to counsel – who, like Mr. McKen, practices in the Fort McMurray area – this misconduct was uncharacteristic of Mr. McKen, who otherwise enjoys a good reputation and is both well-known and well-liked in the community. His primary source of work is Legal Aid Alberta, as he likes to help people who are disadvantaged. However, as it is not a particularly lucrative practice, Mr. McKen requires time to pay the LSA's costs.

44. As mentioned, Mr. McKen took no position with respect to a referral to the Solicitor General. However, his counsel acknowledged that section 78(6) of the *Act* requires only that the Committee have "reasonable and probable grounds" to believe a criminal offence was committed.

Further Submissions

45. Initially, some members of the Committee were troubled by the jointly-recommended sanction, as it seemed comparatively light given the severe consequences suffered by R.S. as a result of following the advice of a lawyer he had every reason to expect would not misdirect him. If R.S. had not received the Erroneous Advice, it is possible he may not have faced any criminal charges or served any time in jail (see Supreme Court of Canada Decision, dissent at paragraphs 108 and 183). Instead, he and his wife were terrorized and maimed, and R.S. now carries a criminal record.

46. Moreover, because this case involves competence in the law, some members of the Committee were greatly concerned about the impact of the jointly-recommended sanction on the public's confidence in the legal profession and the Brydges duty counsel

program. The sanction could be perceived as too lenient in the circumstances, and deliver insufficient denunciation of significant misconduct causing significant harm, such that it would erode "the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members." There was also concern that the "[i]mpact or injury caused by the conduct" had been given insufficient weight by counsel for the parties.

47. As a result, the Committee considered taking the unusual step of departing from the joint submission on the basis that it was "unfit, unreasonable, [and] contrary to the public interest". We therefore asked the parties to reappear before us to make further submissions and provide additional case authorities in support of the jointly-recommended sanction.

48. At the continued hearing, counsel for the LSA reiterated the stringency of the test for rejecting a joint submission set out in *Anthony-Cook*, as well as that case's discussion of the considerable benefits of a joint submission – not only for the parties, but for the justice system as a whole (see paragraphs 35-40). She argued that as discussed in *Law Society of Alberta v. Pearson* (2011 ABLS 17 at paragraph 45), there is a public interest and strong policy reasons in favour of accepting a joint submission, including certainty and efficiency in the regulatory process.

49. LSA counsel pointed out that the joint submission in this case saved the LSA time, expense, and uncertainty in the result. As it was arrived at <u>in exchange for</u> Mr. McKen's admissions of guilt, it was a "true" joint submission within the meaning of *Anthony-Cook*. By contrast, in *R. v. Lidkea* (2019 ABCA 511), the Alberta Court of Appeal upheld a sentencing decision rejecting a joint submission in part because it was not a "true" joint submission: the accused had plead guilty <u>before</u> counsel agreed on a sentencing recommendation (see paragraphs 12-13).

50. With respect to the range for an appropriate sanction in this case, LSA counsel cited *Law Society of Alberta v. Juneja* (2014 ABLS 32), a sanction decision issued following a fully contested hearing. Mr. Juneja had been found guilty of failing to serve two different clients facing separate criminal charges in a conscientious, diligent, and efficient manner. His failures with respect to one client were particularly egregious; among other things, the client was charged twice under the *Criminal Code* for post-offence failures to appear in court because Mr. Juneja had not informed him of the court dates.

51. The *Juneja* hearing committee described the consequences to this client as "appalling" (at paragraph 26), and suspended Mr. Juneja for a period of two months. The hearing committee specifically noted their concerns about the impact of such a case on public confidence, and indicated that the sanction had to be significant enough to denounce the misconduct and protect the reputation of the profession (at paragraphs 52-54, 78).

52. The LSA argued that the facts in *Juneja* were considerably more serious than the facts in this matter. The misconduct here involved a single seven-minute telephone call with one client while Mr. McKen was acting as duty counsel. In *Juneja*, the lawyer failed to serve two clients in multiple respects over an extended period of time. In addition, Mr. Juneja had a discipline history involving other misconduct that occurred in the same time frame, suggesting a pattern of ongoing misconduct.

53. Accordingly, it was LSA counsel's submission that *Juneja* represents the upper end of the range of reasonable sanctions for failing to serve a client, while the lower end of the range is represented by *Yarshenko*. In other words, the lower end is a reprimand and a fine in accordance with a joint submission, and the upper end is a two-month suspension following a contested hearing.

54. In addition, the LSA argued that the sanctioning factors set out in the Guide must be balanced, and no single factor – such as the harm caused to the client – should be given more weight than the others. In this case, the joint submission reflects counsel's consideration of all of the relevant factors. LSA counsel also submitted that there is uncertainty about what R.S. would have done differently if he had received accurate legal advice, and whether he still would have faced the same or similar consequences.

55. LSA counsel further emphasized the importance of Mr. McKen's conduct following the Erroneous Advice, which, in her view, is critical when considering the overall impact of the case on the public's confidence in the profession. He was candid about what occurred, testified at R.S.'s trial, and sought out continuing legal education to ensure that he does not give negligent advice again.

56. In conclusion, the LSA submitted that the jointly-proposed sanction is a severe sanction. Mr. McKen will have to advise his clients that he is suspended from the practice of law, turn his files over to a custodian, and apply for reinstatement afterwards. He will have a discipline record going forward, a notice to the profession about the suspension will go out, and this decision will be publicly reported.

57. Counsel for Mr. McKen similarly emphasized the high threshold for rejecting a joint submission on sanction, as set out in *Anthony-Cook*. He pointed out the Supreme Court of Canada's call for restraint on the part of sentencing judges, who should reject a joint submission "only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system" (at paragraph 42). He also pointed out the Supreme Court of Canada's acknowledgement that it is counsel for the parties who know the case best, and who are "well placed to arrive at a joint submission that reflects the interests of both the public and the accused" (at paragraph 44). Therefore, he submitted that the members of the Committee should not be unduly influenced by their personal opinions.

58. Counsel for Mr. McKen also argued that not all of the consequences suffered by R.S. can be attributed to Mr. McKen. In this regard, he pointed us to several paragraphs in the Supreme Court of Canada Decision that discussed whether R.S. was under a mistake of law when he refused to provide a breath sample and concluded that he was not. The Court was of the view that after R.S. was "confused" by Mr. McKen's legal advice, he made a strategic choice not to provide the sample despite knowing it may be an offence (see paragraphs 62-73).

59. In the same vein, Mr. McKen's counsel argued that the *Yarshenko* matter involved comparably worse conduct. The client's initial conviction was quashed due to Yarshenko's failure to provide him competent and effective legal advice, and after a second trial, the client was acquitted. Therefore, in counsel's view, that client's conviction was entirely attributable to Yarshenko, while R.S.'s was not entirely attributable to Mr. McKen.

60. Finally, counsel for Mr. McKen emphasized that Mr. McKen has had no additional issues concerning competency or negligence since the Erroneous Advice seven years ago. He agreed with LSA counsel that the jointly-proposed sanction is a significant one, and pointed out the additional repercussions of his misconduct that Mr. McKen has already faced, including the civil suit R.S. commenced against him.

Majority Decision on Sanction

61. Like the hearing committee in *Law Society of Alberta v. Kramar* (2020 ABLS 31), the Majority has concluded that we are "constrained in this case by the principles in *Anthony-Cook* to defer to the joint submission" (at paragraph 36). If we were not, we may have ordered a suspension longer than two weeks. However, the Supreme Court of Canada has made it clear (at paragraph 34) that the threshold is a high one, and "a joint submission should not be rejected lightly". This is because:

> [r]ejection 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.

62. The Majority do not believe that the joint submission in this case falls within this category.

63. Moreover, the additional arguments made and legal authorities cited by counsel for the parties persuaded the Majority that the jointly-recommended sanction is sufficient and appropriate in the circumstances of this case. It falls within the range suggested by the cases cited, albeit toward the lower end of that range given the severe consequences suffered by R.S. and his wife. That said, the Majority accept that there is no way to know if R.S. and his wife would have been subjected to vigilante violence even if he had

received correct legal advice, nor do we know what the result would have been if R.S. had disregarded Mr. McKen's advice and provided the breath sample. It is also true that some of the vigilante violence occurred before R.S. ever spoke to Mr. McKen, at the restaurant just after the Incident took place.

64. The Majority reiterate our concern about the impact a matter such as this could have on the public's confidence in the advice given by members of the legal profession, particularly where a lawyer purports to specialize in a certain area of law.

65. However, the Majority accept that there are a number of mitigating considerations in Mr. McKen's favour, especially his candour and acceptance of responsibility at an early stage, his cooperation during R.S.'s legal proceedings, his cooperation with the LSA in resolving this matter, and the steps he has taken to enhance his skills and knowledge. The Majority agree with counsel that these factors mitigate the negative impact of this matter on public perception. As stated in *Juneja* (at paragraph 30), "…the purpose of the 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."

66. The Majority do not consider Mr. McKen an ongoing threat to the public. Combined with the other consequences Mr. McKen has faced and may face in the future, the Majority are satisfied that the jointly-proposed sanction is sufficient to effect the necessary specific and general deterrence. Such deterrence will help achieve the goal of maintaining the standing of the profession and preserving the public's confidence.

Referral to the Minister of Justice and Solicitor General

67. The remaining issue for the Committee's determination was whether or not to refer this matter to the Solicitor General pursuant to section 78(6) of the *Act*.

68. The Committee are of the view that the mandatory language in section 78(6) requires us to direct the referral. There are "reasonable and probable grounds to believe" that Mr. McKen committed a criminal offence contrary to section 22 of the *Criminal Code*. As pointed out by LSA counsel, in the Supreme Court of Canada Decision, the Supreme Court of Canada noted that R.S.'s sentencing judge "accepted [R.S.'s] evidence that the lawyer expressly told him not to provide the police with a breath sample – i.e., the lawyer advised [R.S.] to break the law" (at paragraph 75). Mr. McKen knew that failing to provide a breath sample was an offence, he simply thought that it carried a lesser penalty than the potential sentence for impaired driving causing death or bodily harm.

Concluding Matters

69. As indicated, on December 22, 2020, the Majority accepted the jointly-proposed sanction and the Committee accepted the jointly-proposed costs order. Accordingly, pursuant to section 72 of the *Act*, Mr. McKen:

    1) is suspended for two weeks commencing on a date to be agreed by the parties but no later than 90 days from December 22, 2020; and

    2) must pay the LSA $3500 in costs, commencing January 15, 2021 at the rate of $500 per month until fully paid.

70. A Notice to the Profession shall be issued, as required by section 85 of the *Act* in the circumstances of a suspension.

71. The Committee directs the Executive Director of the LSA to send a copy of the hearing record to the Solicitor General.

72. The exhibits, other hearing materials, and this report 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 Mr. McKen will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at Calgary, Alberta, June 2, 2021.

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Deanna Steblyk, QC - Chair

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Nick Tywoniuk

Reasons for Dissent

(Reasons for the dissent by Barbara McKinley)

73. I take no issue with the summary of the facts of the case provided by the Majority. I will confine my remarks to the appropriateness of the sanction.

74. For the LSA, the two main purposes of disciplinary proceedings are protection of the public and protection of the public confidence in the legal profession. With reference to sanctioning, paragraph 57 of the Guide states:

> The second purpose is the most fundamental to all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth … A profession's most valuable asset is its collective reputation and the confidence which that inspires. (*Bolton v. Law Society*, [1994]).

The Guide further emphasizes the importance of considering the impact of the conduct on the individual, i.e., the client, and on the profession (paragraph 67).

75. For the reasons cited below, I do not believe that the sanction of a two-week suspension adequately protects the public confidence in the legal profession, nor does it reflect the impact on the client in this case.

Public Confidence in the Legal Profession

76. The Supreme Court of Canada commented on the implication of the conduct in this case for the legal system as a whole as well as for the public perception of the legal profession:

> Accepting, as we must for the present purposes, the sentencing judge's findings against the *Brydges* lawyer, the lawyer's advice was not only incorrect, it represented a serious failure to keep abreast of the governing law and a troublesome breakdown in the provincial program carrying out the *Brydges* mandate—a program designed to ensure that *all* detained persons have access to legal advice under s. 10(b) of the *Canadian Charter of Rights and Freedoms*. (Supreme Court of Canada Decision, footnote 4 to paragraph 75).

77. In this case, Mr. McKen was not a law student, nor was he a brand new member of the profession when he provided the Erroneous Advice. He had been a lawyer specialising in criminal law for at least four years when he advised R.S. about providing a breath sample.

78. Furthermore, the change in the law respecting failure to provide a breath sample was not a recent one when Mr. McKen provided the Erroneous Advice. This change had occurred in 2008, some five years prior to Mr. McKen's encounter with R.S., providing adequate time for Mr. McKen to have become aware of the current law. The fact that he did not know the applicable law in his sole area of practice is shocking. It is difficult to conceive of a set of circumstances, other than perhaps criminal conduct, that is more damaging to the reputation of the legal profession than this. Clients and members of the public should be able to rely on the advice of a lawyer. In this case, relying on his lawyer's advice resulted in a ten-month period of incarceration and a criminal record for Mr. McKen's client.

The Impact of the Conduct on the Client

79. The severe impact of the conduct on Mr. McKen's client is what distinguishes this case from other cases that have been before the LSA. R.S. endured three layers of court and the attending costs, a ten-month incarceration and a criminal record. Further, his refusal to provide a breath sample and the subsequent charge may have contributed to a

perception among the public that he was a drunk driver who killed a child. Some months after he was charged, R.S. was the victim of vigilantes who abducted him and cut off his thumb. His wife was assaulted and suffered broken bones in her face and broken teeth. The impact on R.S. and his family is serious and is permanent.

80. Contrary to the submissions of the LSA that no single factor such as harm to the client is to be given more weight than others in sanctioning, at paragraph 69 of the Guide, it states that:

> A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

81. In my opinion, the Majority did not give due consideration to the impact on R.S. In paragraph 63 of the Majority decision, they state that it is uncertain that RS and his wife would have been subjected to vigilante violence if he had received the correct advice or if he had disregarded the Erroneous Advice. Respectfully, I am not persuaded by this argument.

82. What we do know is that R.S. did rely on his lawyer's advice. This resulted in him being charged with an offence and being incarcerated for ten months. He now has a criminal record.

83. Given the facts in this case, had R.S. been given the correct advice he may have relied on it and provided a breath sample. According to evidence presented at his trial, he was likely not impaired at the time of the accident, so a breath sample may have exonerated him from an impaired driving charge.

Case Law

84. It should be noted that administrative bodies are not bound by the same level of adherence to *stare decisis* as are the courts. Nevertheless, other disciplinary cases can be a guideline when deciding sanction.

85. Three cases were cited by counsel: *Yarshenko*, *MacGregor* and *Juneja*. None of them include the kind of impact on the client as suffered by R.S. In *Yarshenko*, the lawyer failed to represent his client competently and was sanctioned with a reprimand and a $7000 fine, was ordered to pay $3000 in costs, and referred to Practice Review. The impact on Yarshenko's client does not appear to have included incarceration, as was the case with R.S. Although the citation of failing to represent his client competently is the same, the impact on the client does not compare to this particular case.

86. In the second case, *MacGregor*, the lawyer counselled his client to breach a separation agreement that was, in effect, a court order. He was suspended for 15 days and ordered to pay $7000 in costs. The client did not suffer incarceration or a criminal record as a result of the lawyer's misconduct.

87. In *Juneja*, the lawyer failed to serve two clients in a conscientious, diligent, and efficient manner. He did not hire an expert witness for trial, did not ensure his client was aware of trial dates and warrants, and failed to advise the Court of his client's legitimate excuses

for failing to attend court. He was suspended for two months. His client was not arrested or incarcerated as a result of the misconduct.

88. The impact on R.S. was more significant than in any of the cases presented and for this reason, I am not swayed by the sanction range in these cases.

Joint Submissions on Sanction - Principles

89. Deference to a joint submission should not outweigh adherence to the fundamental purpose of sanctioning - to protect the public interest and the public's confidence in the legal profession. Counsel for the parties emphasized the high threshold for rejecting a joint submission on sanction, as set out in *Anthony-Cook*. I accept that significant deference must be given to a joint submission, however, in applying *Anthony-Cook*, I am not convinced that the joint submission at hand meets the test.

90. Given the impact on the client and the effect on the reputation of the legal profession and the Brydges program, I cannot accept the joint submission because, as set out in *Anthony-Cook,* I find the proposed sanction brings the administration of justice into disrepute and is contrary to the public interest. In my view, the sanction of a two-week suspension is insufficient.

Summary

91. The privilege of self-regulation carries with it the burden of zealous protection of the public interest and of the public's confidence in the legal profession.

92. In this case, R.S. lost his liberty due in no small part to the advice he was given about providing a breath sample. He now has a criminal record.

93. The suspension of two weeks does not adequately denounce the misconduct, especially in light of the harm suffered by the client. The cases cited by counsel do not compare in terms of the impact on the client.

94. The smooth functioning of the justice system depends in large part on the ability of a client to trust the advice of their lawyer. We trust that lawyers who practice in a certain area of law actually know the current state of that law. We must trust that our lawyers are not going to counsel us to commit criminal offences. An informed member of the public, when confronted with the facts of this case, would undoubtedly conclude that the administration of justice was in disarray.

95. For these reasons, I do not concur with my colleagues that a two-week suspension is an adequate or reasonable sanction.

Dated at Calgary, Alberta, June 2, 2021.

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Barbara McKinley