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 JOHNY FAUL
A STUDENT-AT-LAW OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel

Edward Feehan, KC - Chair/Bencher
Glen Buick - Lay Bencher
Levonne Louie - Lay Bencher
Sanjiv Parmar, KC - Bencher
Ron Sorokin, KC - Bencher
Moira Váně, KC - Bencher
Grant Vogeli, KC - Bencher

Appearances

Miriam Staav and Shane Sackman - Counsel for the Law Society of Alberta (LSA)
Alain Hepner, KC - Counsel for Johny Faul

Hearing Date

September 13, 2023 and January 25, 2024

Hearing Location

Virtual Hearing

APPEAL PANEL DECISION

Overview

1. On May 18, 2021, a Conduct Committee Panel of the LSA directed a hearing in relation to the following citation:

    a) It is alleged that the conduct of Johny H. Faul in relation to his guilty plea to the criminal charge of assault, for which he was granted a conditional discharge, harms the standing of the legal profession and that such conduct is deserving of sanction.

    (Citation).

2. On October 13 and 19, 2021, a hearing into Mr. Faul's conduct was heard (Merits Hearing) by a Hearing Committee (Committee).

3. On April 8, 2022, the Committee determined that Mr. Faul's conduct was deserving of sanction (Merits Decision [1]) and directed a hearing in relation to the appropriate sanction. No appeal was filed by Mr. Faul in relation to the determination that his conduct was deserving of sanction.

4. On November 29, 2022, the Committee heard evidence and submissions in relation to the appropriate sanction to be imposed on Mr. Faul (Sanction Hearing).

5. On April 3, 2023, the Committee determined that the appropriate sanction was deregistration as a Student-at-Law (Sanction Decision[2]).

6. On April 13, 2023, Mr. Faul appealed the sanction imposed upon him by the Committee pursuant to section 75 of the *Legal Profession Act*, RSA 2000, c. L-8 (*Act*). In the Notice of Appeal, Mr. Faul submitted that the Committee overemphasized certain aggravating factors and underemphasized various personal mitigating factors. Mr. Faul proposed a period of suspension or reprimand as a more appropriate sentence.

7. On January 25, 2024, an Appeal Panel of the Benchers (Appeal Panel) conducted a hearing of the appeal from the Sanction Decision.

8. After considering, *inter alia*, the Hearing Record as well as the oral and written submissions of counsel, the Appeal Panel, for the reasons set out below, upholds the decision of the Committee to impose deregistration as an appropriate sanction.

9. Accordingly, the appeal is dismissed.

Preliminary Matters

10. The Appeal Panel notes that there were no objections to either the constitution of the Appeal Panel or the jurisdiction of the Appeal Panel.

11. Further, it is noted that a private hearing was not requested by either Mr. Faul or the LSA.

Background Facts

Criminal Proceedings

12. Mr. Faul was admitted to the LSA as a student-of-law in June 2019.

13. On December 8, 2019, an incident occurred at Mr. Faul's residence involving a female identified as R.L. (Incident).

[1] *Law Society v Faul,* 2022 ABLS 12**.**
[2] *Law Society of Alberta v Faul,* 2023 ABLS 10.

14. On January 31, 2020, Mr. Faul was arrested and charged with the sexual assault of R.L., contrary to section 271 of the *Criminal Code of Canada*.

15. On February 3, 2020, Mr. Faul's counsel reported to the LSA that Mr. Faul had been criminally charged with sexual assault.

16. On March 31, 2020, Mr. Faul was terminated from his articling position at his firm.

17. On December 7, 2020, with the consent of the Crown, Mr. Faul entered a guilty plea to a summary charge of assault simpliciter, contrary to section 266 of the *Criminal Code of Canada*.

18. Mr. Faul has never admitted guilt for, nor been convicted of, sexual assault pursuant to section 271 of the *Criminal Code of Canada*.

19. At Mr. Faul's criminal proceeding in the Alberta Court of Justice (ACJ), an Agreed Statement of Facts (ACJ ASF) was submitted along with a joint sentencing recommendation. Based on the joint recommendation, which was accepted by the Court, Mr. Faul received an 18-month conditional discharge.

20. As of the date of the Merits Hearing, Mr. Faul had completed all of the requirements of his Probation Order save the passage of time. This included completing the counselling session required by the probation officer. Thereafter, Mr. Faul voluntarily continued with therapy.

Merits Hearing

21. Mr. Faul never admitted guilt in relation to the Citation. As a consequence, evidence was adduced at the Merits Hearing relating to his conduct.

22. Part of the evidence submitted at the Merits Hearing included a Statement of Admitted Facts and Exhibits (LSA ASF)[3]. The LSA ASF, which did not include an admission of guilt or unprofessional conduct, read as follows:

    a) I met R.L. on a dating app in April 2019. We started our relationship with a view to dating and went on three dates together, but decided to become friends in May 2019 after R.L. told me that she was not interested in a romantic relationship. A copy of the text messages exchanged between R.L. and myself from April to July 2019 are included as **Exhibit 1**;

    b) On December 8, 2019, R.L., was present at my residence in Calgary. The events of that date are described in further detail in this Statement of Admitted Facts and were the basis for the criminal charges against me;

[3] Statement of Admitted Facts and Exhibits **[Hearing Record, Tab 10, Exhibit 5].**

c) On December 9, 2019, a series of cellphone text messages were exchanged between myself and R.L. A copy of this series of text messages is included as **Exhibit 2**;

d) On January 31, 2020, I was arrested and charged with sexual assault. My arrest was by appointment and I was released on the same date on an undertaking with conditions;

e) On February 3, 2020, I reported to the [LSA] through my counsel that I had been charged;

f) On December 7, 2020, the Crown [and] I entered a guilty plea to assault contrary to s. 266 of the *Criminal Code of Canada*, on which the Crown proceeded summarily in the Provincial Court of Alberta in Calgary;

g) In support of my guilty plea to assault, an agreed statement of facts was read into the Court record. **The agreed statement of facts is admitted for the truth of its contents** and is included as **Exhibit 3**; [emphasis added]

h) After entering a guilty plea, I was granted a conditional discharge. The terms and conditions of the conditional discharge are included as **Exhibit 4**;

i) On January 20, 2021, I was interviewed by an investigator with the LSA, [J.D.]. The transcript of this interview is included as **Exhibit 5**;

j) On January 25, 2021, I was interviewed again by [J.D.]. A transcript of this interview is included as **Exhibit 6**; and

k) On February 17, 2021, I was interviewed by [J.D.]. A transcript of this interview is included as **Exhibit 7**.

23. Exhibit 1 to the LSA ASF consists of a series of text messages exchanged between Mr. Faul and R.L. ***prior*** to the Incident on December 8, 2019. Notably, the texts reveal the following disclosure made by R.L.: [detailed description of sensitive personal history and mental health struggles]

24. Mr. Faul responded to the extremely personal disclosure by saying, in part: “I know I will never be a man to cheat on you, abuse you or rape you. And I hope I can be a man one day who will build you up and make you stronger so that you can overcome mental health, and catch you if you fall”.

25. Exhibit 3 of the LSA ASF incorporates by reference the ACJ ASF, which read as follows:

On December 8, 2019 the accused Johny Faul picked up R.L. in his vehicle at her residence at approximately 8:24 p.m. where the two returned to his residence [address omitted] to hang out. The two they [sic] had met online, initially gone on a few dates, and then decided to be just friends as R.L. expressed she was not interested in a relationship with him. They talked regularly and were friends from July 2019 until December 2019 the night of the incident. The accused was in a relationship with another woman at the time of his incident, who both parties referred to as his "girlfriend"; and

The parties were drinking alcohol over the evening. R.L. began to feel weak and tired so much so she laid down on the couch. Mr. Faul attended to R.L. on the couch by touching her body, kissing her and confessing his love and desire to have sex with her. Several times, R.L. tried to push him away and stated that she was not interested and reminded him he had a girlfriend. Mr. Faul responded with "I don't care" and continued with persistence.

Eventually R.L. moved to the bedroom where she assumed she could fall asleep alone. Mr. Faul crawled into bed with her. R.L. awoke to inappropriate touching. She was scared and began to cry at which time Mr. Faul stopped and left the bedroom. R.L. left Mr. Faul's home and walked home. The parties then decided to mutually cease communications the next morning.

26. Exhibit 2 to the LSA ASF included a series of text messages exchanged between Mr. Faul and R.L. on December 9, 2019, the day ***following*** the assault, which read, in part:

Mr. Faul:	I'm sorry for being stupid
	What are you thinking
R.L.:	I'm thinking that was really not cool last night
Mr. Faul:	You're right
	Idk how it happened.
R.L.:	What are you going to do?
Mr. Faul:	Honestly I don't know
	I will tell her in person
	What are you going to do
R.L.:	I kind of want to kill you
Mr. Faul:	I want to kill myself.

We were stupid.

R.L.: No you don't

We?

Mr. Faul: Yes I really do. And I do think it was both of us [R.L.].

R.L.: I was basically unconscious.

Don't you dare put that on me.

Mr. Faul: [R.L.]

I don't think this was just me

R.L.: I'm basically passed out on the couch, you start kissing me, I say you have a girlfriend, you say you don't care, I want you to stop, but I basically pass out. I wake up in your bed with my pants off. I ask what happened. You said you took them off and were fingering me and went down on me and I wasn't exactly conscious. You stuck a part of your body into a part of mine without consent. That's called sexual assault.

Mr. Faul: [R.L.]. I asked you when I started kissing you and you didn't stop.

I am stupid and I want to die right now.

I'm having a panic attack

R.L.: Not saying anything doesn't mean I gave consent. It means I was too out of it to process what was happening. I'm not going to argue about this with you and I'm not going to do anything about it, but I can't talk about this with you right now.

Mr. Faul: I am sorry. You did say things back to me. I don't want to argue but I'm scared and I can't breathe right now

I am sorry [R.L.]

27. Exhibits 5, 6 and 7 to the LSA ASF consist of transcripts of interviews conducted by a LSA investigator prior to the Merits Hearing, which resulted in the following disclosure:

    a) During the first interview, Mr. Faul was asked about a letter his previous counsel had sent to the LSA, which indicated, in part: "Mr. Faul's contention is that all the contact was consensual". Mr. Faul advised that this was what his counsel wrote, but he agreed with the wording. When asked how this could be reconciled with

the facts in the ACJ ASF, which was entered for the truth of its contents, Mr. Faul explained that he had been presented with the option to enter a guilty plea, and he really wanted to conclude the matter without going to trial;

b) During the second interview, the investigator asked Mr. Faul: “would I be correct in understanding that you maintain that the contact that you had with R.L. in December of 2019 was completely consensual?” Mr. Faul responded: “Yes.”

c) Later, Mr. Faul described the events of that evening and said: “There was no indication that she was not a participant in the relationship.”

d) Near the conclusion of the second interview, Mr. Faul reaffirmed: “So I think in response to your question, as far as I was aware, everything that evening was consensual. That was my view at the time, and it’s continued to be my view.”;

e) In response to a question about what happened the night of the assault, Mr. Faul responded as follows:

> I guess briefly, like, we -- I picked her up at about 8:30 to come to my apartment. I picked her up at her place. We had a few drinks. Started talking. At some point she asked me like, like, do I have a T-shirt that I can lend to her because she was warm in the sweater. She then proceeded to change, like, right in front of me, which was quite odd, I thought. Then we went back into my living room, kitchen, of the apartment. Continued to just chat and stuff. Started dancing for a little bit and whatnot and then just started kissing each other on my couch. No point did she have any issues with consent relating to this. Then went to my bedroom after she asked to go there, and we continued kissing, and I briefly went down on her in my -- in the bed, and then she, after some time, decided to leave that evening;

f) During the third interview, Mr. Faul provided the following details about the assault:

   i. R.L. and Mr. Faul both walked to Mr. Faul’s bedroom that evening. Mr. Faul didn’t carry R.L. or assist her;

   ii. The “inappropriate touching” noted in the ACJ ASF included touching R.L. above her pants near her vagina, and then going “down on her”;

   iii. There was no intercourse or attempted intercourse;

   iv. After the “inappropriate touching”, Mr. Faul and R.L. laid in his bed for approximately 20 minutes. They talked a little bit and decided to go to

sleep. After that, she got up and decided to leave. R.L. then left and walked home to her apartment. Mr. Faul knew that R.L. was upset, but he didn't think she was crying; and

v. Mr. Faul called R.L. twice after she left his apartment that night and they talked on the phone.

g) Additionally, during the first LSA interview, Mr. Faul was asked about his articles at the firm. When asked if "there were any performance conduct issues" when Mr. Faul was employed at the firm, Mr. Faul responded: "no".

28. At the Merits Hearing, Mr. Faul prepared a letter of apology which was entered as an Exhibit and provided to the Committee. The apology was later revised.

29. It is noted that at the Merits Hearing the Committee made the following ruling:

a) Mr. Faul cannot comment on R.L.'s feelings or thoughts;

b) Any testimony of Mr. Faul which contradicts either the LSA ASF or the ACJ ASF, would be disregarded and not considered by the Committee as both have been entered for the truth of their contents; and

c) Mr. Faul can provide non-contradictory evidence to potentially augment the facts contained in the LSA ASF or ACJ ASF, however, the Committee would determine the weight to be given to the evidence.

(Ruling).

29. Notwithstanding the Ruling, it should be noted that Mr. Faul did attempt to provide evidence in areas which the Committee considers contrary to the ACJ ASF and LSAASF. Specifically:

a) He thought the actions *vis-à-vis* R.L. on December 8, 2019 were done with consent. While he appreciates that R.L. did not hold that view, Mr. Faul felt that he could hold that view and that these divergent views were not mutually exclusive. It should be noted that it is also contradictory to the second LSA interview;

b) Mr. Faul indicated that after he said, "I don't care", he said, "kiss me back";

c) Mr. Faul indicated that R.L. lifted her hips to help remove her pants;

d) Mr. Faul added facts such as R.L. change from a sweater to a t-shirt in front of him and exposed a side view of her breasts;

e) R.L. asked to go to the bedroom;

f) Mr. Faul asked if he should keep going; and

g) Mr. Faul gave different timing in his testimony.

30. The Committee disregarded Mr. Faul's testimony on the points above, as these were contrary to the evidence admitted for the truth of their contents, specifically the ACJ ASF. The Committee also noted that the with respect to the new addition of facts that Mr. Faul provided at the Merits Hearing, Mr. Faul was given opportunity by the LSA investigator to provide additional information and provided none of what he then provided in his testimony at the Merits Hearing.

31. In analyzing the evidence presented at the Merit Hearing, the Committee made the following observations:

a) The best evidence of relevant facts is contained both in the ACJ ASF and the LSAASF. As both documents were entered for the truth of their contents, any facts that were inconsistent with either were given no weight by the Committee;

b) Specifically, any attempt to import elements of consent into the parties' interactions, were not given any weight by the Committee. Mr. Faul did not apply to withdraw the ACJ ASF and, accordingly, cannot rely on contradictory evidence to disprove the admission he made at the criminal proceedings;

c) As an aggravating factor, it is noted that Mr. Faul was aware of R.L.'s personal history, which indicates that she was a vulnerable individual;

d) The attempt to provide additional, contradictory facts indicates a lack of candor with the LSA investigator; and

e) The evidence of Mr. Faul's prior employer contradicts Mr. Faul's evidence with respect to performance issues, which also demonstrates a lack of candor.

32. The Committee concluded that "the oversight of integrity by the LSA of lawyers in Alberta begins when they are students-at-law. Mr. Faul has acted without integrity". Accordingly, the Committee found that the Citation had been proven on a balance of probability and was deserving of sanction.

Sanction Hearing

33. At the Sanction Hearing, many letters of reference from personal friends and colleagues were provided to the Committee. In addition, two reports from two registered

psychologists, Dr. P.B. and Dr. N.P., were also proffered as exhibits. Finally, it is noted that a revised letter of apology was tendered by Mr. Faul.

34. The Report and oral evidence provided by Dr. P.B. was referred to by the Committee in the sanction decision. In particular, it is noted that, in Dr. P.B.'s opinion:

    a) The fact that Mr. Faul had gone outside the LSA ASF could be attributed to cognitive distortion, which "are excuses that we give ourselves for crossing the line, doing something that we otherwise know we should not be doing". In other words, cognitive distortions are "justification for engaging in conduct which, objectively, is not legal nor moral, but when you are checked by an outside source, all of a sudden that cognitive distortion evaporates, and your behaviour becomes more compliant".

    b) Mr. Faul had more room for improvement and could benefit from counselling specific to issues around sexual offending and relapse prevention focused treatment;

    c) Mr. Faul's risks of reoffending using the Static-99 measure indicated a score of two which aligns with a sexual recidivism rate of 9% and 13% at five and ten-year follow up appointments;

    d) At present, Mr. Faul is in the early to middle stages of having a relapse prevention plan; and

    e) Mr. Faul can reduce his risk of reoffending by participating in treatment; the presence of positive supports; and the absence of attitudes that condone offending. Conversely, factors such as episodic alcohol use, poor stress management and depression could serve to increase risk.

35. The Committee then considered the purposes of sanction, reviewed applicable precedent and concluded that deregistration would be appropriate.

Grounds of Appeal

36. This appeal focuses solely on the appropriateness of the sanction imposed.

37. In the factum submitted by Mr. Faul, he requested that the appeal be allowed and that his sanction be varied on the following two grounds:

    a) By relying on aggravated factors not available or established, the Committee committed errors in principles that impacted the sanction imposed; and

    b) The sanction imposed was unreasonable.

Preliminary Application to Adduce New Evidence

38. On October 2, 2023, Mr. Faul submitted an application pursuant to section 76(6) of the *Act* for leave to adduce fresh evidence on appeal. In particular, Mr. Faul sought leave to file an affidavit of Dr. P.B., affirmed September 28, 2023 in support of the appeal.

39. The application to adduce new evidence was opposed by the LSA, which submitted a brief of argument on November 28, 2023, requesting that the application for fresh evidence be dismissed with costs.

40. On December 18, 2023, counsel for Mr. Faul and counsel for the LSA were advised as follows:

> Please be advised that the Appeal Committee has received, reviewed, and discussed the briefs and materials relating to Mr. Faul's application to adduce fresh evidence. The Committee has decided that, in accordance with standard appeal procedure[4], they will hear submissions and consider the application concurrent with the hearing of the appeal on January 25, 2024. Although no decision has been made as to whether the evidence proffered by Dr. P.B. (1) constitutes new evidence, and (2) meets the test for admission articulated in *Palmer v. The Queen*, [1980] 1 SCR 759, and *Barendregt v. Grebliunas*, 2022 SCC 22, counsel are invited to proceed on the basis that the affidavit of Dr. P.B. *may* ultimately be accepted as admissible, fresh evidence by the Appeal Committee.

41. In the *Barendregt* decision, the Supreme Court of Canada cautions that:

> An appeal is not a re-trial. Nor is it license for an appellate court to review the evidence afresh. When appellate courts stray beyond the proper bounds of review, finality and order in our system of justice is compromised. But not every trial decision can weather a dynamic and unpredictable future. Once it is rendered, lives go on and circumstances may change. When additional evidence is put forward, how should appellate courts reconcile the need for finality and order in our legal system with the need for decisions that reflect the just result in the proceedings before the court?[5]

42. In determining whether to admit fresh evidence (evidence concerning events that occur before the trial) or new evidence (evidence concerning events that occur after trial), parties must meet the test in *Palmer*:

[4] For standard practice, see: *McDonald v Brookfield Asset Management Inc*., 2016 ABCA 419.
[5] *Barendregt v. Grebliunas*, 2022 SCC 22 at paragraph 1.

a) Could the evidence, by exercise of due diligence, have been obtained for the trial?

b) Is the evidence relevant in that it bears upon a decisive or potentially decisive issue?

c) Is the evidence credible in the sense that it is reasonably capable of belief?

d) Is the evidence such that, if believed, it could have affected the result at trial?[6]

43. In determining whether to permit new fresh evidence, the Committee was guided by the principles set forth in the *Barendregt* and *Palmer* decisions.

44. Further, it must be noted that "the provision allowing the introduction of fresh evidence on appeal[7] is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal".[8]

45. As indicated to counsel on December 18, 2023, a determination of whether Mr. Faul discharged the burden of establishing the test set forth in *Palmer* will be addressed later in this decision in the context of analyzing the appeal submissions.

Standard of Review

46. An appeal hearing is not a hearing *de novo*.

47. The standard of review to be applied by the Appeal Panel is guided by its statutory mandate. Section 76(1) of the *Act* states:

> 76 (1) If an appeal is taken to the Benchers under section 75, the Benchers shall, as soon as practicable and subject to compliance with section 75, hold a hearing to
>
> (a) consider the hearing report and the hearing record [emphasis added], and
> (b) hear any representations of the member or the member's counsel respecting the appeal.

48. The legislation makes it clear that the mandate of the Appeal Panel is to consider the existing hearing record and review the decision made by the Committee; it is not to re-conduct the hearing.

[6] *Palmer v The Queen*, [1980] 1 SCR 759.
[7] = *Act*, section 76(6) and (7).
[8] *Yee v Chartered Professional Accountants of Alberta,* 2020 ABCA 98, at paragraph 34.

49. Generally, the standard of review for an internal administrative appeal was established by the Alberta Court of Appeal in *Yee v. Chartered Professional Accountants of Alberta*[9], wherein the Alberta Court of Appeal considered its prior decisions in *Newton v. Criminal Lawyers' Association*[10] and *Zuk v Alberta Dental Association and College*[11] decisions, and stated that:

> When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal wholistically, without rigid focus on any abstract standards of review[12]: *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at paragraph 23, 290 NSR (2d) 361. The following guidelines may be helpful:
>
> a) Findings of fact made by a disciplinary tribunal, particularly based on credibility of witnesses, should be afforded significant deference;
>
> b) Likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for argument;
>
> c) With respect to the decisions on questions of law by the disciplinary tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the review of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure the proper professional standards are maintained;
>
> d) With respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and findings about what constitutes professional misconduct: *Newton* at paragraph 79. It obviously should not disregard the view of the discipline tribunal or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;
>
> e) The appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure

[9] *Yee v Chartered Professional Accountants of Alberta,* 2020 ABCA 98..
[10] *Newton v. Criminal Lawyers' Association,* 2010 ABCA 399.
[11] *Zuk v Alberta Dental Association and College, 2018 ABCA 270.*
[12] *Yee,* supra, at paragraph 35.

that, considered overall, it properly protects the public and reputation of the profession; and

f) The appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

50. It is noted that counsel for Mr. Faul[13] emphasized the reasoning of the Supreme Court of Canada in *R v. Friesen.* In that decision, the Court observed that appellate Courts must generally defer to sentencing judges' decisions. The sentencing judge "has regular front-line experience and usually has experience with the particular circumstances and need of the community where the crime was committed". An appellate Court should only substitute its own decision for a sentencing judges' for good reason.[14]

51. The Court in *Friesen*[15] further stated:

> As this Court confirmed in *Lacasse*, an appellate Court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). **Errors in principle include** an error of law, a failure to consider a relevant factor, or **erroneous consideration of an aggravating or mitigating factor**. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably… **Not every error in principle is material: an appellate Court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence** (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit. [emphasis added]
>
> If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate Court must perform its own sentencing analysis to determine a fit sentence (*Lacasse*, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate Court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.

[13] *R v. Friesen*, 2020 SCC 9.
[14] Ibid., at paragraph 25.
[15] Ibid., at paragraphs 26-28,

However, in sentencing afresh, the appellate Court will determine the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing process; and recognizes the sentencing judge's expertise and advantageous position (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).

52. While the above principles relating to standard of review have been noted and observed by the Appeal Panel, it is noted that this is an internal statutory review. Moreover, it is noted that the Appeal Panel does not have powers of the appellate Court. Finally, it is noted that this Appeal Panel is not imposing any criminal sanction affecting the liberty of the member.

Submissions of the Parties

Appellant Submissions – Ground One: Relying on aggravated factors not available or established

53. At the appeal, counsel for Mr. Faul based his submissions on, *inter alia*, the following legal principles:

a) The reasons for entering a guilty plea vary. A guilty plea can be a rational choice to avoid financial, emotional and other costs associated with a criminal trial. Moreover, a guilty plea can alleviate psychological stress and avoid negative collateral consequences that would flow from finding of guilt after trial. Finally, a guilty plea to a "lesser offence" may result in a lesser sanction;

b) A guilty plea is an admission by the accused that they are "*guilty of that particular offence and nothing more*". It is not an admission of the truth of *all* facts contained in the disclosure package; nor are guilty pleas a concession to *all* allegations made by the complainant;

c) A guilty plea to a less serious offence arising from the same transaction requires a sentencing judge to acquit the accused of the offence charged and find them guilty of the other offence, which requires broader judicial oversight;

d) Where an alternative plea is accepted, the Crown is precluded from leading evidence in support of finding the accused was guilty of the more serious offence for which he or she was found not guilty. In this case, it is noted that the Crown would have been prohibited from relying on the sexual nature of the circumstances surrounding the charge as Mr. Faul was acquitted of sexual assault and found guilty of assault simpliciter;

e) If sufficient facts are set out in an agreed statement of facts to establish the essential element of an offence, and those facts are admitted by the accused, then the plea should be accepted.

f) The Crown's burden to prove aggravating factors beyond a reasonable doubt is still required;

g) A guilty plea can be validly accepted even where factual disputes remain between the Crown and the defence. After any agreed facts are presented to the sentencing judge, both the Crown and the defence have the opportunity to make submissions regarding the relevant facts.

h) An agreed statement of facts may be introduced at subsequent disciplinary proceedings. However, where the central issue in the criminal matter is different than the disciplinary matter, unfairness may result in accepting facts in the criminal matter notwithstanding an overlap in the conduct at issue, and therefore, first-hand evidence is required;

54. Based upon these legal principles, Mr. Faul's counsel argued that the Committee erred in concluding that the evidence provided by Mr. Faul to the LSA's investigator and the Committee demonstrated a lack of candor and integrity, and was inconsistent with his criminal guilty plea, merely because (1) it was not contained within the ACJ ASF, and (2) it suggested that R.L. had consented to sexual activity. Mr. Faul argued that no inconsistency existed because "the LSA proceeding[s] were patently different than the narrow assault allegation delineated within the ACJ ASF" and that Mr. Faul was entitled to provide additional information to provide context within the disciplinary process.

55. Further, Mr. Faul argued that if the LSA wished to rely on more aggravated version of events of December 8, it was their onus to call evidence to support this claim. The LSA knew that the Citation was contested, and that Mr. Faul was only convicted of simple assault. By seeking to establish different issues than pursued by the Crown, the LSA lost its ability to declare the ACJ ASF as determinative.

Appellant's Submission – Ground Two: Unreasonable Sanction

56. As a second ground of appeal, Mr. Faul's counsel alleged that the sanction imposed was unreasonable. He observed that the disciplinary sanctions are not primarily punitive in nature and are more concerned about protecting the public; maintaining confidence in the profession; and deterring the member from future conduct of a similar nature.

57. Mr. Faul argues that the sanction requires case-specific analysis, which should consider the following circumstances:

a) A member's willingness to acknowledge the wrongdoing;

b) Presence of dishonest to selfish motivation;

c) Medical, mental health, or other personal circumstances that impact the lawyers' conduct;

d) The length of time a lawyer has been in practice, as well as their general character;

e) Cooperation with the LSA, including whether full and free disclosure was made to those involved and the complaint process is not impacted by the misconduct; and

f) The member's prospect for rehabilitation, including any rehabilitative efforts undertaken in the interim.

58. After reviewing extensive precedent, Mr. Faul argued that deregistration is usually only imposed in cases involving blatant dishonesty, forgery, or fraud.

59. Further, Mr. Faul explained the following issues in the following manner:

a) Mr. Faul's response regarding his departure from his firm must be read in context. The questions asked by the LSA investigator of Mr. Faul, combined with the evidence provided by D.H., Mr. Faul's principal, eliminate Mr. Faul's termination from his employment as an aggravating factor;

b) It is not surprising that Mr. Faul's responses regarding the December 8, 2019 Incident contained more detail than the ACJ ASF. Mr. Faul's guilty plea in the Alberta Court of Justice was in relation to a much narrower allegation than the scope of the LSA investigation. In the criminal proceedings, the parties agreed that Mr. Faul should be acquitted of sexual assault and convicted of simple assault instead. Accordingly, it did not detail the circumstances of a sexual nature; and

c) Mr. Faul believed, at the time, and in his own mind, that R.L. was consenting to the touching. The fact that he later learned that it was not consensual does not give rise to a lack of candor. Mr. Faul has displayed remorse and has undertaken rehabilitative programs which have helped him deal with issues such as cognitive distortion.

60. In light of these factors, it is argued that the appropriate sanction for Mr. Faul should have been a reprimand and fine or, alternatively, a short suspension.

Respondent Submissions

61. On appeal, counsel for the LSA proffered the following submissions:

a) Participating in a regulated profession is a privilege not a right. Individuals who are members of a regulated profession may be subject to disciplinary proceedings separate and apart from criminal trials, even if those proceedings stem from similar underlying conduct. The purpose of the proceedings, and the law applied during them, are distinct and may lead to different conclusions;

b) The findings of fact made by the Committee were in the context of an administrative proceeding with relaxed evidentiary rules. All findings were grounded in the evidence or logical inferences drawn from the evidence. The attack on the Committee's finding of fact is an improper attack on the Committee's findings in the Merits Decision, which is not subject to appeal. The Committee did appropriately consider the relevant aggravating and mitigating factors in this case;

c) Notwithstanding Mr. Faul was criminally convicted of simple assault, it does not preclude the Committee from considering the sexual nature of the events underlying the assault. Ignoring the sexual nature of the event underlying the assault would have been improper;

d) The Committee was justified in rejecting Mr. Faul's testimony that imported an element of consent into his interactions with R.L. The Committee was justified in viewing Mr. Faul's evidence with skepticism as the events clearly demonstrate that the sexual aspect of the case was non-consensual;

e) The Committee was justified in concluding that Mr. Faul failed to display candor with the LSA in relation to both the assault incident as well as his performance issues at his former firm. Mr. Faul focused significant portions of his argument on criminal law cases and, in the process, conflates the criminal and regulatory proceedings. The Committee did not err by treating the guilty plea to the offence of assault as akin to a conviction of sexual assault, but rather, properly considered the evidence before them to assess the relevant issues;

f) The Committee did not substitute its own conclusions about points not articulated in the ACJ ASF without requiring evidence to support the same. The Committee relied on logical implications arising out of the ACJ ASF and evidence presented to them, including the testimony of Mr. Faul during the LSA interviews and the hearings; and

g) Moreover, the Committee did not treat the ACJ ASF as a comprehensive set of facts. Mr. Faul was permitted to provide non-contradictory evidence to potentially augment the facts contained in the criminal agreed statement of facts, which was admitted for the truth of its contents in the LSA ASF, which was a voluntary admission made by Mr. Faul.

62. In relation to the reasonableness of the sanction imposed, the LSA submits that the Committee considered the appropriate principles and arrived at a sanction which fell within the range of reasonable sanctions for the type of misconduct committed by Mr. Faul.

Analysis

63. At the outset, it is important to reiterate that this an appeal of the Sanction Decision. It is not an appeal of the Merits Decision. The determination by the Committee that the Citation has been proven on a balance of probabilities, and the grounds and rationale for arriving at that decision, are not under appeal.

64. To properly analyze the Sanction Decision, it is necessary to determine whether the Committee was improper or unreasonable in emphasizing certain aggravating factors so as to commit an error in principle which would affect the sanction imposed.

65. It is important to note that an error in principle includes erroneous consideration of aggravating or mitigating factors. However, not every error in principle is material. The Appeal Panel should only intervene if it is apparent from reviewing the Sanction Decision that an error in principle had an impact on sentencing.[16]

66. In Mr. Faul's submissions, the alleged aggravating factors which were allegedly overemphasized by the Committee thereby amounting to a material error in principle were:

    a) Overemphasizing the sexual nature of the assault;

    b) Overemphasizing Mr. Faul's lack of candor with the investigator and the Committee hearing Merits Hearing and the Committee regarding the assault; and

    c) Overemphasizing Mr. Faul's lack of meaningful progress towards rehabilitation.

67. In relation to the first alleged error in principle, it was conceded by both the LSA and Mr. Faul that the disciplinary hearing process is distinct from the criminal law process. The former is an internal disciplinary matter to determine, *inter alia*, whether Mr. Faul's conduct harms the standing of the legal profession. The latter is a criminal matter which determines whether he committed the necessary elements to constitute a criminal act of assault. The onus on the LSA to prove the Citation is on a balance of probabilities whereas the onus on the Crown to prove assault is beyond a reasonable doubt.

68. In this case, the Appeal Panel is of the opinion that it was appropriate to consider the sexual nature of the assault notwithstanding that Mr. Faul was only convicted of assault

[16] *Friesen*, supra, at paragraph 26.

simpliciter. Ignoring the pre-existing vulnerability of R.L. and the sexual nature of the events underlining the assault would have been improper for the Committee in its determination as to whether Mr. Faul's conduct affected the standing of the legal profession. The simple fact is that Mr. Faul's conduct, particularly in light of his prior knowledge of R.L.'s history, displayed a significant lack of integrity, honesty and governability.

69. In relation to his lack of candor, Mr. Faul suggests that the Committee held that Mr. Faul lacked candor as the ACJ ASF did not admit to circumstances of a sexual nature. Respectfully, that is not the basis upon which the Committee felt Mr. Faul lacked candor. The Committee full well knew that the ACJ ASF was specifically designed to admit only those elements which gave rise to a plea arrangement for simple assault.

70. The lack of candor displayed by Mr. Faul related to his attempt to adduce additional facts regarding the assault at the Merits Hearing which were not previously provided to the investigator despite the investigator asking if all relevant facts had been provided. Furthermore, the lack of candor related to his failure providing evidence about his performance issues at his former firm that contradicted the testimony of his principal, D.H.

71. In his *revised* letter of apology, Mr. Faul concedes that:

> Further to the Hearing Committee, while it was not my genuine intention to mislead or lack candor in our dealings, I do wholeheartedly understand how my testimony during the interview stage with the LSA, and at the October 2021 Hearing indicates otherwise. I am very remorseful and sorry about my lack of candor; and
>
> For me to import extra evidence above the agreed statement of facts from the predicated proceeding was wrong. As those who regulate our profession, I failed you in this regard and for that I am very humbly sorry. I acted without integrity and without candor. I understand the severity of my behavior and I know that I cannot ever do this again. I am profoundly sorry.

72. Accordingly, it is the decision of the Appeal Panel that the Committee did not commit an error in principle, material or otherwise, by considering Mr. Faul's lack of candor.

73. Finally, it is argued that the Committee improperly misinterpreted Dr. P.B.'s report to the extent that they sought leave to introduce fresh or new evidence. However, a careful review of the Sanction Decision in conjunction with Dr. P.B.'s reports and oral evidence confirm that the statements attributed to Dr. P.B. in the sanction report are accurate.

74. In relation to Dr. P.B.'s evidence, Mr. Faul sought to introduce new or fresh evidence in the form of an Affidavit from Dr. P.B. commenting on the Sanction Decision. The Appeal

Panel, however, is not prepared to permit the introduction of a further Affidavit from Dr. P.B. for the following reasons:

a) The suggestion that the Committee misinterpreted Dr. P.B.'s evidence is not new evidence but argument;

b) If the misinterpretation was because the evidence was not clear, such evidence should have been presented at the Hearing;

c) There was nothing preventing Mr. Faul from arguing the points made by Dr. P.B. in relation to misinterpretation of his evidence. To the extent that his Affidavit seeks to do so, the Appeal Panel can confirm that they have read the comments of Dr. P.B.;

d) Much of the evidence simply reiterates Dr. P.B.'s opinion and is not new nor fresh evidence;

e) The new Affidavit evidence of Dr. P.B. appears to be nothing more than an attempt to bolster and/or re-argue the position taken at the Sanction Hearing; and

f) The evidence of Dr. P.B., if admitted, would not affect the result or decision of the Appeal Panel in relation to whether there was a material error in principle.

75. In short, it is the decision of the Appeal Panel that the Affidavit of Dr. P.B. does not meet the *Palmer* test.

Appropriate Sanction

76. The Appeal Panel does not find that the Committee committed a material error in principle. Even if it did, and was required to perform its own sentencing review, it is the opinion of this Appeal Panel that the sanction imposed by the Committee of deregistration was not unreasonable; it fell within the reasonable range of outcomes for the misconduct proven.

77. As stated by the Committee, "one of the fundamental purposes of sanctioning is to protect the public's confidence in the integrity of the profession. It is essential to protect the public's confidence in the integrity of the profession as this is one of the primary mandates of the LSA. In order to do so, Mr. Faul's conduct must be denounced in the strongest possible terms".

78. Mr. Faul committed an assault of a sexual nature on a non-consenting victim who had endured a troubling and vulnerable history, with which Mr. Faul was well acquainted. These facts alone justify deregistration.

79. Moreover, the Appeal Panel agrees with the Committee that the decision of *Law Society of Alberta v. Fairclough*[17] is the most relevant authority referred to of the Committee. That case involved an unauthorized photographic violation of a partially naked, intoxicated co-worker combined with a failure of candor with his firm, with the investigators and the LSA which resulted in a resignation in the face of disciplinary proceedings (*de facto* disbarment). Exclusion from the profession is not reserved solely for cases of dishonesty, forgery, or fraud.

80. The practice of law is a privilege which carries many corresponding responsibilities including, but not limited to, a high degree of ethics, a high degree of integrity, and high degree of honesty. Mr. Faul's lack of candor with the LSA about the nature of the incident and about performance issues with his firm all violate the standards expected of lawyers by the public and by the LSA and its members.

81. Under the circumstances, deregistration was most appropriate.

Decision

82. It is the decision of the Appeal Panel to confirm the sanction imposed by the Committee and to dismiss the within appeal.

Concluding Matters

83. As to costs of the appeal, the parties shall provide their submissions on costs and any time needed to pay such costs, in the event costs are ordered payable by the Appeal Panel, to the Appeal Panel within 30 days of the date of this decision. The Appeal Panel shall render its decision on costs thereafter.

84. This report will be available for public inspection. Considering the sensitive and confidential nature of the subject matter of this report, and more importantly, to protect R.L., the exhibits and other hearing materials will not be available for public inspection.

Dated July 22, 2024

Edward Feehan, KC – Chair

Glen Buick – Lay Bencher

[17] *Law Society of Alberta v. Fairclough,* 2014 ABLS 46.

Levonne Louie – Lay Bencher

Sanjiv Parmar, KC – Bencher

Ron Sorokin, KC – Bencher

Moira Váně, KC – Bencher

Grant Vogeli, KC – Bencher