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 MATHEW FARRELL
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee
Ken Warren, KC – Chair
Troy Couillard – Adjudicator
Tammy Pidner – Adjudicator

Appearances
Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Alain Hepner, KC – Counsel for Mathew Farrell

Hearing Dates
May 15, 2024

Hearing Location
Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. The following citations were directed to hearing by the Conduct Committee Panel on May 16, 2023:

    1) It is alleged that Mathew Farrell practiced law while administratively suspended and that such conduct is deserving of sanction.

    2) It is alleged that Mathew Farrell failed to be candid with the Law Society and that such conduct is deserving of sanction.

2. On May 15, 2024, the Hearing Committee (Committee) convened for what was scheduled to be a two day hearing into the conduct of Mr. Farrell, based on the above citations.

3. After reviewing the Statement of Admitted Facts, Exhibits and Admissions of Guilt (SAF) provided to the Committee on May 14, 2024, and hearing submissions from counsel for the LSA and counsel for Mr. Farrell, the Committee accepts Mr. Farrell's admission of guilt to the citations, pursuant to section 71 of the *Legal Profession Act* (*Act*).

4. The Committee also finds, pursuant to section 72 of the *Act*, that based on the facts of this case and joint submission on sanction, the appropriate sanction is a reprimand, payment of the fine in the amount of $1,000.00, and payment of costs in the amount of $3,500.00, each to be paid by November May 15, 2025.

Preliminary Matters

5. There were no objections to the constitution of the Committee or its jurisdiction and a private hearing was not requested.

Agreed Statement of Facts/Background

6. The LSA and Mr. Farrell submitted the SAF that set out admitted facts and an admission of guilt to the essential elements of each citation describing the conduct deserving of sanction. Pursuant to section 60 of the *Act*, the Committee found the form of the SAF to be acceptable.

Citation 1

7. Mr. Farrell chose to pay his 2022/2023 annual active membership fee to the LSA in two installments. The first installment was paid by the deadline of March 15, 2022. The second installment, in the amount of $1,281.00, was not paid by the September 15, 2022 deadline, resulting in Mr. Farrell becoming administratively suspended effective September 16, 2022.

8. In the spring of 2022, Mr. Farrell started work with a new law firm which was based in the US. Mr. Farrell's new law firm's server unfortunately blocked notices to the profession sent by the LSA. As a result, Mr. Farrell did not receive email reminders from the LSA on August 9, 2022 and September 7, 2022 that the second membership fee installment deadline was September 15, 2022. A notice from the LSA to Mr. Farrell on September 20, 2022 advising him that he had been administratively suspended for failing to pay the second installment of his membership fee and how to seek reinstatement was also blocked by his new law firm's server. The notice advised that a suspended lawyer could be automatically reinstated by paying the second installment and an administrative fee by October 5, 2022.

9. On October 6, 2022, the LSA issued a notice to the profession in which Mr. Farrell was listed as one of the lawyers who had been administratively suspended for non-payment of the membership fee. The notice included a statement that Mr. Farrell was unable to practice law while suspended. That notice was also blocked by the server of Mr. Farrell's new law firm. However, on that same date, a friend alerted Mr. Farrell that he had been administratively suspended and forwarded him the October 6 notice.

10. Mr. Farrell paid the second installment on October 10, 2022 but did not consult the Rules of the LSA (Rules) or anyone at the LSA to confirm that the payment was sufficient for

him to resume practicing. On October 18, 2022, Mr. Farrell received an email from the LSA confirming receipt of the October 10 payment and advising that because the payment was received after October 5, Mr. Farrell was also required to submit a manual application form and pay the administrative fee. Mr. Farrell responded immediately by submitting the manual reinstatement application to the LSA on October 18, 2022. He continued to practice.

11. On October 28, 2022, the LSA confirmed to Mr. Farrell that his application for reinstatement had been approved effective October 27, 2022.

12. Leaving aside the period from September 16 to October 6, 2022, during which Mr. Farrell did not realize he had been administratively suspended, Mr. Farrell was reckless and cavalier in failing to take any reasonable steps to understand the impact of the administrative suspension on his ability to practice and the steps required to resume practice upon his reinstatement.

Citation 2

13. In his application for reinstatement dated October 18, 2022, Mr. Farrell stated that he was last engaged in active practice in Alberta in September 2022. That was false in that Mr. Farrell had practiced law between September 16 and October 22, as now admitted by him. In a follow-up email exchange with an LSA membership representative on October 25, 2022, Mr. Farrell conceded that he had inadvertently practiced while administratively suspended until part of the day on October 18, but he at that time failed to disclose that he had in fact practiced law from later on the day of October 18 until October 22, 2022.

14. Mr. Farrell's counsel conceded that Mr. Farrell had not been forthright and candid with the LSA with respect to the exchanges in question. His counsel characterized Mr. Farrell's conduct as cavalier and attributed it at least in part to a number of practice and personal pressures experienced by Mr. Farrell at the time.

Joint Submission on Sanction

15. The LSA and Mr. Farrell agreed to a joint submission on sanction, as set out above in paragraph 4.

16. As acknowledged by Mr. Farrell in paragraph 4 of the SAF, a hearing committee is required to show deference to a joint submission but is not bound by it. When a hearing committee is presented with a joint submission on sanction, its analysis is not to determine the correct sanction in the hearing committee's view. Rather, the hearing committee is to determine whether the proposed sanction is within a range of possible sanctions that would satisfy the "public interest" test flowing from the decision of the Supreme Court of Canada in *R. v. Anthony-Coo*k (2016 SCC 43) and following cases. The public interest test requires that a decision maker should not depart from a joint submission on sanction unless the proposed sanction would bring the administration of

justice into disrepute or is otherwise contrary to public interest. The following questions should be considered by a hearing committee in applying the public interest test:

1) Is the joint submission so markedly out of line with the expectations of reasonable persons aware of the circumstances of the offence and the offender that the joint submission would be viewed as a breakdown in the proper functioning of the conduct and discipline system?

2) Would the joint submission cause an informed and reasonable public to lose confidence in the regulator?

3) Is the joint 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 conduct and discipline system had broken down? [1]

17. The Court of Appeal for Saskatchewan very recently considered in a lawyer disciplinary case the deference to be shown to a joint submission on sanction.[2] Citing *Anthony-Cook*, the court described the deference threshold as meaning that the sentence must be so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system" and the sentencing judge should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

18. The citations to which Mr. Farrell has admitted guilt represent serious breaches of the obligations of a member of the LSA to it.

19. With respect to sanction, counsel referred the Committee to several decisions concerning unauthorized practice and failures to be candid with the LSA, although none of the authorities had facts in which there had been both unauthorized practice and a failure to be candid, as is the case here. The referenced authorities were: *LSA v. Flynn*, 2023 ABLS 7; *LSA v. Andrews*, 2020 ABLS 35; *LSA v. Laughlin*, 2020 ABLS 32; *LSA v. Piragoff*, 2016 ABLS 40; *LSA v. Demong*, 2012 ABLS 14; *LSA v. Adsit*, 2022 ABLS 23; and *LSA v. Ewing*, 2016 ABLS 48. The sanctions in all of those cases included a reprimand, in all but one case included payment of costs, and in one case included a fine. In none of the cases was a suspension ordered.

20. The Committee questioned whether in a case in which a lawyer has in fact practiced while suspended from doing so, the sanction should usually include a suspension. Counsel for the LSA responded that the LSA may have sought a suspension in this case

[1] *Law Society of Alberta v. Billing,* 2024 ABLS 1 at para. 14
[2] *Xiao-Phillips v. Law Society Saskatchewan,* 2024 SKCA 44 at paras. 146-147

had the matter proceeded through a full hearing but felt that having regard to the admission of guilt by Mr. Farrell and the explanation for the initial inadvertent practicing while suspended, the absence of a suspension in the joint submission represented a sanction that was reasonable and consistent with the authorities. Counsel for Mr. Farrell concurred, noting that the authorities did not support a suspension, even a short one, in these circumstances.

21. The LSA's Pre-hearing and Hearing Guideline (Guideline) at paragraph 198 notes that the prime determinant of the appropriate sanction is the seriousness of the misconduct, and that the seriousness of the misconduct may be determined by various factors, some of which include:

> 1) The degree to which the misconduct constitutes a risk to the public;
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> 2) The degree to which the misconduct constitutes a risk to the reputation of the legal profession;
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> …
>
> (e) The potential impact on the Law Society's ability to effectively govern its members by such a misconduct;
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> (f) The harm caused by the misconduct;
>
> (g) The potential harm to a client, the public, the profession or the administration of justice that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would likely have resulted in the lawyer's misconduct;
>
> (h) The number of incidents involved; and
>
> (i) The length of time involved.

22. Those factors, applied to the facts in this case, support a conclusion by the Committee that the misconduct was less serious than what might have been the case having regard to the general nature of the citations. The public was not at risk and no clients were harmed, the reputational risk to the profession was slight, governability was not in issue, and there were a small number of incidents over a relatively short period.

23. Section 204 of the Guideline sets out additional factors that may be either a mitigating or aggravating effect on the appropriate sanction. Counsel for Mr. Farrell described Mr.

Farrell's lack of disciplinary record as a mitigating factor. The Committee disagrees with that characterization. Its view is that the lack of disciplinary record is a neutral factor while the existence of a disciplinary record may be an aggravating factor. The Committee accepts that Mr. Farrell's admission of guilt, although at a late date, constitutes a significant mitigating factor. Mr. Farrell's counsel referred at times to various personal and financial pressures that may have contributed to Mr. Farrell's misconduct but the Committee notes that there was no evidence adduced on those matters.

24. The LSA submitted an estimated statement of costs for the hearing in the amount of $10,074.00. The costs portion of the joint submission on sanction amounts to about 35% of the very modest estimated statement of costs. The Committee notes that about 75% of the estimated costs were generated by the fees for preparation by LSA counsel at the rate of $125.00 per hour. That rate represents a small fraction of the market rate for experienced advocacy counsel in the Alberta market.

25. Counsel referred the Committee to three recent Alberta decisions respecting the payment of costs in administrative proceedings involving professional regulatory bodies. In *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, the Court considered an appeal by a dentist of a disciplinary decision by her College's appeal panel finding her guilty of unprofessional conduct and ordering a sanction consisting of a reprimand, completion of an ethics course, payment of hearing tribunal costs in the amount of $37,500.00 and payment of one-quarter of the appeal panel costs. The professional college was under the ambit of the *Health Professions Act*, RSA 2000, c. H-7. The Court set aside the Order that the dentist pay the costs of the investigation and hearing. The Court directed those matters to be reconsidered by the College's appeal panel for determination in accordance with the principles set out in the Court's decision.

26. In *Jinnah*, the Court held that it is the profession as a whole, not just a disciplined member, that benefits from the privilege of self-regulation. The costs of conducting discipline proceedings were viewed as an inevitable part of self-regulation. The Court held that the imposition of all or a significant percentage of the costs of self-regulation on the profession as a whole was fair because all members benefit from self-regulation. The Court held that as a general principle, it would be appropriate to impose a significant portion of the costs of an investigation into and hearing of a complaint on a disciplined dentist only if there was a compelling reason to do so. The Court outlined what it considered to be the four compelling reasons to depart from the general rule:

    1) a dentist who engages in serious unprofessional conduct;

    2) a dentist who is a serial offender who engages in unprofessional conduct on two or more occasions;

3) a dentist who fails to cooperate with the college investigators and forces the college to expend more resources than is necessary to ascertain the facts related to a complaint; and

4) a dentist who engages in hearing misconduct, being behavior that unnecessarily prolongs the hearing or otherwise results in increased costs of prosecution that are not justifiable.

27. The Court concluded that in most cases of unprofessional conduct, the profession as a whole should bear the costs of the discipline process. This represented a significant shift from the previous position of the Court.

28. The *Jinnah* decision was considered by an appeal panel of the Benchers (consisting of seven Benchers) in *Law Society of Alberta v. Beaver*, 2023 ABLS 4. Mr. Beaver was found guilty by a hearing committee of unprofessional conduct resulting in his disbarment and an order to pay costs in the amount of $120,000.00, representing about 75% of the total costs. Coincidentally, Mr. Beaver's counsel on the appeal represented Dr. Jinnah on his appeal. The Bencher appeal panel held that the Court of Appeal's decision in *Jinnah* was applicable only to professionals regulated by the Alberta *Health Professions Act*.

29. In *Tan v. Alberta Veterinary Medical Association*, 2024 ABCA 94, the Court considered an appeal by the veterinarian of findings of unprofessional conduct. The hearing tribunal ordered that he pay 20% of the costs of the investigation and initial hearing. The College's appeal panel (Committee of Council) upheld the findings on the merits and on sanction and ordered the veterinarian to pay about 50% of the appeal costs. The proceedings were conducted under the *Veterinary Professions Act*, RSA 2000, c. V-2, which is not encompassed under the Alberta *Health Professions Act*. At paragraph 34 of its decision, the Court of Appeal panel (that included one member who had been part of the *Jinnah* panel) characterized the *Jinnah* decision as confirming that "professional regulatory bodies should not automatically order costs against a member, even where allegations are sustained. The decision-maker must consider both whether a costs award is appropriate and if so, the quantum". The court's holding made it clear that *Jinnah* was not restricted to professions regulated under the Alberta *Health Professions Act*.

30. Importantly, at paragraph 35 of its decision, the Court relied not upon *Jinnah* but on its earlier decision in *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, in holding:

> We agree with the appellant that even where it is appropriate to order costs against a member, the Hearing Tribunal and the Committee of Council must consider the appropriate quantum in all respects, including which expenses the member should be partially responsible for, whether the expenses incurred were for reasonable steps in reasonable amounts,

what portion is chargeable to the member and whether the end result is reasonable.

31. The Court's reliance on *Alsaadi* rather than *Jinnah* is instructive. In *Alsaadi*, Justice Khullar (now Chief Justice of the Court of Appeal of Alberta) stated at paragraph 94 that the Court's approach to costs in the disciplinary process of self-regulated professions was set out in *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 2053, as follows:

> The fact that the **Act** and **Regulation** permit the recovery of all hearing and appeal costs does not mean that they must be ordered in every case. Costs are discretionary, with the discretion to be exercised judicially… Costs awarded on a full indemnity basis should not be the default, nor, in the case of mixed success, should costs be a straight mathematical calculation based on the number of convictions divided by the number of charges. In addition to success or failure, a discipline committee awarding costs must consider such factors as the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. Costs are not a penalty, and should not be awarded on that basis. When the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny: … If costs awarded routinely are exorbitant they may deny an investigated person a fair chance to dispute allegations of professional misconduct;… Costs are often treated as an afterthought and an inevitability in professional discipline matters under the *Health Professions Act*.

32. Justice Khullar noted that the approach taken by many hearing tribunals was to calculate the total maximum expenses related to the hearing and then to order a percentage of that amount to be paid by the unsuccessful professional. She referred to a number of decisions in which the costs ordered to be paid by the professional were in the range of 60 to 75% of the total costs. Justice Khullar summarized the approach to costs at paragraph 120:

> A more deliberate approach to calculating the expenses that will be payable is necessary. Factors such as those described in *K.C.* should be kept in mind. A hearing tribunal should first consider whether a costs award is warranted at all. If so, then the next step is to consider how to calculate the amount. What expenses should be included? Should it be the full or partial amount of the included expenses? Is the final amount a reasonable number? In other words, a hearing tribunal should be considering all the factors set out in *K.C.*, in exercising its discretion of whether to award costs, and on what basis. And of course, it should provide a justification for its decision.

33. The Alberta Court of Appeal's approach to costs in discipline proceedings involving professionals seems to have come full circle through the decisions of a number of panels of the Court over the past three years:

- *K.C. v. The College of Physical Therapists of Alberta*, 1999 ABCA 253 – August 23, 1999 – The factors to be considered are set out above in paragraph 31.

- *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313 – September 17, 2021 – Confirmed the application of the *K.C.* factors.

- *Tan v. Alberta Veterinary Medical Association*, 2022 ABCA 2021[Tan 1] – June 17, 2022 – The court cited *Alsaadi* and *K.C.* factors.

- *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336 - October 13, 2022 – The court held that a professional should not be charged with a significant portion of the costs of an investigation and hearing unless one or more of four enumerated compelling reasons applied.

- *Tan v. Alberta Veterinary Medical Association*, 2024 ABCA 94[Tan 2] – March 19, 2024 – The court referenced *Jinnah* as deciding that a professional regulatory body should not automatically order costs against a member, even where allegations are sustained, but it cited *Alsaadi* and applied the *K.C.* factors in assessing costs.

34. The Committee is of the view that the *K.C*. factors apply and that a partial costs award against Mr. Farrell is appropriate in the circumstances here. The amount of the agreed costs, $3,500.00, representing approximately 35% of the total costs, is at the low end of the reasonable range having regard to all of the facts, including the late stage at which Mr. Farrell made his admission of guilt. The Committee is satisfied that an earlier admission of guilt would have reduced the preparation costs of the LSA's counsel. The imposition of the small fine and the reprimand are consistent with the authorities cited.

35. In sum, the Committee accepts the joint submission on sanction, finding it to be within the range of possible sanctions that would satisfy the public interest test.

Reprimand

36. The chair of the Committee delivered the following reprimand to Mr. Farrell during the hearing:

> Mr. Farrell, you have admitted guilt to two serious citations, practicing while administratively suspended and failing to be candid with the Law Society. Your admission of guilt has come at a very late stage in the proceedings. The Rules are designed to ensure that only individuals

authorized to practice law do so. Initially, your continued practice of law while administratively suspended might be seen as an inadvertent. However, a few weeks later, you became aware of your suspension through a notification by a colleague and yet you continued to practice. You were cavalier with respect to your obligations as a member of the Law Society. That reflects very poorly on you as an experienced member of the Law Society who frankly should have known better.

Similarly, you were cavalier in responding to questions from the Law Society, resulting in a failure to be candid. The responses in question were clearly incorrect and you would have known that had you taken any reasonable time to think about the questions and your responses.

The members of the Law Society enjoy the privilege of self-regulation. It is incumbent upon all members of the Law Society to understand, respect and adhere to the provisions of the *Act* and the Law Society's Rules. Members of the Law Society who fail to do so may be found to be ungovernable and lose their practice privileges, for either a period of suspension or completely.

The Committee appreciates your admission of guilt, even at this late stage, as it has significantly reduced the Hearing time and allowed for a much more efficient disposition of the citations. The Committee also appreciates the cooperation you and your counsel have shown in reaching the joint submission on sanction that has been accepted by the Committee. The Committee trusts that this incident will have impressed upon you the need to be vigilant in understanding your obligations as a Law Society member and diligent at all times to ensure that those obligations are met. The Committee wishes you success in the continuation of your relatively new practice.

Concluding Matters

37. In summary, the Committee accepts Mr. Farrell's admission of guilt to the two citations and also accepts the joint submission on sanction consisting of a reprimand, payment of a fine in the amount of $1,000.00 and payment of costs in the amount of $3,500.00, each to be paid by November 15, 2025.

38. No notice to the Attorney General is required.

39. No Notice to the Profession is required.

40. 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. Farrell will be redacted

and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated May 30, 2024.

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Ken Warren, KC

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Troy Couillard

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Tammy Pidner