

**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 V. A. (BUD) MACDONALD, KC
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Matthew Woodley – Chair and Adjudicator
John Byrne – Adjudicator
Sharilyn Nagina, KC – Bencher

Appearances

Will Cascadden, KC – Counsel for the Law Society of Alberta
Alain Hepner, KC – Counsel for Bud MacDonald, KC

Hearing Dates

February 6, 2025

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. The following citation was directed to hearing by the Conduct Committee Panel on June 18, 2024:
 - 1) It is alleged that V. A. (Bud) MacDonald, KC brought the administration of justice into disrepute by distributing an intimate image, without the consent of all persons depicted in the image, in an Affidavit of Records and that such conduct is deserving of sanction.
2. On February 6, 2025, the Hearing Committee (Committee) of the Law Society of Alberta (LSA) convened a hearing into the conduct of Mr. MacDonald, based on the above citation. The parties jointly presented a Statement of Admitted Facts and Admission of Guilt dated February 4, 2025 (Admission).
3. After reviewing the exhibits and hearing the submissions of the parties, the Committee finds Mr. MacDonald guilty of conduct deserving of sanction on the citation pursuant to section 71 of the *Legal Profession Act (Act)*.

4. The Committee also finds that, based on the facts of this case, the appropriate sanction is a reprimand. In accordance with section 72 of the *Act*, the Committee orders that Mr. MacDonald be reprimanded as set out below.
5. In addition, pursuant to section 72(2) of the *Act*, the Committee orders that Mr. MacDonald pay costs in the amount of \$1,500.00, and that he will have until July 31, 2025 to pay those costs. There shall be no notice to the profession, nor a referral to the Attorney General.

Preliminary Matters

6. There were no objections to the composition of the Committee or its jurisdiction, and a private hearing was not requested.

Agreed Statement of Facts/Background

7. As noted, the parties presented the Admission to the Committee which was marked as Exhibit 9. In summary, the Admission (as supplemented by the joint submissions of the parties) established the following essential facts:
 - 1) In August of 2020, a client of Mr. MacDonald commenced a proceeding in the Court of King's Bench against his former partner (Complainant). The Complainant retained counsel and filed a statement of defence in September of 2020.
 - 2) In December of 2020, Mr. MacDonald served his client's affidavit of records as required by the *Rules of Court*, along with the producible documents identified in it, on the Complainant's lawyer. One of the producible records identified in the affidavit of records and provided to the Complainant's counsel was a photograph which depicted Mr. MacDonald's client, the Complainant, and a friend of the Complainant (Photograph). In the photograph, the Complainant was partially nude.
 - 3) Counsel for the Complainant strongly objected to the inclusion of the photograph and raised the issue with Mr. MacDonald. Mr. MacDonald initially defended his decision to include the Photograph, stating that it was relevant and material to an issue in the ongoing action which had been raised in an affidavit filed by the Complainant in a separate proceeding. Specifically, Mr. MacDonald noted that the Complainant alleged that she had been sexually assaulted by his client on November 3, 2019; his client advised him that the Photograph had been taken on the same day, and that such a Photograph therefore served to "contradict [the Complainant's] evidence that she was raped that day by my [his], and calls into question [the Complainant's] allegations of physical and sexual abuse". Mr. MacDonald pointed out to opposing counsel that it was not distributed publicly and had been provided to her as legal counsel only.

- 4) In March of 2021, Mr. MacDonald agreed to remove the Photograph from the affidavit of records while serving the right to seek a ruling on its relevance and materiality from the Court.
8. Bases on those facts, Mr. MacDonald admitted that his conduct brought the administration of justice into disrepute by distributing the Photograph without the consent or all persons in the image in an affidavit of records. He admitted that such conduct was deserving of sanction. Further, Mr. MacDonald confirmed that he has signed the Admission voluntarily, that he understood the nature and consequences of the Admission, that he had the opportunity to consult legal counsel, and that the Committee would not be bound by any joint submission relating to sanction.

Submissions of the LSA

9. On behalf of the LSA, Mr. Cascadden submitted that the Admission ought to be accepted having regard to the criteria set out in section 60 of the *Act*. He stated that the admitted facts establish conduct that is deserving of sanction because Mr. MacDonald's actions brought the administration of justice into disrepute.
10. Mr. Cascadden referred the Committee to a decision of a hearing committee of the LSA in *Law Society of Alberta v Herrington*, 2021 ABLS 9, where a member was found guilty of conduct deserving of sanction for having filed an affidavit in Court which contained "explicit and nude pictures" of a party to the proceedings (paragraph 13). While Herrington had not originally drafted the affidavit to include those as exhibits, she was aware that her client had added them to the affidavit at the time that she arranged to file it. Mr. Cascadden acknowledged that the conduct in *Herrington* was more serious than the present case because the affidavit was filed on a public court file, meaning that members of the public had a presumptive right of access to it. However, he submitted that the decision stands for the proposition that failing to exercise judgment when faced with a decision about the inclusion of such images in an affidavit may bring the administration of justice into disrepute.
11. Mr. Cascadden also referred the Committee to a recent decision of a hearing committee relating to an admission of conduct deserving of sanction where a member included explicit video footage in a package of materials prepared for a family law proceeding. While in that case the materials were not filed on a public court file, they were made available to several individuals involved in the litigation.
12. Ultimately, Mr. Cascadden urged the Committee to accept the Admission by finding that the proven facts rose to the level of conduct deserving of sanction for the purposes of the *Act*.

Submissions of Mr. MacDonald

13. Counsel for Mr. MacDonald agreed with the submissions made by the LSA. Mr. Hepner indicated that he and counsel for the LSA had discussed the matter at length, and that he had also had several discussions with Mr. MacDonald about these issues. He indicated that Mr. MacDonald had an honestly held, subjective belief that the Photograph was relevant and material to the issues in the action because it called into question the allegation made by the Complainant that she had been sexually assaulted by Mr. MacDonald's client. Mr. Hepner stated that in this respect, Mr. MacDonald's understanding was not legally sound, and that there were other ways in which Mr. MacDonald could have addressed the issue relating to disclosure even if the Photograph was relevant and material.
14. The Committee deliberated on the Admission and the submissions of the parties and posed follow-up questions. Specifically, the Committee requested submissions on what Mr. MacDonald ought to have done given that he was faced with an obligation to ensure that his client identified all relevant and material records in his possession relating to the issues in the action. Further, the Committee asked whether there was any guidance available to Mr. MacDonald at the relevant time to assist him in determining what he ought to have done.
15. In response, counsel for the LSA stated that it was important to understand that it was not simply the disclosure of the Photograph to counsel for the Complainant that was concerning; it was also the determination of its relevance and materiality to the issues in dispute, and that it reflected an incorrect understanding of how a complainant's behaviour around the time of a sexual assault might impact the analysis of whether or not she was telling the truth about the allegation. Mr. Cascadden indicated that in circumstances where such a record was truly relevant and material to the issues in an action, a lawyer could have simply called opposing counsel to discuss the issue and find a mutually agreeable approach, or to provide a written description of the image while refraining from sending it to opposing counsel at first instance.
16. Counsel for Mr. MacDonald agreed with those submissions and noted that the incorrect conclusion by Mr. MacDonald about its relevance and materiality is part of the conduct which brings the administration of justice into disrepute. He expressed that the protection of the public was a relevant factor for the Committee to consider based on these facts.
17. Finally, the parties agreed that there was no guidance available to Mr. MacDonald at the time when he was faced with this issue; even the decision in *Herrington* had not been released by the time of the disclosure of the Photograph.

Analysis and Decision

18. The sole issue for determination by the Committee is whether the agreed facts establish that Mr. MacDonald's conduct is deserving of sanction because it brought the administration of justice into disrepute. While it ultimately concludes that the proven facts do constitute conduct deserving of sanction, it does so based on the unique facts and context presented to it by the parties.
19. Specifically, Mr. MacDonald was confronted with a situation where his client was required by the *Rules of Court* to disclose all relevant and material records to the opposing party. The *Rules of Court* contain no guidance about what a party or lawyer ought to do when a relevant and material records includes intimate images or other difficult material. Further, while the Committee has no hesitation in concluding that Mr. MacDonald was wrong about the Photograph being relevant and material based on how the parties framed the issue, it notes that Mr. MacDonald held a good faith belief that it was producible. The Photograph itself was described by the parties (in submissions, not in the Admission) as a topless "selfie" depicting Mr. MacDonald's client, the Complainant and a third party. While clearly an intimate image, it is at a lower place on the intimacy spectrum than the materials described in *Herrington* or the case involving video footage.
20. Despite some initial reservations, however, the Committee finds that the disclosure of the Photograph to the Complainant's lawyer in these circumstances brings the administration of justice into disrepute. The receipt of such a Photograph from one's lawyer would have been shocking for the Complainant. Further, it was open for Mr. MacDonald to both comply with the obligations placed on his client in the *Rules of Court* and to avoid the sending of the Photograph. Mr. MacDonald could have simply described the Photograph in Schedule 1 to the affidavit without sending the Photograph at first instance. Mr. MacDonald could have spoken with the Complainant's lawyer to come to a mutual agreement about how to treat the Photograph in a sensitive manner. Those conversations might also have allowed Mr. MacDonald to reflect on the flawed basis for his belief that the Photograph was relevant and material to the issue of whether the Complainant had been sexually assaulted by his client.
21. These are difficult issues, and the fact that there was no guidance available to Mr. MacDonald in these circumstances is noteworthy. However, it does not excuse the conduct at issue, and a finding on the citation is appropriate as requested by the parties. As is obvious, this decision is highly fact and context specific, and the Committee does not purport to establish any bright-line rule which might apply to other circumstances.
22. The Committee finds that the citation has been proven on a balance of probabilities and Mr. MacDonald's conduct is deserving of sanction.

Analysis and Decision on Sanction

23. Following acceptance of the Admission, the parties provided their joint submission on sanction. Counsel for the LSA identified no aggravating factors, and acknowledged a number of mitigating factors, some of which are noted above. Counsel also stressed the fact that Mr. MacDonald has been a practicing lawyer since 1977 with no disciplinary record, that he was exceptionally cooperative in the process, and that he has admitted guilt.
24. In the circumstances, counsel recommended that the Committee impose a reprimand only.
25. The Committee agrees with the joint submission on sanction. A reprimand is the lowest level of sanction contemplated by the *Act*, and the Committee agrees that Mr. MacDonald's conduct warrants only that. There were no aggravating factors, and it was clear that Mr. MacDonald took responsibility for his conduct through the Admission. The proposed sanction protects the public by imposing a sanction on Mr. MacDonald but does so in a manner which reflects the seriousness of the conduct, Mr. MacDonald's approach to the hearing, and the lack of aggravating factors. The objective of specific deterrence is accomplished by ensuring that Mr. MacDonald will reflect on his judgment should a similar situation arise in the future. The profession will also benefit from understanding the need to approach similar issues with caution.
26. The Committee Chair delivered the following reprimand during the sanction phase of the hearing:

Mr. McDonald, you've admitted guilt on one citation, which admission was found acceptable by this panel pursuant to Section 60 of the *Act*. The nature of your actions in this matter reflect conduct which brought the administration of justice into disrepute.

We, as lawyers, must represent our clients vigorously, but must exercise judgment both in relation to the determination of records that are relevant and material in litigation, and in relation to the use of discretion in providing intimate images to opposing counsel in that context. You acknowledged responsibility for this conduct through an admission of conduct deserving of sanction.

The Hearing Committee views this as a one-time lack of judgment in a long, and unblemished legal career.
27. Finally, the parties agreed that Mr. MacDonald should be responsible for the payment of costs associated with the investigation and hearing in the amount of \$1,500.00, which represents slightly less than 50 percent of the total costs set out in Exhibit 8. The

Committee found this to be appropriate.

Concluding Matters

28. For those reasons, the Committee imposes a reprimand on Mr. MacDonald in the form set out above and orders that he pay the sum of \$1,500.00 in costs to the LSA by no later than July 31, 2025.
29. There will be no notice to the Attorney General, and no notice to the profession.
30. The exhibits, other hearing materials, and this decision 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. MacDonald and the hearing participants will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated February 20, 2025.

Matthew Woodley

John Byrne

Sharilyn Nagina, KC