

**Nova Scotia Barristers' Society
Hearing Panel**

Citation: The Nova Scotia Barristers' Society v. Brogan, 2022 NSBS 2

Date: 20211018
Docket: Hfx. No.17547
Registry: Halifax

IN THE MATTER OF: The *Legal Profession Act, S.N.S. 2004, c. 28*

BETWEEN: The Nova Scotia Barristers' Society

-and-

Nash Brogan

Restrictions on Publication: By Resolution made under section 44(3) of the *Legal Profession Act*, no person shall publish, broadcast, or otherwise disclose any information that identifies or may tend to identify clients of Nash Brogan, his firm Brogan Law Inc, or his former firms, Brogan McKeough and Kimball Brogan **and any complainants or victims identified during the hearing.**

Before: Julia Cornish, QC, Chair
Paul Goodman, FCPA, Public Representative
Peter Dostal

Date of Decision February 24, 2022

Counsel: Bernadine MacAulay, for the Nova Scotia Barristers' Society
Christopher Conohan, for Nash Brogan

[2022]

NOVA SCOTIA BARRISTERS' SOCIETY

IN THE MATTER OF: The *Legal Profession Act, S.N.S. 2004, c. 28*

BETWEEN: The Nova Scotia Barristers' Society

-and-

Nash Brogan

Panel: Julia Cornish, QC, Chair
Paul Goodman, FCPA, Public Representative]
Peter Dostal

Appearances: Bernadine MacAulay, for the Nova Scotia Barristers' Society

Christopher Conohan, for Nash Brogan

Decision on Settlement Agreement

[1] This matter concerns Mr. Nash Brogan (“the Member”) of Sydney, Nova Scotia, a member of the Nova Scotia Barristers' Society (“the Society”) since 1977.

[2] On July 7, 2021, the Nova Scotia Barristers' Society filed a complaint alleging seven separate violations of the Society's Code of Professional Conduct, the *Legal Profession Act, S.N.S. 2004, c.28* and the Regulations thereunder. (see Appendix 'A1').

[3] Negotiations resulted in the Member and the Society reaching a Settlement Agreement (“the Agreement”)(Appendix 'B1'). The Agreement was tendered to the Society's Complaints Investigation Committee (“the Committee”), pursuant to Rule 9.12.1 of the Regulations pursuant to the *Legal Profession Act, supra*. The Committee reviewed the Agreement, and recommended it for acceptance, on September 10, 2021. The Committee then referred the recommendation to this Hearing Panel (“the Panel”), constituted under the Regulations pursuant to the *Legal Professions Act, supra*, for consideration .

[4] On October 12, 2021, the Panel heard submissions from counsel for the Member and for the Society on whether to approve or reject the Agreement, pursuant to s. 42(2)(k) of the *Legal Profession Act, supra*. Through counsel, both parties requested that the Panel approve the Agreement.

[5] Paragraph 38 of the Agreement identifies the recommended penalty. It consists of a six-month suspension from practice with additional penalties and restrictions.

[6] This Agreement is before the Panel as a joint submission. *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81, provides clear guidance on the applicable principles. In that decision, the Court considered the principles from numerous jurisdictions. It recommended that a

panel should adopt a settlement agreement unless the agreement is "unfit", "unreasonable" or "contrary to the public interest." Joint submissions should not be readily rejected and only for "good reason" (at par 20). *The Nova Scotia Barristers' Society v. Rodgers, 2021 NSBS 2*, sets out the general principles and objective of sanctioning and sentencing, including aggravating or mitigating factors.

[7] This standard, as well as the Regulations which empower this Panel, impose limitations on us (see Regulation 9.12.7). We are not asked to provide our view as to the most suitable penalty. We are not permitted to adjust or modify the proposal to better match our view regarding an optimal disposition. We are restricted to deciding whether the agreement as reached between the parties is within the broad range of reasonable outcomes available under the Act, and that it is not contrary to the public interest. We must do so based on the information before us, including the agreed facts. Indeed, there is a good reason for these limitations. Both parties are entitled to a full hearing on the merits but they have elected not to proceed in such a manner. In reaching an agreement, experienced counsel have assessed the strengths and weaknesses of their case and reasonably compromised their positions to a mutually agreeable outcome.

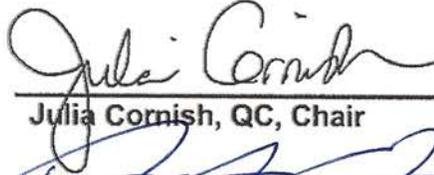
[8] Counsel have asked us to consider other penalties imposed in comparable cases for the purposes of establishing parity:

- *NSBS v White*, 2015 NSBS 1 (30 days suspension with additional restrictions – by agreement)
- *NSBS v MacIsaac*, 2014 NSBS 4 (2 months suspension with additional penalties – by agreement)
- *NSBS v Whitehead*, 2014 NSBS 2 (30-day suspension with additional penalties – agreed statement of facts)
- *NSBS v Blaikie*, 2010 NSBS 3 (2-month suspension with additional penalties – by agreement)
- *NSBS v Cragg*, 2007 NSBS 7 (reprimand with additional penalties – by agreement)
- *NSBS v Gilpin*, 2007 NSBS 4 (4-month suspension with additional penalties – by agreement)
- *NSBS v Rhyno*, 2007 NSBS 2 (30-day suspension with additional penalties)
- *NSBS v Savoie*, 2005 NSBS 6 (4-month suspension with additional penalties)
- *NSBS v Rideout*, 2004 NSBS 11 (1-month suspension with additional penalties – by agreement)
- *NSBS v Romney*, 2004 NSBS 7 (12-month suspension with additional penalties)
- *NSBS v Cushing*, 2004 NSBS 3 (9-month suspension with additional penalties)
- *NSBS v Rhindress*, 2002 NSBS 9 (1-year suspension with additional penalties - by agreement)

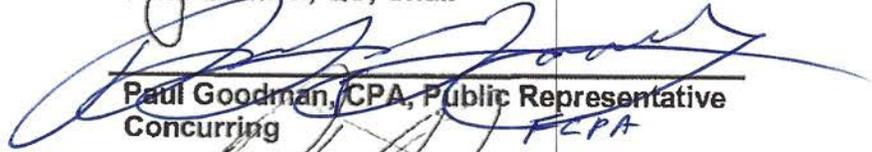
[9] These decisions inform the range of acceptable penalties. While every case turns on its specific facts, the Agreement cannot be said to be outside the range. The Agreement is not unreasonable. Considering the purposes and principles of sentencing required under the *Legal Profession Act*, supra, in our view, no part of the Agreement fails to address the necessary legislative objectives. The Agreement is not contrary to the public interest.

[10] Accordingly, we approve the Agreement.

Dated at Dartmouth, Nova Scotia, February 24, 2022.



Julia Cornish, QC, Chair



Paul Goodman, CPA, Public Representative
Concurring

FCPA



Peter Dostal
Concurring

2021

NOVA SCOTIA BARRISTERS' SOCIETY

IN THE MATTER OF: The *Legal Profession Act*, S.N.S. 2004, c. 28 and the Regulations of the Nova Scotia Barristers' Society, as amended

BETWEEN: **The Nova Scotia Barristers' Society**

- and -

Nash Brogan, of Sydney, Nova Scotia

COMPLAINT

The Nova Scotia Barristers' Society charges Nash Brogan, of Sydney, Nova Scotia with professional misconduct and professional incompetence in that he breached provisions of the *Code of Professional Conduct* (the "*Code*"), and the *Legal Profession Act* (the "*Act*") and the Regulations made thereunder. Specifically,

1. Contrary to Chapters 2.1-1 and 3.5-2 of the *Code*, Mr. Brogan conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice and failed to observe rules related to preservation of client property entrusted to the lawyer when it was his practice until January of 2019 to take cash from criminal clients prior to legal services being rendered, to not deposit the cash into a trust account, to deem the cash as fees earned upon receipt without any or sufficient work having been completed to justify the fees contrary to Regulations 10.2.1, 10.4.2 (e), (f), and (g), and for some of these transactions to not include cash as income.
2. Contrary to Chapter 3.1-2 of the *Code*, Mr. Brogan failed to provide legal services to the standard of a competent lawyer when, during a period from 2016 until November of 2018, he did not take diligent steps to have and implement a system to track pending limitation dates which resulted in approximately 17 missed limitation periods.
3. Contrary to Chapters 6.1-1, 6.1-3(n), and 6.1-5, Mr. Brogan provided his personal lawyer LRA passcode to his assistant, allowed her to perform work that could only be done by a lawyer, and failed to properly supervise his assistant in his real estate practice.

4. Contrary to Chapter 3.3-1, Mr. Brogan failed to hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship when he communicated with a person outside of his firm confidential client information. In particular, Mr. Brogan texted information about a client, ABC Inc., to YZ.
5. Contrary to Chapters 2.1-1, 3.4-1, and 3.4-28 Mr. Brogan conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice and acted for a client in a conflict of interest when he loaned money to and acted for AB and CD in matters in which he had a personal financial interest without ensuring that the transaction was fair and reasonable, the clients had full disclosure, the clients had independent legal representation, and in a situation where his duty of loyalty to the clients was compromised by his personal financial interest.
6. Contrary to Chapter 2.1-1, Mr. Brogan failed to discharge his responsibilities with honour and integrity when he transferred the title of a client's tangible personal property to one of his companies without good reason and refused to return title when asked by the client.
7. Contrary to Chapter 7.2-4, Mr. Brogan communicated with another person in a manner that was abusive, offensive, and/or inconsistent with the proper tone of a professional communication from a lawyer. In particular, Mr. Brogan sent written communications to EF alleging that he was "stupid" and sent a text message on July 18, 2018 asking EF if he was "brain dead".

And that in relation to the charges set out above, Nash Brogan has been guilty of professional misconduct and professional incompetence.

TAKE NOTICE that at the Hearing of this complaint, the Hearing Panel may be asked to make a finding of professional misconduct and professional incompetence against you, Nash Brogan, on the basis of any evidence brought before the Hearing Panel.

DATED at Halifax, Nova Scotia this 7th day of July, 2021.

Nova Scotia Barristers' Society

Per: _____
Andrew Taillon
Director of Professional Responsibility

IN THE MATTER OF: The *Legal Profession Act*, S.N.S. 2004, c. 28 and *Regulations* of the Nova Scotia Barristers' Society, as amended

- and -

IN THE MATTER OF: Nash Brogan, Barrister and Solicitor

SETTLEMENT AGREEMENT

Nash Brogan, a member of the Nova Scotia Barristers' Society hereby admits the following facts and consents to the following as the disposition of the complaint of the Nova Scotia Barristers' Society, dated July 7, 2021, a copy of which is attached hereto as Appendix "A", in accordance with the provisions of the *Legal Profession Act* and *Regulations* made pursuant thereto:

MEMBER BACKGROUND

1. Mr. Brogan was admitted to the Bar on December 20, 1977.
2. Mr. Brogan was a sole practitioner until approximately 2000, at which time he and Derrick Kimball formed Kimball Brogan. In 2016, Kimball Brogan was dissolved, and Mr. Brogan formed a partnership with Tj McKeough. They practiced as Brogan McKeough until November 8, 2018, at which time the partnership was dissolved, and Mr. Brogan again became a sole practitioner.
3. Mr. Brogan's practice currently involves mostly personal injury law and some criminal law.

CIRCUMSTANCES OF THE COMPLAINT

Missed Limitation Periods

4. The Brogan McKeough law firm missed at least 17 limitation periods in 2018. Mr. Brogan provided the Society with a list of fifteen clients whose limitation periods had been missed. After reviewing the number of missed limitation periods, Mr. Brogan recognized that he should have seen the signs that there was a problem in the practice in April of 2018. Mr. Brogan did not ensure that the firm had a system in place to track limitation periods. Since November of 2018, Mr. Brogan diarizes limitations in the firms "Cozi Calendar" to commence litigation after one year. Mr. Brogan worked to rectify all the cases for which he was the responsible lawyer that had limitation issues.

Real Estate Practice

5. In his small real estate practice, Mr. Brogan permitted his assistant to use his private password and make changes to the parcel register. In January of 2019, Mr. Brogan undertook not to engage in the practice of real estate law unless he was personally

competent to do so and able to fulfill all obligations of the lawyer under the Land Registration System. He further undertook that he would change his personal lawyer LRA password and not provide it to anyone else.

6. Mr. Brogan has since "farmed out" all property work that required any involvement with the Land Registration System, and very rarely engages in sales transactions, and only when they do not require a Release of Mortgage to be recorded on the parcel register.

Retainers and Cash Payments

7. Some clients of the firm were required to pay in cash prior to legal services being rendered. Mr. Brogan did not deposit the cash into a trust account and fees were deemed to be earned upon receipt.
8. Further, when Mr. Brogan's clients paid fees in cash, he did not always deposit the cash into the general account, but rather kept the cash without accounting for it as income. In addition, he did not issue invoices to his criminal clients.
9. When Mr. Brogan received a retainer for services, either in cash or cheque, he never placed the funds into the firm's trust account but, rather, deposited the funds directly into the general account as fees earned upon receipt, and used these monies in the general operation of the firm, including Mr. Brogan's partnership draws.
10. No client has made a claim against Mr. Brogan or any other lawyer in his firm under the Lawyers' Fund for Client Compensation.

Confidentiality

11. Mr. Brogan sent a text message to YZ and disclosed confidential client information relating to the firm's client, ABC Inc. He disclosed the nature of the client's matter, the steps being taken in the matter, and the outcome of the matter.

AB and CD

12. In December of 2014, AB and CD purchased a property at Shore Road in Sydney Mines from a close family member of Mr. Brogan.
13. Mr. Brogan had purchased the property in August of 2012, hoping that he could entice his close family member to return to Nova Scotia.
14. AB and CD paid for the property with a \$25,000 down payment and a vendor take back mortgage in the amount of \$274,000 with interest calculated at the rate of 5% semi-annually. The collateral mortgage was for a twelve-month term with an option to renew for a further twelve months with the payments amortized over a thirty-year period. The monthly mortgage payment was \$1,479.66.
15. Mr. Brogan represented his close family member and AB/CD in the sale/purchase and the mortgage. Mr. Brogan did not ensure that AB and CD had independent representation in the transaction. Mr. Brogan had another lawyer in his firm sign a certificate in which AB and CD indicated they understood their legal rights and obligations arising from the mortgage.

16. AB and CD continued to make mortgage payments beyond the two years set out in the mortgage. In June of 2019, CD asked Mr. Brogan to take back the property because she and AB were separating. She told Mr. Brogan that for the wellbeing of her children and herself, she needed to leave the matrimonial home because AB was refusing to leave.
17. On June 24, 2019, AB and CD entered into and signed an agreement of purchase and sale with Mr. Brogan's close family member. Mr. Brogan signed the agreement on behalf of his close family member.
18. The agreement provided that upon the re-conveyance of the property to Mr. Brogan's close family member, AB and CD would be released from any and all obligations pursuant to the terms of the collateral mortgage. The agreement included an acknowledgement that AB and CD had been advised to obtain independent legal advice. It noted that CD had discussed her rights and obligations under the agreement of purchase and sale with her family lawyer and AB had declined to seek independent legal advice.
19. In re-conveying the property, AB and CD did not receive any credit for the equity they created in the property through the \$25,000 down payment and 54 months of mortgage payments.
20. Mr. Brogan represented his close family member and AB/CD in the conveyance of the property and the release of the collateral mortgage. Mr. Brogan did not ensure that AB and CD had independent representation.
21. After Mr. Brogan's close family member took back the property, AB stayed in the property and paid rent as a tenant.

Offensive Communication

22. Starting in 2017 and up to November of 2018, Mr. Brogan spent less time in the office, anticipating that EF would eventually be the successor of his practice. During that time, Mr. Brogan had daily telephone, email, and/or text message contact with EF related to file matters.
23. On occasion, Mr. Brogan would refer to EF as being stupid when he made a decision with which Mr. Brogan disagreed.
24. EF scheduled a matter for a time when Mr. Brogan was to be in Florida and Mr. Brogan wrote EF, "what are u brain dead?"

YZ's Trailers

25. Mr. Brogan learned that a creditor had obtained judgment against his client, DEF Inc., for approximately \$50,000. DEF Inc. is owned by YZ. Mr. Brogan encouraged YZ to protect the assets of the company. Mr. Brogan arranged to transfer the title of 4 trailers to one of his companies, B&K Auto Sales. Mr. Brogan's intention was to park the trailers in B&K Auto Sales on an interim basis.

26. The trailers were not owned by DEF Inc. but were in YZ's name personally.
27. YZ has requested that Mr. Brogan transfer the title of the trailers back to her, and Mr. Brogan has refused to do so.

THE INVESTIGATION

28. In November of 2018, the Society became aware of some issues related to Mr. Brogan and commenced an investigation pursuant to section 9.2.3 of the Regulations made pursuant to the *Legal Profession Act*. Guy LaFosse, QC was retained to assist with the investigation and subsequently met with Mr. Brogan. He prepared a preliminary report on November 21, 2018, and he identified several potential concerns relating to Mr. Brogan's conduct and competence.
29. As a result of Mr. LaFosse's report, Michael Brooker, QC was retained to perform a practice review. Mr. Brooker's initial report in January of 2019 led to another Society initiated complaint, and a request that Mr. Brogan agree to abide by certain conditions of practice. Mr. Brogan provided his undertaking and complied with those conditions of practice and undertakings throughout the course of the investigation.
30. Following Mr. Brooker's final Practice Review Report, Mr. Brogan was asked by the Complaints Investigation Committee (the "CIC") to undertake to implement the recommendations in the Report. Mr. Brogan provided his undertaking and implemented the recommendations into his practice.
31. The Society retained Mr. Brooker to fully investigate the Society complaints and 2 other individual complaints that were received by Society. Mr. Brooker interviewed Mr. Brogan. Following the completion of his investigation, Mr. Brooker provided the CIC with a comprehensive report.
32. After receiving Mr. Brooker's report, the CIC met on March 30, 2021, and the CIC authorized the Executive Director to lay a charge against Mr. Brogan (Appendix "A").
33. Counsel for the Society received confirmation from Mr. Brogan's counsel on July 15, 2021, that he received service of these charges on behalf of Mr. Brogan on July 8, 2021.

MEMBER DISCIPLINARY RECORD

34. On December 22, 1987, Mr. Brogan was reprimanded and ordered to pay costs of \$2,119.59 for lack of courtesy and good faith towards another lawyer.

MITIGATING FACTORS

35. Mr. Brogan cooperated during the investigation and made admissions to a number of concerns without any dispute. He has implemented all the recommendations made in each of the practice review reports.

ADMISSION

36. Mr. Brogan admits that his conduct did not meet the professional standards expected of a lawyer and the requirements of the Nova Scotia Barristers' Society *Code of Professional Conduct*, the *Legal Profession Act* and regulations thereunder, including the following:
- a. Chapter 2 .1-1- Integrity
 - b. Chapter 3.1-2 – Competence in providing legal services
 - c. Chapter 3.3-1 – Confidentiality of Client Information
 - d. Chapters 3.4-1 and 3.4-28 – Conflict of Interest
 - e. Chapter 3.5-2 – Preservation of Client Property
 - f. Chapters 6.1-1, 6.1-3(n), and 6.1-5 – Supervision of Employees
 - g. Chapter 7.2-4 – Unprofessional communication
37. Mr. Brogan agrees that the evidence against him could support a finding of professional incompetence and misconduct.

DISPOSITION

38. Mr. Brogan accepts the following disposition of this matter:
- a. Six (6) month suspension effective on October 11, 2021 or the effective date of this agreement, which ever is later.
 - b. Mr. Brogan shall make the necessary arrangements for his practice in accordance with the Cessation of Practice Guidelines established by the Nova Scotia Barristers' Society. Failure to do so will result in the appointment of a Receiver by the Society with the costs associated with that Receivership being payable in full by Mr. Brogan as a condition of his reinstatement to practice.
 - c. During the suspension, Mr. Brogan will adhere to the Cessation of Practice Guidelines, a copy of which has been provided to him.
 - d. While practicing pending the commencement of the suspension and upon return from suspension, Mr. Brogan will:
 - provide the Society with copies of his monthly trust reconciliations with supporting documentation;
 - provide the Society monthly confirmation that all required remittances (including payroll and HST) are being made;
 - provide a monthly report detailing all retainers received in relation to existing matters, and when and in what manner they are subsequently billed and transferred into his general account for payment of fees;
 - cease practicing in the area of real estate;
 - file Notice of Action for any civil matter within 90 days of his retainer or immediately upon retainer in the event the limitation period is less than 90 days from the date of retainer.
 - e. Mr. Brogan will not be eligible to be a principal or supervising lawyer to an articled clerk for a period of five (5) years upon his return to practice after the suspension.

f. The Society agrees to seek no costs in this matter.

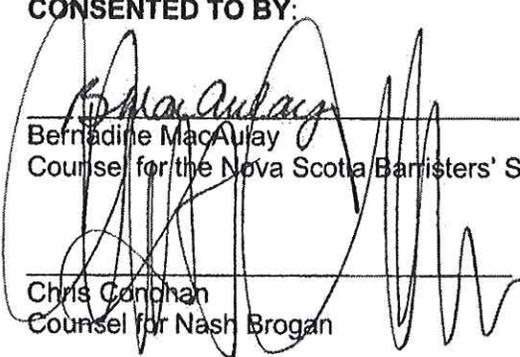
INDEPENDENT LEGAL ADVICE

39. Mr. Brogan confirms that he has had independent legal advice regarding the terms of this Settlement Agreement, prior to its execution.

EFFECTIVE DATE

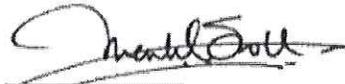
40. The Settlement Agreement shall become effective upon acceptance by the Hearing Committee.

CONSENTED TO BY:


Bernadine MacAulay
Counsel for the Nova Scotia Barristers' Society

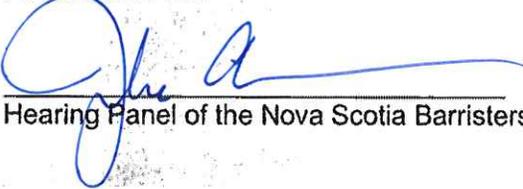
Chris Conchan
Counsel for Nash Brogan

RECOMMENDED BY:



Complaints Investigation Committee this 10th day of September, 2021.

APPROVED BY:



Hearing Panel of the Nova Scotia Barristers' Society, this 12 day of October, 2021.

NOVA SCOTIA BARRISTERS' SOCIETY

HEARING COMMITTEE

IN THE MATTER OF: The *Legal Profession Act*, S.N.S. 2004, c.28 and the Regulations of the Nova Scotia Barristers' Society, as amended

BETWEEN: The Nova Scotia Barristers' Society

Applicant

- and -

Nash Brogan

Respondent

RESOLUTION

WHEREAS the Charges dated July 7, 2021 were laid by the Nova Scotia Barristers' Society (the "Society") against Nash Brogan (the "Member"), pursuant to Regulations made under the *Legal Profession Act*, S.N.S. 2004, c. 28;

AND WHEREAS a Settlement Agreement was negotiated between the Society and the Member and was presented to the Panel composed of members of the Hearing Committee;

AND WHEREAS the Settlement Agreement has been consented to by the Member and the Society and recommended by the Complaints Investigation Committee;

AND UPON the Panel of the Hearing Committee having considered the Charges, the proposed Settlement Agreement, the facts as presented in the Settlement Agreement, the authorities provided by counsel and the submissions of counsel;

AND WHEREAS the Panel of the Hearing Committee unanimously approved the Settlement Agreement;

IT IS RESOLVED THAT pursuant to the provisions of Section 42(k) of the *Legal Profession Act*, S.N.S. 2004, c. 28, the Settlement Agreement, a copy of which is attached hereto as Schedule "A", is hereby approved, and the following is ordered:

Permanent Publication Ban

No person shall publish, broadcast, or otherwise disclose any information that identifies or may tend to identify clients of Nash Brogan, his firm Brogan Law Inc, or his former firms, Brogan McKeough and Kimball Brogan **and any complainants or victims identified during the hearing.**

Costs

There shall be no costs in this matter.

DATED at Halifax, Nova Scotia this 18th day of October, 2021.



Julia Cornish, QC
Chair of the Panel and member of the Hearing
Committee of the Nova Scotia Barristers' Society