Court of Appeal for Saskatchewan
Docket: CACV3055

Citation: ***Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37**
Date: 2018-05-23

Between:

Peter Andrew Abrametz

Appellant

And

The Law Society of Saskatchewan

Respondent

Before:	Richards C.J.S., Herauf and Schwann JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Madam Justice Schwann
In concurrence:	The Honourable Chief Justice Richards The Honourable Mr. Justice Herauf
On Appeal From:	Law Society of Saskatchewan, Saskatoon
Appeal Heard:	April 18, 2018
Counsel:	Ross Macnab for the Appellant Timothy Huber for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] A Hearing Committee constituted pursuant to *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 [*Act*], found the appellant, Peter Andrew Abrametz, guilty of three charges of conduct unbecoming a lawyer. Following a penalty hearing, the appellant was sentenced by the Discipline Committee to a two-month suspension, payment of $14,000 in restitution, ethics training and costs of $29,702.50.

[2] For the reasons expressed below, the appellant's appeal with respect to the two-month suspension is dismissed, but his appeal relating to the costs award is allowed in part.

II. BACKGROUND

[3] The appellant was the subject of an amended formal complaint initiated by the Law Society of Saskatchewan (LSS) on February 1, 2011, the particulars of which are as follows:

> 1. Peter A. Abrametz (the "Member") is the subject of an Amended Formal Complaint dated February 1, 2011. The allegations are that the Member is guilty of conduct unbecoming a lawyer in that he:
>
> > 1. did personally, or on behalf of his associate, 1011227770 Saskatchewan Ltd., enter into or continue a business transaction with his clients, Mr. and Mrs. M., when his interests or the interests of his associate and the interests of Mr. and Mrs. M. were in conflict;
> >
> > 2. did prefer his own interests, or the interests of his associate, 1011227770 Saskatchewan Ltd., over the interests of his clients, Mr. and Mrs. M;
> >
> > 3. did personally, or on behalf of his associate, 1011227770 Saskatchewan Ltd., acquire from his clients, Mr. and Mrs. M., ownership of real property and failed to ensure that:
> >
> > > a. the transaction was a fair and reasonable one and its terms were fully disclosed to the client in writing in a manner that was reasonably understood by the clients;
> > >
> > > b. the clients were given a reasonable opportunity to seek independent legal advice about the transaction;
> > >
> > > c. the clients consented in writing to the transaction and the conflict of interest; and

> 4. did use information obtained during his representation of his clients, Mr. and Mrs. M., to obtain a benefit for himself or his associate, 1011227770 Saskatchewan Ltd.
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> (*Law Society of Saskatchewan v Abrametz*, 2017 SKLSS 4 [*Hearing Decision*])

[4] A hearing on all four counts proceeded before a Hearing Committee of the LSS in July of 2015. The hearing was preceded by a judicial review application to stay the proceedings and several pre-hearing motions. All of these preliminary matters were initiated by the appellant.

[5] The evidence before the Hearing Committee consisted of an agreed statement of facts and testimonial evidence from three witnesses, one of whom was the appellant. A summary of the essential background facts was set out in the *Hearing Decision*. For ease of reference, that summary is reproduced below:

> 9. Mr. and Mrs. M., long-time friends and clients of the Member who were separated and not on speaking terms at the pertinent time in 2008, jointly owned an acreage in the R.M. of Paddockwood south of Christopher Lake which they wished to sell as quickly as possible. Mrs. M., together with potential purchasers, Mr. and Mrs. H., attended the Member's office and an Offer to Purchase dated July 2, 2008, was completed, indicating a purchase price of $30,000.00 and a possession date of August 4, 2008. This Offer was open for acceptance until July 7, 2008. A deposit of $3,000.00 was contemplated in the Offer, but was not paid by Mr. and Mrs. H., who sought their own legal representation in relation to the transaction.
>
> 10. On July 2, 2008, the Member advised Mrs. M. that the purchase price was too low. The Member subsequently contacted Mr. M. and mentioned that he might be able to find a purchaser willing to pay more. Mr. M. agreed that the Member could explore this possibility.
>
> 11. On July 4, 2008, the Member contacted Mr. Y., another personal friend, advising him of the opportunity to purchase the property for $33,000.00. Mr. Y. agreed to do so, signing an Offer to Purchase that same day. Mr. and Mrs. M. signed the Acceptance on July 5, 2008.
>
> 12. To facilitate the transaction and assist both the purchaser and the vendors, all of whom are friends of the Member, the Member paid the $5,000.00 deposit on Mr. Y's behalf from the Member's professional corporation account.
>
> 13. On July 7, 2008, Mr. H. contacted Mrs. M. regarding the property and learned that it had been sold to someone else for more money. Sometime later, after discovering that the Member was a shareholder of the Purchaser, 1011227770 Saskatchewan Ltd., Mr. H. lodged a complaint with the Law Society of Saskatchewan.
>
> 14. In early August 2008, Mr. Y. determined that he did not wish to live on the property, nor did he wish to build a new home on the acreage. Mr. Y. suggested, and the Member agreed, that the two of them buy the property together.
>
> 15. As noted in paragraph 15 of Exhibit P-2, the Agreed Statement of Facts:

> [15] … The Member acknowledges that it was at this point that his interests and the interests of Mr. and Mrs. M may have been in conflict. The Member did not ensure that his involvement was fully disclosed to both of the vendors, that they were advised of the opportunity to seek independent legal advice and that they consent in writing to the possible conflict of interest.

16. The Member and Mr. Y. incorporated 1011227770 Saskatchewan Ltd. on August 12, 2008, with each owning a 50% share in the company. The transfer authorization, previously signed in blank by the vendors on July 5, 2008, was completed by the Member indicating the company as the purchaser. At the request of Mr. and Mrs. M., the possession date was advanced from September 1, 2008 to August 14, 2008 and the purchase was finalized at that time.

17. As noted in paragraph 19 of Exhibit P-2:

> [19] P.M. was sent a report after the deal closed indicating that a corporation had purchased her property, but was not aware that her lawyer, the Member, had an interest in the corporation. After agreeing to join in the purchase with B.Y. and before the transaction closed the member advised J.M. that the land was being purchased through a corporation formed by himself and B.Y., but acknowledges that neither J.M. nor P.M. received any independent legal advice in relation to the transaction, nor did the Member recommend to either J.M. or P.M. that independent legal advice be obtained.

18. Sometime following August 14, 2008, the Member moved another friend, Mr. J., who was in need of a place to live, into the property. Mr. J. lived there for a while rent-free, in exchange for doing some general maintenance and minor repairs. The out of pocket expenses reimbursed to Mr. J. from 1011227770 Saskatchewan Ltd. for cleaning supplies and paint were approximately $100.00.

19. In October of 2008, apparently concerned about the property being vacant over the winter, the Member suggested to Mr. Y. that they sell the property. Mr. Y. agreed and the Member contacted a realtor to list the property on October 20, 2008. The listing dated October 21, 2008 indicated an asking price of $87,500.00.

20. On November 5, 2008, the Member on behalf of 1011227770 Saskatchewan Ltd. accepted an offer of $80,000.00, with a closing date of November 21, 2008. This yielded a net gain to 1011227770 Saskatchewan Ltd. of approximately $66,000.00, even following payment of real estate fees, taxes, and other expenses. Two special resolutions of 1011227770 Saskatchewan Ltd. dated November 21, 2008, authorized payment of $17,000.00 to the Member's professional corporation and Mr. Y's corporation, respectively.

III. THE HEARING DECISION

[6] Taking a broad view of things, the Hearing Committee concluded that the appellant's actions gave rise to a conflict of interest. Armed with the knowledge that his clients were prepared to sell valuable acreage property at a low asking price, the appellant commenced, what

the Hearing Committee described as, a series of misguided, although perhaps well intended, actions designed to benefit friends and ultimately himself as co-owner of 1011227770 Saskatchewan Ltd. (numbered company). The Hearing Committee found the appellant "'knew basically what real estate was worth'", and he had told his friend, Mr. Y., that he "'thought [the investment] was safe'" (at para 43). In the result, the Hearing Committee concluded the appellant's judgment became impaired and his loyalty divided (at para 40) and, as such, the circumstances gave rise to a conflict of interest.

[7] The Hearing Committee then turned to each of the four allegations, ultimately finding counts 1, 3 and 4 well founded. Specifically, on the facts before it, the Hearing Committee had no difficulty finding a breach of the appellant's duty of loyalty to his clients and a conflict of interest in relation to the numbered company's acquisition of the acreage. The numbered company had acquired the acreage from the vendors when the terms of sale (i.e., the name of purchaser) had not been made known to them, and the appellant had used information gained from his professional relationship with his clients to his advantage. The Hearing Committee emphasized the fiduciary nature of the solicitor–client relationship, and pointed to the strict standards of conduct demanded of a fiduciary. In the end, given the appellant's solicitor–client relationship with his clients and the profit gained by him through his dealings, the Hearing Committee had little difficulty finding numerous breaches of the *Code of Professional Conduct*.

[8] The Hearing Committee, though, found the second allegation unsubstantiated. It grappled with the wording of the charge and mused about whether the phrase "prefer … over" required proof of an "active or overt preference in the factual components" (at para 55). That said, the Hearing Committee did *not* go so far as to say that the charge embraced an element of subjective intent or displaced its strict liability status. Nonetheless, the Hearing Committee found that, although the appellant had tried to be "all things to all people", including himself, it was unable to determine which of the appellant's goals was paramount. Consequently, the Hearing Committee was unable to conclude that he had preferred the interests of the numbered company (of which he was a 50% shareholder) over the interests of his clients. On this point, the *Hearing Decision* said the following:

> 58. In the case at hand, the Hearing Committee accepts that the Member, albeit in a misguided fashion which was in conflict with the interests of Mr. and Mrs. M., did not necessarily prefer the interest of 101127770 Saskatchewan Ltd. and its principals over

> those of his clients. Rather, it appears that he was trying to be all things to all people. He wished to facilitate a quick sale for Mr. and Mrs. M., find an acreage for his friend, Mr. Y., provide a residence for another friend, Mr. J., as well as take advantage of the real estate boom to benefit himself as shareholder in 101127770 Saskatchewan Ltd. Which of those goals was pre-eminent is unclear.

IV. THE PENALTY DECISION

[9] Since legal counsel for the Conduct Investigation Committee had signalled an intention to seek the imposition of a substantial period of suspension from practice by way of penalty, the Hearing Committee referred the penalty hearing component of the proceedings to the full body of Benchers sitting as the Discipline Committee. A penalty hearing was convened on February 19, 2016, to receive submissions from the parties.

[10] A lengthy written decision was released by the Discipline Committee on March 2, 2017 (*Law Society of Saskatchewan v Abrametz* (Hildebrandt, Q.C.) [*Discipline Decision*]), pursuant to which the following sanctions were imposed:

> 73. Having considered the range of penalties … the Discipline Committee orders that:
>
> > a. the Member be suspended for a period of two months commencing May 1, 2017;
> >
> > b. the Member, by no later than June 30, 2017, pay to the Law Society of Saskatchewan the sum of $14,000.00, which funds will be forwarded by that office to the vendors, with $7.000.00 payable to each of Mr. M. and Mrs. M. by way of restitution;
> >
> > c. the Member, in addition to the mandatory Continuing Professional Development hours he is required to complete for the current practice year, at his own cost:
> >
> > > i. review the mandatory training program on the Saskatchewan *Code of Professional Conduct* entitled “Legal Ethics for Saskatchewan Lawyers”, developed in 2012;
> > >
> > > ii. view or attend training sessions on ethical issues, for which a total of at least ten Ethics Units credits have been assigned by the Law Society for Continuing Professional Development selected from the list attached as Appendix “A” to this Decision, or as otherwise approved by the Chair of the Discipline Executive Committee; and
> > >
> > > iii. provide verification of satisfactory completion of this additional training to the Chair of the Discipline Executive Committee of the Law Society of Saskatchewan prior to the Member’s resumption of practice following the suspension.

> d. failure to complete the requirements ordered in subparagraphs b. and c. will result in an extension of the suspension beyond June 30, 2017, until such time as they are completed;
>
> e. the Member pay costs in the amount of $29,702.50 to the Law Society of Saskatchewan on or before September 15, 2017, failing which an additional suspension from practice will be imposed until full payment has been made.

V. THE APPELLANT'S GROUNDS OF APPEAL

[11] In the notice of appeal filed with this Court, the appellant appeals from the following:

> [T]he Decision of the Hearing Committee of the Law Society of Saskatchewan dated September 21, 2015, and the Penalty Hearing Decision dated March 8, 2017, and the interlocutory Decision of Madam Justice A. Rothery dated March 16, 2011, and Decision of the Hearing Committee re: Stay of Proceedings dated May 30, 2013.

[12] In large measure, the appellant's notice of appeal seeks to resurrect many of the "bias" and "procedural fairness" issues that had been previously raised in his preliminary motions and on judicial review. As to sentence, the appellant appeals from the imposition of a two-month suspension and the costs award. With regard to the latter, he sought a referral to the Registrar of the Court of Queen's Bench for taxation of the in-house counsel's legal fees.

[13] The appellant subsequently abandoned all grounds of appeal but for his appeal from the two-month suspension and the award of costs.

VI. JURISDICTION AND STANDARD OF REVIEW

[14] This appeal is brought pursuant to s. 56(1)(a) of the *Act*. Section 56(1)(a) permits a member to appeal a hearing committee's decision that determined a complaint against a member to be well founded, or from the penalty imposed:

> **Appeal to Court of Appeal**
> **56**(1) If a formal complaint against a member is determined by the hearing committee to be well founded:
>
> > (a) the member may appeal the decision of the hearing committee or a penalty assessed or requirement imposed by the hearing committee resulting from the decision to the Court of Appeal within 30 days after the day of the decision or the assessment of a penalty or imposition of a requirement, whichever is later, by:
> >
> > > (i) filing a notice of appeal with the registrar of the Court of Appeal; and
> > >
> > > (ii) serving a copy of the notice of appeal on the executive director … .

[15] The scope of appellate review is decidedly narrow and deferential. "The standard of review to be applied to decisions of the [Hearing Committee] respecting misconduct and [Discipline Committee] respecting penalty is common ground and has been authoritatively established as reasonableness" (*Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at para 38, [2014] 6 WWR 643 [*Merchant 2014*], see also paras 39–41).

[16] The deferential approach to decisions made by the LSS in professional misconduct matters was reinforced in *Merchant 2014* by reference to what this Court had previously said in *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 WWR 478 [*Merchant 2009*]:

> [26] Nothing in recent case law has diminished the force of Justice Iacobucci's observations in *Pearlman v. Manitoba Law Society Judicial Committee* [[1991] 2 SCR 869], where he stated:
>
> > I note that courts have recognized that Benchers are in the best position to determine issues of misconduct and incompetence. For example, in *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292–93):
> >
> > > No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

[17] No issue is taken by the appellant with respect to the applicable standard of review.

VII. ISSUES

[18] The appellant characterizes the issues at play as follows:

(a) Did the Discipline Committee act unreasonably in ordering that the appellant be suspended from practice for a period of two months?

(b) Did the Discipline Committee act unreasonably in the exercise of the discretion it possessed by virtue of the *Act* by ordering the appellant to pay costs in the amount of $29,702.50?

VIII. ANALYSIS

A. Was the two-month suspension unreasonable?

[19] This ground of appeal was dismissed at the time of the appeal hearing, with written reasons to follow. These are those reasons.

[20] The appellant argues the suspension was unreasonable on two bases. First, he asserts the Discipline Committee failed to consider a long line of Saskatchewan case authorities that have consistently imposed a reprimand for "simple conflict" cases. In contrast, the imposition of a suspension, he argues, amounts to a difference in kind, not of severity, and was therefore unreasonable in its result. Second, the appellant argues the Discipline Committee failed to consider and give effect to the absence of any finding of "dishonesty" by the Hearing Committee and also failed to give effect to the Hearing Committee's finding that he had been "well intended" and "trying to help his friends". Given these crucial findings, he argues that a reprimand was the appropriate penalty, not suspension.

[21] The Discipline Committee began its analysis by setting out the broad principles that guide sentencing in disciplinary proceedings. The first and paramount consideration related to the objects and purposes of the *Act*, noting in particular s. 3.1, which emphasizes public protection, and s. 3.2, which prioritizes the goals of public protection and ethical and competent practice over the interests of members in the self-regulation process (see *Discipline Decision* at para 21). Related to the public protection mandate, the Discipline Committee identified the importance of maintaining public "confidence in the integrity" of the profession and in its ability to "govern its own members" (at para 22). Citing this Court's decision in *Merchant 2009*, the Discipline Committee commented on the difference between sentencing in criminal matters (an individualized approach) versus the approach utilized in professional disciplinary proceedings (concern for the collective reputation of the members as a whole). Finally, by way of general principle, the Discipline Committee identified the need for general and specific deterrence, and in this particular case, to "'awaken the Member in relation to his obligations towards his clients'" (*Discipline Decision* at para 24, quoting Mr. Huber of the Conduct Investigation Committee).

[22] The Discipline Committee then turned to the particular circumstances of this case, beginning with the aggravating factors:

> 25. Other considerations in the assessment of penalty include determining whether any aggravating, mitigating, or other special factors are present. Along with providing a "Comparative Law Society Sentencing Principle Grid," which highlighted factors considered by the Law Societies of British Columbia and Alberta, Mr. Huber [the Conduct Investigation Committee representative] argued that there were numerous aggravating factors present in this case. These are summarized as follows:
>
> > a. The Member failed to acknowledge or show any insight regarding his misconduct;
> >
> > b. As an experienced lawyer, he ought to have known that a transaction involving his friend and, ultimately, himself, required enhanced protection of his clients' interests;
> >
> > c. There are three victims in the transaction – the vendors who lost significant equity and the original intended purchaser;
> >
> > d. The Member gained a significant financial benefit;
> >
> > e. The Member was aware from the outset that he and his friend, as co-owners of the purchaser-corporation, were well-positioned to gain such a benefit;
> >
> > f. His clients were in a vulnerable situation;
> >
> > g. Lawyers who extract a financial benefit from their vulnerable clients in the presence of a conflict of interest diminish public confidence in the legal profession; and
> >
> > h. The Member has not accepted responsibility for his behavior, but throughout the disciplinary process has attempted to cast aspersions against Law Society staff and blame others for his own actions.

[23] As to the mitigating factors, the Discipline Committee made note of the appellant's lack of prior discipline history, and professed "lack of knowledge that his conduct was wrongful" (at para 26).

[24] Turning to the sentencing range, the Discipline Committee observed that the range of sanctions previously imposed for conflict of interest cases varied dramatically from a reprimand at the low end, to disbarment at the top end. Each case, it noted, is fact sensitive.

[25] Although legal counsel for the Conduct Investigation Committee had advocated for a two-year suspension based on the rulings in *Smith v Law Society of Manitoba*, 2011 MBCA 81, [2012] 3 WWR 23, (leave to appeal to SCC refused, 2012 CanLII 22046) [*Smith*] (disbarment), and *Law Society of Saskatchewan v Anderson*, [1998] LSDD No 69 (QL) [*Anderson*] (two-year

suspension), the Discipline Committee distinguished the facts in those cases from the appellant's situation. In particular, the Discipline Committee noted the absence of any "taint of dishonesty" (*Discipline Decision* at para 44), and observed that the appellant's "initial motivation may not have been personal gain" (at para 50).

[26] Even so, the Discipline Committee found some startling similarities between the appellant's circumstance and the facts in *Smith* and *Anderson*: "In both cases the lawyer owed a fiduciary duty, was dealing with parties in vulnerable circumstances, purchased property at less than fair market value, did not fully disclose the identity of the purchaser, benefited financially, and maintained the misguided view that he had done nothing wrong" (at para 44).

[27] As to the line of case authority relied upon by the appellant, the Discipline Committee had little trouble also distinguishing those decisions from the facts of this case. In this regard, the Discipline Committee identified the following distinguishing features: the appellant's lack of integrity, his lack of insight into a lawyer's obligation to safeguard client interests, the loss incurred by the appellant's clients, personal gain, and lack of remorse.

[28] With that general background in mind, I turn to the appellant's two arguments.

[29] The appellant argues the two-month suspension was excessive and out of line with the sentences that have been imposed in other conflict of interest decisions. There are several reasons why this argument cannot prevail. To begin with, there is no fixed penalty or sanction for misconducting involving conflict of interest. Each case is different and will turn on the unique circumstances of the member and the nature of the conduct complained of. As this Court noted in *Merchant 2009*, "Not unexpectedly, the reasonable range of sentences in disciplinary matters is elastic" (at para 95).

[30] The Discipline Committee properly identified the range of penalties that have been imposed in previous conflict of interest decisions and carefully considered the authorities that had been referred to it by the appellant. On the whole, the Discipline Committee had little trouble distinguishing the appellant's situation from cases where a reprimand was imposed, highlighting, as noted above, the following features of the appellant's situation that differentiated his circumstance from the circumstances in those cases: namely, lack of integrity, lack of insight into

a lawyer's obligation to safeguard client interests, the loss incurred by his client and personal gain by the appellant, and lack of remorse. Of equal importance, and as discussed above, the Discipline Committee found some striking similarities between the appellant's conduct and the conduct complained of in *Smith* and *Anderson*. In the end result, the Discipline Committee balanced all of these considerations in determining the appropriate sentence for the appellant.

[31] I see nothing unreasonable with the manner in which the Discipline Committee approached sentence. The cases relied upon by the appellant largely consisted of a less-serious fact pattern in comparison to the appellant's situation, and were all distinguishable on their facts. Moreover, most of those cases proceeded by some combination of guilty plea, joint submission or were precipitated by self-reporting. On the whole, the Discipline Committee was alert to the range of sanction that had been imposed in the past for conflict of interest cases and carefully considered the decisions referred to it by the appellant. In the end, the decision was well reasoned and justifiable in terms of how the Discipline Committee arrived at a two-month suspension.

[32] Neither is there any merit in the appellant's second argument about the "prefer over" charge (that is, the second charge, which had not been established). First of all, there is no tenable basis to support the appellant's characterization of this charge as the most serious or egregious of the four charges, or that it implicitly requires proof of dishonest intent. If the charge had historically attracted a more severe penalty compared to conflict-of-interest cases, this sort of information would have been relevant to the argument advanced, but no information suggesting this is the case was provided.

[33] Second, the appellant's submission is inconsistent with what the Hearing Committee actually said about this type of charge. Regardless of any reservation it had about what the wording of the charge meant in terms of proof, the Hearing Committee reaffirmed the strict liability status of the charge and, more importantly, stated that it did *not* include "an element of subjective intent" (*Hearing Decision* at para 54).

[34] Third, while it is true the Hearing Committee characterized the appellant's actions as "misguided" and "well intended", a careful reading of this decision reveals that the Hearing Committee directed these comments to the appellant's *initial actions* and not to his subsequent

purchase of the property through the numbered company. More to the point, that the appellant's initial motivation may not have been personal gain was the reason that distinguished the appellant's situation from the facts in *Anderson*, and it was on this basis that the Discipline Committee concluded a two-year suspension (which had been imposed in *Anderson*) was not warranted for the appellant (para 50).

[35] In summary, the Discipline Committee thoroughly explained the rationale for its bottom-line decision in relation to the two-month suspension. The decision was consistent with general sentencing principles for professional disciplinary matters, particularly the need to ensure the public is protected from acts of professional misconduct. In fashioning its penalty, the Discipline Committee undertook a balanced and fair assessment of the circumstances that gave rise to the conflict allegation and the appellant's role in it. The Discipline Committee had legitimate reason for concern, given the appellant's lack of knowledge about conflict of interest generally and his persistence that he did nothing wrong. Moreover, the Discipline Committee took proper notice of the aggravating and mitigating factors at play and the range of penalties for conflict of interest cases. Having regard to the deferential standard of review and, taken as a whole, the two-month suspension imposed by the Discipline Committee was not unreasonable and was well within the range of acceptable outcomes. There is, therefore, no basis for appellate intervention.

[36] For the reasons expressed, this part of the appeal must be dismissed with the proviso that the two-month suspension commence on a date to be set by the LSS after consulting with legal counsel for the appellant, on the understanding that it shall commence no later than 90 days from the date of the appeal hearing.

B. Was the costs award of $29,702.50 unreasonable?

[37] The Discipline Committee made an award of costs of $29,702.50 against the appellant. This sum represents the full amount that had been sought by legal counsel for the Conduct Investigation Committee at the time of the hearing based on the following itemization of expenses:

Timothy Huber's time: 125 hours @ $200.00/hour	$25,000.00
Royal Reporting for February 23, 2013:	285.00

Royal Reporting for April 23, 2013:	285.00
Royal Reporting for July 7, 2015:	420.00
Royal Reporting for August 25, 2015:	420.00
Royal Reporting Transcripts:	1,627.50
Royal Reporting for November 27, 2015 (est.):	315.00
Honorarium for Hearing Committee Members: 3 x $450.00 (Greg Stevens, George Patterson & Brenda Hildebrandt)	1,350.00
TOTAL COSTS:	**$29,702.50**

[38] As I understand his submission, the appellant only takes issue with the first item – Mr. Huber's "billable" time – which came to $25,000 based on 125 hours at $200 per hour. While the appellant had initially sought an assessment of this portion of the costs award under the *Act*, he moved away from that position and now advances three arguments in support of his position that this part of the costs award is unreasonable.

[39] First, he argues that since he prevailed on the "prefer over" charge, the bottom-line outcome before the Hearing Committee was divided; consequently, as a matter of principle, the costs award should reflect this mixed result. Second, he argues that, since the LSS had been denied costs in the Court of Queen's Bench on the judicial review application, the LSS should not be entitled to indemnification of those costs in the context of the professional disciplinary proceedings. Not only were costs of the judicial review application already dealt with, says the appellant, but the reasons given by the Court of Queen's Bench for denying costs were directly relevant to the Discipline Committee's consideration of the costs issue and should have been accounted for in fashioning its order. Finally, the appellant argues that, taken as a whole, $25,000 is excessive, unreasonable and punitive in nature.

[40] The Discipline Committee provided relatively few reasons for the "costs" part of its decision, apart from referencing its statutory authority to make such an order. The Discipline Committee did not refer to the mixed success argument in its decision, which is not altogether surprising since this issue does not appear to have been raised by the legal counsel who acted for the appellant at the time of the hearing. Instead, counsel focused on the hourly rate attributed to the LSS's in-house counsel. The Discipline Committee discounted this argument stating, "Mr. Huber's time was itemized and full particulars provided" and, because this hourly rate had

been imposed in another LSS decision, there was "no reason to deviate from the practice" (*Hearing Decision* at para 67). As to court costs denied on the judicial review application, the Discipline Committee found this argument unpersuasive because s. 55(2)(a)(v)(C) of the *Act* (repealed May 20, 2010) provides statutory authority to require a member to pay "all other costs related to the inquiry", and the cost of the judicial review application was necessarily encompassed by the scope of that authority. Finally, the Discipline Committee attributed the high number of hours spent on the file by LSS legal counsel to the way in which the appellant had chosen to respond to the charges: i.e., with reference to the appellant's numerous preliminary motions that consumed a great deal of counsel's time.

1. General principles

[41] The operative provision at the time of the formal complaint was s. 55(2)(a)(v) of the *Act* (repealed). This section expressly authorized the Discipline Committee to make an order requiring the member under investigation to pay the costs of an inquiry (including those related to the investigation, hearing and discipline committees), as well as legal costs incurred during the inquiry. It provided:

> **Powers of discipline committee to assess penalties**
> **55**(2) At a meeting called pursuant to subsection (1), the discipline committee may make any one or more of the following orders:
>
> ...
>
> (v) requiring the member to pay:
>
> (A) the costs of the inquiry, including the costs of the investigation committee, hearing committee and discipline committee;
>
> (B) the costs of the society for counsel during the inquiry; and
>
> (C) all other costs related to the inquiry … .

[42] Rule 490 of the *Rules of the Law Society of Saskatchewan* (as it was prior to June 2010) provided additional specificity about the nature of these costs and clarified that costs can include investigation costs, reasonable travel expenses, a court reporter's fee, transcript costs, hearing committee fees, and any amount arising out of the proceedings for which the LSS would otherwise be liable. With regard to in-house legal counsel, Rule 490(1)(h) specifically provided as follows:

> **Costs**
> **490**(1) In calculating the costs payable under section 55(2)(a)(v) of the *Act*, a Hearing

> Committee may include part or all of one or more of the following costs actually incurred by the Society:
>
> ...
>
> > (h) reasonable fees of counsel retained to act for the Society or, in the case of staff counsel, an amount approximating that portion of the person's salary attributable to these proceedings … .

[43] Costs are at the discretion of the Discipline Committee, with discretion to be exercised judicially (*Brand v College of Physicians and Surgeons of Saskatchewan* (1990), 72 DLR (4th) 446 (CanLII) (Sask CA) [*Brand*]). Even though the *Act* expressly authorizes the discipline body to impose an order requiring the disciplined member to pay costs of the inquiry, the legislation does not prescribe any principles to guide the exercise of that discretion. For that, I turn to the jurisprudence and other authorities.

[44] Before turning to the factors that have been considered relevant by other courts, I begin with the theory or purpose underlying costs in a professional disciplinary setting. As explained in "Trends in Costs Awards before Administrative Tribunals" (2014) 27 Can J Admin L & Prac 259 (WL) by Robert A. Centa and Denise Cooney ["Trends in Costs"], the purpose of costs in this context differs from the approach taken in the courts. The focus is not to indemnify the opposing party but for the sanctioned member to bear the costs of disciplinary proceedings as an aspect of the burden of being a member (at 263), and not to visit those expenses on the collective membership:

> [W]hile the costs awarded by a professional discipline body will partially compensate the opposing party for its expenses, the purpose is not for the member to indemnify personally an adverse party for its expenses. Rather, the disciplined member is ensuring that the other members of the profession do not bear the full costs of her misconduct. The costs award thus reflects one of the burdens of being a member of a profession and represents a corresponding theory regarding the allocation of costs in a proceeding.

(See also *Groia v Law Society of Upper Canada*, 2016 ONCA 471 at para 179, 131 OR (3d) 1, leave to SCC granted [*Groia*].)

[45] That said, the burden of membership principle that underpins a costs order does not necessarily mean full indemnification. Costs should not be so prohibitive as to prevent a member from defending his or her right to practice in the chosen profession, or from being able to dispute misconduct charges. As explained by Centa and Cooney, this consideration requires the disciplinary body to strike a careful balance:

> At the same time, in a discipline hearing, the individual's right to practise as a professional is at stake. The costs of defending one's ability to practise one's chosen profession should not be so prohibitive as to prevent individuals from defending themselves. If there is a finding of misconduct and the individual loses the right to practise, a costs award in addition to the revocation of the licence can be devastating. Indeed, it can affect the ability to recover from the discipline and return to practice, if permitted. *In this way, a costs award is not intended to be a punitive measure to supplement whatever penalties the panel imposes but a balancing measure that reflects the privilege of membership in a professional organization.*
>
> (Emphasis added, "Trends in Costs" at 262)

(See also *Chuang v Royal College of Dental Surgeons of Ontario*, 211 OAC 281 (Div Ct) [*Chuang*].)

[46] Apart from these broad principles, courts have taken a variety of factors into account in undertaking a reasonableness review of a costs award. The factors that emerge from case authority, as identified by Bryan Salte in *The Law of Professional Regulation*, (Markham: LexisNexis, 2015) at 262 [*Professional Regulation*], are the following:

> 1. Whether the costs are so large that the costs are punitive;
> 2. Whether the costs are so large that they are likely to deter a member from raising a legitimate defence;
> 3. The member's financial status;
> 4. A member has an obligation to provide financial information to support a contention that a cost award will impose an undue hardship;
> 5. The regulatory body should provide full supporting material for the amount of costs claimed;
> 6. The regulatory body should provide the individual with an opportunity to respond to the information and respond to the total quantum of costs which may be ordered before costs are imposed;
> 7. The regulatory body should provide reasons for reaching the decision that it made;
> 8. If the decision is made in British Columbia, it appears that the cost award will have to be based upon the tariff of costs that is awarded in court actions.

[47] A more concise statement of factors can be found in the Nova Scotia Court of Appeal decision of *Hills v Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, 307 DLR (4th) 341 [*Hills*]. There, the Court reduced the salient considerations to the following:

> [61] … the Committee referred to the *Regulation* prescribing the sanctions which it could impose, summarized the expenses … and identified and addressed the following factors:

> a. The balance between the effect of a cost award on the Appellant and the need for the Provincial Dental Board to be able to effectively administer the disciplinary process;
>
> b. The respective degrees of success of the parties;
>
> c. Costs awards ought not to be punitive;
>
> d. The other sanctions imposed and the expenses associated therewith;
>
> e. The relative time and expense of the investigation and hearing associated with each of the charges and *in particular those on which guilt were entered and those where the Appellant was found not guilty*.
>
> (Emphasis added)

[48] There is considerable attraction to the factors identified in *Hills*, not only for review purposes but for the Discipline Committee's use in making the initial order. The application of the *Hills* factors on a go-forward basis would serve the twofold purpose of allowing a member to understand why the costs award was made, and allow for an appellate court to undertake a reasonableness review in a meaningful manner. That said, this list of factors should not be construed as exhaustive. The proper exercise of discretionary authority necessarily requires a discipline body to take into account any other matter that is relevant to the unique circumstances of the case before it.

[49] One final general observation about the "mixed success" factor identified in *Hills* must be made at the outset. While this principle is generally understood to refer to a result where some, but not all of the charges are proven, how courts and regulatory bodies have applied this principle to appropriately quantify costs has not been uniform across Canada: "There does not appear to be a consistent approach by regulatory bodies in determining how to assess costs where the success has been divided, nor does there appear to be a consistent approach by the courts in suggesting which approach is appropriate" (*Professional Regulation* at 268). Some regulatory bodies and courts have applied a strict mathematical calculation (*Fadelle v Nova Scotia (College of Pharmacists)*, 2013 NSCA 26 [*Fadelle*]; or *Kaburda v British Columbia (College of Dental Surgeons)*, 2002 BCSC 870, [2002] BCTC 870). Another approach has been to determine what the total costs would have been if the member had only been charged with the particulars ultimately proven (*Huerto v College of Physicians and Surgeons of Saskatchewan*, 2004 SKQB 360, 253 Sask R 1 [*Huerto*]; *Hills*). Yet another approach has been to consider a variety of factors (e.g., the relative importance of the charges dismissed compared to those proven) in

determining what portion of the costs should be borne by the member (*K.C. v College of Physical Therapists (Alberta)*, 1999 ABCA 253, [1999] 12 WWR 339 [*K.C.*]).

[50] Several Saskatchewan decisions have dealt with costs in a mixed success situation. In *Brand*, the physician under investigation was found guilty of professional misconduct and ordered to pay costs of $12,177.13 for a three day hearing. Speaking for the Court, Vancise J.A. characterized the costs award as discretionary in nature, stating that it "must be exercised judicially" (at para 24). Applying the reasonableness standard to the full indemnification award, the Court held "$12,177.13 for a hearing which lasted a portion of three days (*a greater portion of which was taken up in connection with an offence which was not proven*) is unreasonable" (at para 25, emphasis added). The matter was remitted for reassessment.

[51] In *Huerto*, the Court of Queen's Bench addressed the reasonableness of a costs award in a situation where Dr. Huerto was charged with 31 offences but convicted of only 14. Total costs for the overall investigation and disciplinary hearing amounted to $205,608.78. Given the divided success, the Court deducted the costs that would not have been incurred had the charges not proven not been laid, and thus reduced the total amount to $172,600.

[52] With those broad principles in mind, I turn to the specific issues raised on this appeal.

C. The mixed success argument

[53] As noted above, while I do not share the appellant's view that the "prefer over" charge was the most serious of the four charges, or that it represents a "substantial" victory for him, it was a victory of sorts nonetheless, and the costs award imposed by the Disciplinary Committee should have reflected this mixed result: "Courts have concluded that it is unreasonable to order that the member pay the entirety of the costs if not all of the charges have been proved" (*Professional Regulation* at 267; see also *Brand* and *Huerto*).

[54] While I recognize the mixed results issue was not raised before the Discipline Committee, the Discipline Committee was nonetheless required to exercise its discretion judicially and reasonably. In doing so, it could only award the costs that were justified in light of the outcome of the overall proceedings as determined by the Hearing Committee. The "prefer

over" charge was not proven, but the Discipline Committee gave no effect to the appellant's success on this charge. This factor was relevant to the proper exercise of their discretionary authority under Rule 490 of the *Rules of the Law Society of Saskatchewan* (as it was prior to June 2010) and failure to consider it makes this part of the Discipline Committee's decision unreasonable.

[55] This brings me to the secondary issue of how the mixed result in this case should be quantified. As noted above, courts across Canada have adopted a variety of approaches when it comes to determining what the appropriate amount of costs in a mixed success situation should be. In Saskatchewan, *Huerto* took the approach of deducting the costs that would not have been incurred had the charges not proven not been laid. Stated another way, the Court said the member should pay costs in proportion to the allocation of expenses between the charges that resulted in convictions and those involving acquittals. Further, support for this approach can be found in *Brand v College of Physicians and Surgeons (Saskatchewan)* (1991), 101 Sask R 143 (QB) (on reassessment in the Court of Queen's Bench) and in the *Hills* decision from the Nova Scotia Court of Appeal (at para 66).

[56] While there might possibly be other reasonable ways to approach the question of costs in a mixed success scenario, I find merit to the approach taken in *Huerto*. It is both realistic and practical since it will take into account the vagaries of time and expense that go into proof of any given charge. Some charges will be easy to prosecute and take less time, while others are more complex and involve many hearing days. Understandably, some amount of evidence is required for this assessment to be properly made.

D. The judicial review application

[57] As mentioned, the appellant had applied to the Court of Queen's Bench to quash the formal complaint and in the alternative for other relief. He was wholly unsuccessful. But when it came to the matter of costs, Rothery J. denied the LSS's request, stating:

> Counsel for the Law Society seeks costs of this motion. While the Law Society has been successful in having the applications dismissed, I decline to order costs. The Law Society ought to have been more precise in providing its affidavit evidence to the court as to Schmidt's status under the Act. While Allen [the Law Society's investigating officer] was not required to share his preliminary report with the member, having done so may well

> have alleviated the member's concerns over Allen's potential bias against him. The Law Society cannot be rewarded for these deficiencies.
>
> (*Abrametz v Law Society of Saskatchewan* (16 March 2011) Prince Albert, QB 452/2010 (Sask) at 7)

[58] The governing principle in relation to how costs are dealt with in the courts is found in Rule 11-7(1) of the *Queen's Bench Rules of Court*, that is, costs of a proceeding must follow an event. This Rule has been interpreted to mean that the successful party is generally entitled to costs. This is a long standing principle firmly rooted in common law (Mark M. Orkin, *The Law of Costs*, loose-leaf (Rel 73, December 2017) 2d ed, vol 1 (Toronto: Thomson Reuters, 2017).

[59] Notwithstanding this general principle, courts retain discretion to not award costs, or for that matter, to award costs to the unsuccessful party (*Bourque v Clark*, 2016 SKQB 44). An order depriving a successful party of costs is exceptional (*Georgian Bluffs (Township) v Moyer*, 2012 ONCA 700 at para 21, 298 OAC 121; *Law of Costs* at para 202.1). The exercise of discretion departing from the general rule must be based on good reasons, such as "misconduct of the parties, miscarriage in the procedure or oppressive and vexatious conduct of the proceedings" (*Law of Costs* at para 205.2(2); see also *Hill v Arcola (School Division)*, 2002 SKQB 156, 218 Sask R 82).

[60] I make these broad points about how costs are generally treated in the courts to emphasize the fact that, in this case, the LSS had been *denied* costs in the Court of Queen's Bench in spite of the fact it was the *successful party* on the judicial review application and that costs typically accrue to the benefit of the successful party. Obviously, Rothery J. felt the LSS had not been as careful and upfront as it should have been in relation to its affidavit material, and had not taken reasonable steps to pursue settlement through disclosure of its preliminary report. Her comments were strongly worded and have a chastising effect.

[61] Returning to the impact of the Chambers judge's fiat in relation to this appeal, this Court must ask itself whether, in the exercise of its discretion, the Discipline Committee's decision was reasonable in light of what happened on the judicial review application. The Discipline Committee briefly turned its mind to this issue:

> 68. Mr. Bodnar also suggested that, as the Member had a right to pursue preliminary applications, including judicial review, he ought not to have to pay the Law Society costs in relation to those proceedings. This objection is also without merit. Section

> 55(2)(a)(v)(C) of the *Act* authorizes the Discipline Committee to require the Member to pay "all other costs related to the inquiry". The costs pertaining to the preliminary motions and judicial review are encompassed in this.

[62] As illustrated by the above paragraph, the Discipline Committee refused to give this argument any weight and declined to probe the rationale for the judge's order or its import for the Discipline Committee's consideration of costs. Instead, the Discipline Committee saw fit to reimburse the LSS for time spent on the judicial review file simply because it had the broad statutory authority to do so.

[63] Respectfully, in proceeding as it did, the Discipline Committee ignored a factor that was relevant to costs in this unique situation, failed to explain why it had no significance to its decision, and simply deferred to its broad legislative authority. The fact the *Act* permits recovery of all inquiry and hearing costs does not mean they must be ordered in each and every case. Costs are discretionary in nature, and should not be ordered on a full-indemnity basis by default. The unique circumstances called for the Discipline Committee to consider the rationale for the Chambers judge's decision and to explain, in a transparent manner, why ordering costs on a full-indemnity basis was justified in spite of that decision. It failed to do so and, as such, this part of the decision is unreasonable.

E. Was the costs award punitive in nature?

[64] Even though I have found the Discipline Committee's decision unreasonable for the reasons given above, for the sake of completeness I will go on to address the appellant's third argument, which pertains to the punitive nature of the costs award.

[65] The reasonableness standard of review in relation to costs permits consideration of whether the quantum of costs would be so excessive as to deny the member a fair opportunity to dispute the allegation or is so exorbitant that it will effectively bar the member from practice (see *Lambert v College of Physicians and Surgeons (Saskatchewan)* (1992), 100 Sask R 203 (CA), leave to appeal the SCC denied, 105 Sask R 80n [*Lambert*]; *Chuang*; *Provincial Dental Board of Nova Scotia v Creager*, 2005 NSCA 9, 230 NSR (2d) 48; and *Hills*). An exorbitant costs award can have a devastating impact on a member, particularly where, as here, the costs award is higher than the restitution order and the appellant will be suspended from practice and consequently

prevented from earning his livelihood for a period of time. This point was effectively made in *Brand* where this Court said the reasonableness of the exercise of discretion must be "expressly wide when the consequence is that someone is or can be deprived of his rights" (at para 22): when the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny (*K.C.* at para 94).

[66] Thus, in assessing whether a costs award is punitive in nature, the professional body should not lose sight of how the total costs award impacts the member in question. In this respect, disciplinary bodies must stand back and assess whether – on the information and evidence before them – the prospect of a significant costs award substantially impairs a member's ability to dispute a misconduct allegation or if it has the effect of delivering a crushing financial blow. There is some obvious flexibility in this assessment for the simple reason that what may be punitive to one member may not be to another. Given the need to assess the impact of a costs award on the member in question, it stands to reason that a member who wishes to advance this line of argument should adduce relevant evidence in the nature of financial or other pertinent information to support his or her position. Simply saying costs are punitive will typically not be enough (see *Fadelle*).

[67] In this case, the appellant placed no information or evidence before the Discipline Committee concerning how the proposed costs had a dampening effect on his ability to defend himself against the formal complaint. Interestingly, the facts in this case would suggest otherwise. The protracted nature of these proceedings (commencing in 2010 and concluding in 2017), coupled with the numerous preliminary applications *brought by the appellant*, significantly undercuts the force of any suggestion that costs impeded, or in any way detracted from, his ability to defend himself against the charges.

[68] Similarly, there was no evidence adduced by the appellant to show how the total amount of costs sought by legal counsel for the Conduct Investigation Committee would have impacted him personally or his ability to practice on a go-forward basis. In fact, not only was there no evidence on this point, but no submissions were even made to the Discipline Committee, apart from a generalized complaint about legal counsel's hourly rate. The appellant had to do more. He did not. For these reasons, I would not give effect to this particular ground of appeal.

IX. CONCLUSION ON COSTS

[69] For the reasons given, I find the Discipline Committee failed to give any weight to the mixed results of the *Hearing Decision* or the costs ruling made by Rothery J. on the judicial review application. Both are legitimate considerations that should have featured in the Discipline Committee's analysis of what was appropriate to the appellant's situation. Instead, the Discipline Committee simply fell back on its statutory authority and, in doing so, failed to take relevant factors into consideration. All of this led to a decision in which the treatment of legal fees was unreasonable. I would allow the appeal in this limited respect.

[70] In light of this decision, and with an eye to the approach endorsed by this Court for assessing costs where there has been mixed success, the matter of costs must necessarily be remitted to the Discipline Committee for reassessment.

[71] In conclusion, the appeal with respect to sentence is dismissed, with the proviso that the two-month suspension commence on a date to be set by the LSS (after consulting with legal counsel for the appellant), on the understanding that it shall commence no later than 90 days from the date of the appeal hearing. The appeal with respect to costs is allowed with respect to the $25,000 portion of the order that had been allocated for legal fees.

[72] Given the mixed success of the parties in this Court, there will be no order as to costs.

"Schwann J.A."
Schwann J.A.

I concur. "Richards C.J.S."
Richards C.J.S.

I concur. "Herauf J.A."
Herauf J.A.