THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2014 SKCA 56 Date: 2014-05-08

Between: Docket: CACV2278

Evatt Francis Anthony Merchant, Q.C.

Appellant

- and -

Law Society of Saskatchewan

Respondent

Coram:
Richards C.J.S., Lane and Ottenbreit JJ.A.

Counsel:
Gord Kuski, Q.C., and Holli Kuski, for the appellant
Timothy Huber, for the respondent

Appeal:

From:	Hearing Committee of the Law Society of Saskatchewan
Heard:	June 21, 2013
Disposition:	Appeal dismissed
Written Reasons:	May 8, 2014
By:	The Honourable Mr. Justice Ottenbreit
In Concurrence:	The Honourable Chief Justice Richards
	The Honourable Mr. Justice Lane

OTTENBREIT J.A.

I. INTRODUCTION

[1] This case concerns Evatt Francis Anthony Merchant ("Mr. Merchant"), a lawyer who has been disciplined by the Law Society of Saskatchewan pursuant to *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1 (the "*Act*") and the *Law Society Rules*. A Law Society of Saskatchewan Hearing Committee (the "HC") on December 12, 2011, determined he was guilty of conduct unbecoming in respect of a two count amended formal complaint that he did:

> (i) breach a Court Order of Mr. Justice Smith dated June 4, 2003 (the "Smith order") that required his firm to pay certain settlement proceeds due to his client, M.H., into court pending determination of a related family property issue;
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> Reference Chapter XIII of the Code of Professional Conduct
>
> (ii) counsel and/or assist his client, M.H., to act in defiance of a Court Order of Mr. Justice Smith dated June 4, 2003;
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> Reference Chapter XIII of the Code of Professional Conduct

("count 1" and "count 2").

[2] On June 1, 2012, the Discipline Committee of the Law Society (the "DC"), suspended Mr. Merchant for three months for each count to be served concurrently and ordered him to pay costs of $28,869.30. Mr. Merchant's suspension began on June 30, 2012. On July 11, 2012, after serving 12 days

suspension, Mr. Merchant filed a consent order with this Court to stay the penalties pending the disposition of this appeal. He appeals the decisions of both the HC and DC.

II. FACTS AND BACKGROUND

[3] Mr. Merchant is a partner in Merchant Law Group ("MLG") which represented M.H. both in relation to an Indian residential school claim brought on his behalf against the Federal Government and, at the same time, in a family law matter where the primary issue was his child support obligations.

[4] On June 4, 2003, Mr. Justice Smith made an order in connection with an application by M.H.'s former spouse, V.W., for the past and future child support obligations of M.H. as follows:

> IT IS HEREBY ORDERED that in the event the Respondent, M.H., receives a settlement in his law suit against the Government based on his claim of abuse suffered at the Indian Residential School, the first $50,000.00, after payment of reasonable solicitor fees and disbursements, shall be paid into Court so that the parties might speak to the distribution of same.
>
> IT IS HEREBY FURTHER ORDERED that the Respondent's counsel, the Merchant Law Group, or any new counsel shall pay the settlement proceeds into Court, in accordance with the foregoing.

[5] This order was brought to Mr. Merchant's attention by one of his associates handling the matter. Mr. Merchant was concerned and upset the order purported to grant relief against MLG when the firm had not been made a party to the application. M.H. appealed the Smith order to this Court. V.W. then brought a successful application to lift the stay of the Smith order caused by the filing of the appeal.

[6] Prior to arguing the appeal of the Smith order, Mr. Merchant had thought through a number of scenarios respecting the situation MLG found itself in. He believed the Smith order had a negative impact on the relationship of MLG with M.H. and it created a solicitor/client conflict between them. Mr. Merchant participated in drafting an appeal factum and spent hours of preparation for the appeal. He argued the appeal before this Court on March 16, 2004. His speaking notes indicated the following:

> i. If you do not overturn this order, we will recommend to our client that the payment from the government go by way of a cheque payable to him so that no money goes through our trust account other than the possible payment of fees;
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> ii. This kind of court order requires lawyers to work around an order of the court … ;
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> iii. We do not want lawyers to have to scheme on how to work around judges orders";
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> iv. Lawyers may be in jeopardy with the Law Society or any other governing institution which might even include criminal governance if it were somehow held that somehow the lawyers were part of a conspiracy not to follow the intention of the Learned Chambers Judge; and
>
> v. Will we be faulted for insisting that the cheque come payable to [M.H.] and not to our firm?

[7] On April 28, 2004, an associate of Mr. Merchant, who had primary carriage of the M.H. Indian residential school claim, settled it for $100,000.00. The Final Release signed by M.H. provided the funds would be forwarded to MLG in trust for M.H.

[8] On April 30, 2004, Mr. Merchant was advised of the settlement by his associate. He was also advised that no contingency fee agreement had been signed by M.H. and MLG relating to the claim; M.H. did not appear to understand that MLG had a right to be paid first from the settlement funds and

M.H. did not appear to understand his obligation under the Smith order since he wanted to use the funds to buy a car. The associate told Mr. Merchant he was “at a loss” on how to handle various problems with M.H. concerning the settlement.

[9] On May 1, 2004, Mr. Merchant took over all responsibility for the M.H. files. All aspects of the receipt and disbursal of settlement monies were managed and directed by him thereafter.

[10] On May 4, 2004, Mr. Merchant wrote a letter to the lawyer handling M.H.’s claim for the Federal Government and directed the settlement cheque be made payable to M.H. personally, contrary to the Final Release signed by M.H. It was not normal practice to have Indian residential school settlement cheques made payable to the client as opposed to the law firm, since having cheques made payable to the law firm ensured that the law firm would be paid.

[11] On May 7, 2004, Mr. Merchant, Mr. Deagle (one of his associates) and M.H. met. M.H. signed a retainer agreement providing for a 30% contingency fee to be paid to MLG. The agreement assigned a portion of the settlement funds to the payment of all outstanding accounts to MLG and gave a Power of Attorney to MLG to receive the settlement funds.

[12] Mr. Deagle testified that at the May 7, 2004, meeting Mr. Merchant discussed two options with M.H. The first was to have the cheque made payable to MLG. MLG would pay its fees and abide by the Smith order, but Mr. M.H. would not have any money. The second was to have the cheque made payable to M.H. who would then, with the assistance of MLG, pay his fees to MLG and then M.H. would have a court order to comply with and if he

didn't comply with it, the Court may find him in contempt. Mr. Merchant indicated that if a contempt application were made against M.H., he would defend him.

[13] On May 11, 2004, Mr. Merchant wrote a memo to his associate in connection with the M.H. Indian residential school file saying "when payment comes, or if anything happens on this matter I will handle it." On June 1, 2004, two settlement cheques totalling $100,000.00 were received from the Federal Government payable to M.H. Mr. Merchant's associate provided them to Mr. Merchant who kept them and held them in his desk drawer until July 14, 2004.

[14] M.H. asked Mr. Merchant for his settlement money on a number of occasions between June 1, 2004, and July 13, 2004, but Mr. Merchant refused. On July 13, 2004, M.H. appeared without an appointment at the MLG office wanting the release of his funds. He was angry about not getting his money. Mr. Merchant was initially reluctant to give him the funds. Mr. Merchant then spoke with office manager Donald Outerbridge, a non-lawyer, and firm lawyer, Gordon Neill, about what to do. They concluded that MLG had a duty to provide M.H. with the settlement cheques because they were his property. MLG needed to ensure it was paid its legal fees and MLG could not breach the Smith order. They determined these three objectives could be achieved by providing M.H. with a loan advance.

[15] Mr. Merchant provided M.H. with particulars of his past indebtedness to MLG for various matters and for the settlement of his residential school claim. The indebtedness totalled $54,428.12. He agreed to advance M.H. the net proceeds of his settlement as a loan.

[16] On July 13, 2004, MLG advanced a loan to M.H. in the amount of $45,571.88 from its general account, which was equal to the difference in what M.H. owed MLG and the $100,000.00. Mr. Merchant personally requested that the cheque be issued. Such an advance to a client was unusual for MLG. This loan was then included as a disbursement on M.H.'s legal account with MLG. The effect of the loan being included as a disbursement increased the legal account and indebtedness of M.H. to MLG to $100,000.00, which equalled the entire settlement amount.

[17] At the July 13, 2004, meeting M.H. had signed a specific authorization allowing MLG to cash the two settlement cheques. On July 14, 2004, MLG deposited the cheques into its trust account pursuant to the authorization. M.H. never signed the cheques. The $100,000.00 in trust was then applied to the $100,000.00 legal account thus paying the indebtedness of M.H. to MLG and the loan advance to him from the previous day.

[18] As a result of these dealings, no monies from the settlement of M.H.'s Indian residential school claim were ever paid into court by MLG pursuant to the Smith order. M.H. also never paid any money into court pursuant to the Smith order. Mr. Merchant took the view he was not bound by the Smith order having regard to the manner in which the settlement funds were released to M.H.

[19] On July 16, 2004, this Court issued its decision in the appeal Mr. Merchant had argued and set aside the second portion of the Smith order concerning MLG.

[20] On November 4, 2004, a complaint was lodged with the Law Society of Saskatchewan against Mr. Merchant by V.W. in relation to the non-payment of the settlement funds into court by MLG.

[21] In the spring of 2005, V.W. brought several contempt applications against M.H., which were successfully defended although the court observed that it was clear M.H. set out to and did frustrate the order of June 4, 2003, (2006 SKQB 50). In May 2005 after the second contempt motion, Mr. Merchant wrote to M.H. advising him to stop talking about the matter or he (M.H.) would end up in jail.

[22] As a result of the complaint of V.W., the Law Society struck a conduct investigation committee pursuant to s. 44(1) of the *Act*, which investigated the complaint. The committee filed its report on June 9, 2010. It concluded Mr. Merchant conducted himself in a manner unbecoming a lawyer, there was a reasonable prospect of conviction and requested a hearing committee be appointed to determine, *inter alia*, whether or not Mr. Merchant was guilty of conduct unbecoming a lawyer.

[23] On September 14, 2010, by way of an amended formal complaint, an HC was struck to hear the two counts that are the subject of this appeal and six other counts of conduct unbecoming unrelated to the first two arising out of circumstances which predate those in this appeal.

[24] The HC heard the six other counts in May 2011 followed by oral submissions immediately prior to the start of the hearing on the two counts on August 2 and 3, 2011. Mr. Merchant was ultimately found not guilty of conduct unbecoming on those six counts.

III. DECISIONS OF THE HEARING COMMITTEE AND DISCIPLINE COMMITTEE

A. Decision of the Hearing Committee

[25] In January of 2011, Mr. Merchant brought a preliminary application to stay proceedings on the eight count formal complaint on the following grounds:

1) inordinate and/or unfair delay in the investigation process; and

2) the charges were compounding and duplicative.

[26] The HC rendered its decision in writing on March 3, 2011. The HC considered three factors arising from the jurisprudence governing whether proceedings must be stayed due to delay and concluded the following:

> 13. Regarding evidentiary prejudice, we conclude that the Member has failed to prove that there is a lack of ability to recall on the part of the Member such that this lack of memory is of such magnitude that the Member's ability to defend himself is unfairly impaired. We agree that a certain amount of faded memory is common for most witnesses with the passage of time and we are mindful of the fact that memory can be revived and refreshed from the documentary evidence that remains available. The Member argues that the underlying facts and issues in the charges are straight forward and "simple" which presumably ameliorates some of the difficulty in preparing a defence and relying on recollection. We are also mindful that the charges relate to specific events that allegedly occurred on specific files handled by the Member and records and documentation exist to assist in his defence. There is no alleged spoliation of documentary evidence. Finally, all relevant witnesses are presumably alive and available, at least at this time.
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> 14. Regarding personal prejudice, we conclude that there is no causation shown between the Member's expressed problems and the delay that has occurred.
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> …
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> 16. Finally, considering the high threshold established in *Blencoe*, regarding the overall contextual analysis and in striking a balance between the interests of the Member and the Law Society, we cannot conclude that there is proven substantial prejudice to the Member that outweighs the Law Society's duty to protect the

> public interest, based on the material in support of the application. We agree that a substantial amount of time has passed since the underlying initial facts of the charges occurred. However, given that we are not convinced that the Member is substantially prejudiced in his defence, to the point of oppression or otherwise, or that the cause of the delay is attributable solely or in the main to the Law Society, it would be contrary to the public interest and the other applicable principles to stay proceedings. We also decline to consider whether some of the charges are more susceptible to the delay argument than others, based on recollection or other factors, as this was not specifically argued and is further not appropriately open for determination by us at this point.

Respecting the duplication of charges, the HC concluded:

> 21. The Member urges us to review the eight counts in the amended formal complaint as a preliminary matter and determine whether there is a risk of multiple convictions for the same conduct. This is asserted even though there has been no evidence called on any of the counts and obviously no finding of guilt on any of the counts. We are of the view that the application of the "Kienapple" principles can be, and should be in this case, dealt with at the time of the consideration of the evidence and the counts on their merits. The Member's interests in this regard are protected. Counsel for the Investigation Committee has conceded same and has indicated that some of the counts are in the alternative in any event.

The HC proceeded on the complaint.

[27] The hearing on count 1 and count 2 took place in August 2011. The HC, after deliberation, made the following determinations by way of a written decision dated December 12, 2011:

> 1. The Smith order was in full force and effect up to July 16, 2004.
>
> 2. Between April 30, 2004, and July 14, 2004, Mr. Merchant proceeded purposefully with full knowledge of what he was doing and was the directing mind and will of the events that transpired during that two and a half month period.

3. The June 4, 2003 court order was brought to the attention of Mr. Merchant shortly after it was issued. He did not like the Smith order or its implications for either MLG or M.H.

4. On finding out the residential school claim of M.H. was settled, Mr. Merchant assumed complete control of M.H.'s files and embarked on a journey with M.H. that resulted in the Smith order being disobeyed.

5. On May 4, 2004, in an effort to avoid a boldfaced breach of the Smith order, Mr. Merchant directed the Department of Justice to make M.H.'s settlement cheque payable to M.H. personally. The change of payee Mr. Merchant requested was an unusual step. But for his intervention, the cheque would have been issued to MLG in trust for M.H. In that event, Mr. Merchant would have been left no option but to comply with the Smith order.

6. Mr. Merchant's awareness of the risks associated with having the settlement cheque(s) made payable to M.H., as opposed to MLG, was recognized by his physical possession of the settlement cheques and supplemented by obtaining a Power of Attorney (contained in the Fee Agreement) and Authorization.

7. Mr. Merchant had legal control over the settlement cheques and deposited them into the MLG trust account.

8. The advance made to M.H. by MLG on July 13, 2004, was neither an out of pocket expense nor a disbursement within the meaning of the Smith order and the contingency agreement signed by M.H. It had no legitimate business purpose.

9. The *actus reus* of the offence occurred on July 14, 2004, when the settlement cheques were deposited into the MLG trust account and Mr. Merchant unlawfully diverted a portion of those funds to repay the July 13, 2004, advance. By doing this, Mr. Merchant willfully breached the Smith order.

10. M.H.'s failure to pay the MLG loan proceeds into Court resulted in Mr. Merchant breaching the Smith order as Mr. Merchant chose to repay the July 13, 2004, advance MLG had made to M.H. rather than ensuring that the terms of the Smith order were satisfied by the settlement proceeds.

11. Mr. Merchant abandoned his duty as an officer of the court and breached Chapter XIII of the Code of Professional Conduct by paying his law firm rather than paying the net settlement proceeds into court as required by the order.

12. Mr. Merchant assisted his client to act in defiance of the Smith order by directing that the settlement cheque be issued contrary to the Release; he held the settlement cheques in his drawer for six weeks and he concocted a scheme to side step the Smith order.

13. Mr. Merchant believed that M.H. had breached the Smith order as he advised him that he could go to jail if he kept talking.

14. Mr. Merchant formulated and eventually executed a plan that was intended to thwart the Smith order and his actions were carried out without regard to the requirements of acceptable practice and acted in a surreptitious manner without regard for the Smith order.

[28] The HC concluded:

> 95. With the benefit of reviewing all of the relevant documents and hearing the evidence we make the following observations:
>
> (a) The Member chose to let his client remain in harm's way on the two contempt applications. If he had disclosed the fact that the funds paid to M.H. were an advance from MLG and that he had applied the settlement funds in repayment of the MLG loan, then there would have been no basis, in fact, for the contempt applications to have proceeded and there would have been no reason to tell his client that he could go to jail if he talked about this matter to anyone. Disclosure of this nature would have likely resulted in the contempt applications having been brought against the Member.
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> (b) The Member's unlawful use of the settlement funds certainly had the potential to cause actual harm to V.W. and her children. If the Smith Order had been abided by, there could have been a timely or orderly disposition of the child support dispute between V.W. and M.H.
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> (c) There was no legitimate reason for the Member to retain the settlement cheques in his desk for 6 weeks. The Smith Order should have been complied with when the cheques were received. The 6 week delay in the cashing of the settlement cheques was an intentional act on the part of the Member and this delay served no useful purpose other than to delay observance and the compliance with the Smith Order. The method and manner of breach of the Smith Order and the ultimate decision as to who would breach the order and how were the only matters that the Member needed to decide during this 6 week waiting period. The Member's gamesmanship with his client, the Court and V.W. is unjustifiable.

Mr. Merchant was found guilty on both counts of the complaint. In due course, the DC convened to determine sentence.

B. Decision of the Discipline Committee

[29] The DC, with the concurrence of counsel for Mr. Merchant and the Law Society, approached the issue of discipline by looking at sentences meted out in Saskatchewan and other provinces.

[30] After reviewing the relevant jurisprudence, the DC determined the dispositions handed down for breaches of court orders ranged from reprimands and fines to suspensions of two months and the only Saskatchewan case dealing with a breach of a court order was *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 W.W.R. 478 (also referred to as the "BP matter"), where a two week suspension was affirmed.

[31] The DC determined Mr. Merchant's convictions for conduct unbecoming from 1986 and 1989 were too distant in time to be given any significant weight in the sentencing process. However, it gave some weight to Mr. Merchant's conviction in 2000, although the conviction was significantly different and less serious than the conduct they were considering. The DC considered aggravating and mitigating factors at play. The mitigating factors that it accepted were as follows:

1) there was a lengthy delay;

2) Mr. Merchant was cooperative with the Law Society investigation to the point where he felt his duty of confidentiality prevented him from providing information;

3) Mr. Merchant exhorted his client on various occasions to pay his money into court both before and after funds were received by the client; and

4) Mr. Merchant is a lawyer of some acknowledgement and status and has engaged in considerable service to both the legal and broader community through his philanthropic efforts.

[32] Mr. Merchant proffered the following factors, which the DC determined to be inappropriate as mitigating factors for the reasons described:

1) Mr. Merchant's conduct was not deliberate, dishonest or intended to deceive and he held a sincere belief his actions were proper (this was inconsistent with the finding of facts by the HC);

2) the BP matter and this matter were not adjudicated at the same time due to delays thereby depriving him of an argument that the sentencing should be concurrent (the BP matter and this one were not part of the same transaction, and had no nexus);

3) the Law Society in the manner in which it published the findings of the HC treated Mr. Merchant unfairly (the Law Society in acting as it did was preserving solicitor/client privilege while at the same time ensuring the public was properly informed); and

4) Mr. Merchant did not act alone (the HC found despite this, he was the directing mind and will of the events).

[33] The DC considered the following factors based on the findings of the HC to be aggravating:

1) the breach of the Smith order was carried out in a calculated manner;

2) the breach had the potential to irreversibly and unfairly dispose of money to be used to benefit someone claiming arrears of child support; and

> 3) Mr. Merchant chose to let his client remain in harm's way on two contempt applications instead of revealing the true nature of the transactions that had occurred and had Mr. Merchant made the disclosure contempt applications would likely have been brought only against him.

[34] The DC also observed that some of the mitigating factors in cases involving similar conduct, such as a lack of a discipline record, acknowledgment of misconduct by the lawyer, and a demonstration of remorse were absent in the case of Mr. Merchant.

[35] The DC stated at para. 32:

> 32. The primary consideration in all Law Society discipline proceedings is the protection of the public. Closely related to this consideration is the need to maintain the public's confidence in the integrity of the profession and the ability of the profession to govern its own members. In order to restore public confidence the penalty imposed must reflect the unique constellation of aggravating and mitigating circumstances presented by this case.

[36] The DC concluded:

> 33. Given the range of penalty articulated in the publicly available cases involving lawyers breaching court orders or counselling clients to breach court orders and appropriately weighing the aggravating and mitigating factors in this case, the Committee orders that the Member be suspended for a period of three months in relation to count l and three months in relation to count 2. Because both counts are properly characterized as being part of the same transaction, the sentences are ordered to run concurrently to one another. In addition, it is ordered that the Member pay the costs of this proceeding in the amount of $28,869.30 to the Law Society of Saskatchewan by September 30, 2012 or such further period as may be allowed by the Chair of Discipline. Finally, it is ordered that the Member's suspension shall commence on a date determined by the Chair of Discipline after hearing from counsel for the Member and counsel for the Investigation Committee.

IV. STANDARD OF REVIEW

[37] The source of appeal and the Court's jurisdiction in this appeal is found in s. 56 of the *Act* as follows:

> 56(1) Where a complaint against a member is determined by the hearing committee to be well founded, the member may appeal the decision of the hearing committee or a penalty assessed or requirement imposed by the hearing committee or the discipline 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:
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> (a) filing a notice of appeal with the registrar of the Court of Appeal; and
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> (b) serving the executive director with a copy of the notice of appeal.
>
> …
>
> (5) On hearing an appeal pursuant to this section, the Court of Appeal may make any order that it considers appropriate.

[38] The standard of review to be applied to decisions of the HC respecting misconduct and DC respecting penalty is common ground and has been authoritatively established as reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *McLean v. Law Society of Saskatchewan*, 2012 SKCA 7, 347 D.L.R. (4th) 414, leave to appeal to Supreme Court of Canada refused, [2012] S.C.C.A. No. 130; *Oledzki v. Law Society of Saskatchewan*, 2010 SKCA 120, 362 Sask. R. 86; *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 W.W.R. 478; *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81, [2010] 1 W.W.R. 678; *Merchant v. Law Society of Saskatchewan*, 2002 SKCA 60, 213 D.L.R. (4th) 457).

[39] The Supreme Court described the standard of reasonableness in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Binnie J., for the majority, wrote (at para. 59):

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[40] As explained by Iacobucci J. at para. 55 in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, the standard of reasonableness calls for "a somewhat probing examination":

> [W]hether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole. (para. 56)

[41] In *Merchant* (2009), *supra*, this Court also made the following observation:

> 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 S.C.R. 869 at 880] where he stated:
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> > 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.

A. Analysis

[42] Mr. Merchant's grounds of appeal and arguments made in support are numerous and can be fairly stated as set forth below.

1. Was the decision of the HC unreasonable because it failed to provide sufficient reasons to support its finding of conduct unbecoming?

[43] The governing law respecting this issue has been set forth in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, which confirmed the principle enunciated in *Dunsmuir* that a court reviewing the reasons of an administrative tribunal must determine whether those reasons demonstrate "justification, transparency and intelligibility" (para. 47).

[44] In *Newfoundland Nurses'*, the Court explained the following regarding the concept of reasonableness and sufficiency of reasons:

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision." In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective [emphasis added].
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

> See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne s. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

[45] The presence of a defect or defects in the tribunal's decision is not necessarily fatal, so long as the reasons as a whole read together with the outcome demonstrates the result is reasonable.

> [13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility." To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions (para. 47)."
>
> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes [emphasis added] (para. 47)."
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[46] A decision maker is not therefore required to make an explicit finding on each constituent element of its chain of reasoning, however subordinate, leading to its final conclusion. Reasons do not have to be perfect, nor do they necessarily need to be comprehensive (*Newfoundland Nurses'* at para. 16–18).

[47] More recently, our Court has also commented on the reasonableness of a decision *vis-à-vis* the sufficiency of reasons in *Mellor v. Saskatchewan (Workers' Compensation Board)*, 2012 SKCA 10, [2012] 6 W.W.R. 669:

> 33 In *Canada (Director of Investigation & Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56, the Supreme Court of Canada described an unreasonable decision as "one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination." The Court suggested that the reviewing court must look to see whether any reasons support the decision. Building on this description from *Southam*, in *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, Iacobucci J., speaking for the Court, asked and answered the question before every court sitting in a judicial review of a tribunal decision on a standard of reasonableness:
>
> > [54] How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.
> >
> > [55] A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79) [emphasis added].
> >
> > [56] This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole [emphasis added].

> See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 31; and *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727 at para. 48.

[48] Mr. Merchant makes several specific arguments under this ground. They primarily relate to factual conclusions of the HC. He argues the H.C. in its reasons fails to explain the evidentiary basis for certain conclusions or alternatively the basis for certain conclusions are not satisfactorily explained. He cites *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, 317 D.L.R. (4th) 419, and submits similar to *Neinstein* where credibility was at issue, the HC failed to make any credibility findings in support of its factual conclusions with respect to him and other witnesses. In that case, the tribunal had made assertions regarding the credibility of witnesses without reasons as to why it did so. After reviewing *Neinstein*, I conclude it is inapplicable to this case.

[49] In this case, there were seven witnesses who gave *viva voce* evidence before the HC. The testimony of Mr. Merchant respecting his actions, behaviour and statements and others testifying on his behalf was virtually uncontroverted and was accepted by the HC. Unlike *Neinstein*, there was no substantial conflict between witnesses as to what happened. Accordingly, the HC did not need to make any credibility findings respecting contradictory evidence in this case. The HC used the facts as explained by Mr. Merchant, which were uncontroverted, to determine whether his actions rose to the level of conduct unbecoming a solicitor.

[50] Mr. Merchant secondly argues that the conclusion of the HC that he "proceeded purposefully with full knowledge of what he was doing" was not explained. The HC explained this statement in the last sentence of para. 73 of its decision "[h]e was the directing mind and will of the events that transpired during this 2 ½ month period." The conclusion of the HC is amply supported by its recitation of the evidence as a whole and specifically, by the evidence of Mr. Merchant who admitted the reasons for the financial transactions proceeding as they did.

[51] Mr. Merchant next argues the HC failed to explain the difference between its description of the funds as "loan proceeds" versus "judgment proceeds" and its determination the two were not synonymous and that M.H. was free to spend the loan in whatever manner he chose.

[52] The reasons of the HC leave no doubt the two sums of money are of a different character for the purposes of the disciplinary proceedings. This is supported by uncontradicted evidence that, on July 13, 2004, M.H. had in his hands $45,571.88 from the firm account of MLG a day prior to MLG depositing what was the settlement proceeds reflected in the cheque from the Government. Mr. Merchant, at transcript T178(b), admits this created an indebtedness by M.H. to MLG. In my view, the HC has adequately explained the basis for its distinction and that distinction is reasonably based on the whole of the evidence. Moreover, the HC explains the creation of this indebtedness did not reduce the obligation of either MLG or M.H. to pay the money into court or the culpability of Mr. Merchant.

[53] Mr. Merchant argues the HC's key finding he was the directing mind and will of the breach of the Smith order is unsupported by its reasons. This argument appears to be based on the illogic that, because Mr. Merchant sought advice from Mr. Neill and Mr. Outerbridge, he cannot have been the directing mind. Contrary to Mr. Merchant's arguments to the effect that the HC ignored the fact Mr. Neill and Mr. Outerbridge had input into the decision, the HC was clearly aware of what transpired in this regard because it commented both had given Mr. Merchant their blessing for the strategy regarding the situation. The evidence relied on by the HC inexorably leads to the conclusion Mr. Merchant was the directing mind.

[54] The reasons of the HC clearly set out that Mr. Merchant was the responsible lawyer on the file at the crucial times. It may be fairly said Mr. Merchant, some four months before ever meeting with Mr. Neill and Mr. Outerbridge, explained to this Court in the course of his oral argument in the appeal of the Smith order what might potentially happen if the appeal were not allowed. At the beginning of May 2004, two and a half months before meeting with Mr. Neill and Mr. Outerbridge, Mr. Merchant took steps to do exactly what he submitted to this Court might have to be done if this Court did not set aside the Smith order in respect of MLG. Shortly thereafter he took complete control of M.H.'s settlement from his associate. It was he who insisted the Government cheque be made payable to M.H. and it was he who requisitioned the July 13, 2004 funds given to M.H. This is overwhelming evidence he was the directing mind and will behind how events transpired and it is reflected in the reasons of the HC.

[55] Mr. Merchant also submits the HC failed to explain its remarks on a number of matters, including the risk Mr. Merchant took in having the Government cheque made payable to M.H., the surreptitious actions of M.H. with regard to the order, Mr. Merchant's assertion his duty of loyalty to his client rectified his actions, reference to Mr. Merchant choosing to let his client remain in harm's way, and Mr. Merchant's protection of his own financial interest. With respect to all of these issues, the HC did not need to expound at length or at all because its comments with respect to these issues are understandable within the context of the decision as a whole. The HC's conclusions respecting these matters are reasonable based on the evidence. I cannot say that any *lacunae* in the reasons respecting these issues would result in the reasons of the HC being insufficient on the basis of the governing principles set forth in the foregoing jurisprudence.

[56] A reading of the entire reasons of the HC make it clear its reasons are sufficient within the principles enunciated in the jurisprudence mentioned earlier. Paragraphs 73–100 of the HC's decision set out its reasons for finding Mr. Merchant guilty of both counts. With respect to count 1, paras. 74–83 explain the actions of Mr. Merchant in relation to that count. Based on these paragraphs, the HC came to the conclusion that "[b]y repaying the July 13, 2004 advance to M.H. with settlement funds that were processed through the MLG trust account on July 14, 2004, the Member wilfully breached the Smith Order."

[57] With respect to count 2, para. 87, read with the facts outlined in paras. 74–83, demonstrates how the HC came to its decision. The HC found Mr. Merchant had concocted a scheme in which his client would be paid "loan"

money which in fact was equal to the settlement money that was within the scope of the Smith order.

[58] The written reasons of the HC, read as a whole, demonstrate how the HC came to its decision and support the reasonableness of its conclusions. This ground of appeal fails.

2. Did the HC unreasonably classify the offences as strict liability?

[59] Mr. Merchant argues the offences as they are worded in the complaint require *mens rea* and that this element has not been established. The Law Society argues the offence is a strict liability offence and *mens rea* is not required.

[60] I begin by observing that the Benchers of the Law Society, through their power to enact rules to regulate the professional conduct of lawyers, have the legal responsibility to determine what constitutes the offence of conduct unbecoming (s. 10(c) and s. 10(o) of the *Act*).

[61] The principles which inform a determination as to the nature of any such offence have been set forth by Wilkinson J.A. in *Merchant* (2009):

> 61 The definition of "conduct unbecoming" in s. 2(1)(d) of *The Legal Profession Act, 1990*, is reproduced for ease of reference:
>
> > (d) "conduct unbecoming" means any act or conduct, whether or not disgraceful or dishonourable, that:
> >
> > (i) is inimical to the best interests of the public or the members; or
> >
> > (ii) tends to harm the standing of the legal profession generally;
> >
> > and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);

> 62 The definition in the *Act* is expansive, and conduct unbecoming may be established through intentional conduct, negligent conduct or total insensibility to the requirements of acceptable practice (as in professional incompetence). In the last two instances, where practitioners have been careless or merely incapable in some aspect, moral turpitude is not, typically speaking, a feature of the unacceptable behaviour. The section provides that the conduct in question need not be disgraceful or dishonourable to constitute conduct unbecoming. It is abundantly clear that moral turpitude is no longer an active requirement.

[62] This definition of conduct unbecoming is necessarily broad and can encompass a wide range of potentially unethical conduct. In short, the degree of fault required to be established in any case will vary depending on the particulars of the allegation and its context.

[63] In *Merchant* (2009), this Court also explained the nature of a strict liability offence:

> 50 Regulatory offences that affect matters of public interest or concern fall into the intermediate category. These frequently involve controlled, restricted, or regulated spheres of activity rather than conduct prohibited on pain of criminal sanction. In strict liability offences, the onus is on the accused to establish on a balance of probabilities that he took all reasonable steps to avoid committing the offence. Or, as more recently articulated by Goudge J.A., speaking for the Ontario Court of Appeal, what must be established is that the "accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system." [*R. v. Petro-Canada* (2003), 222 D.L.R. (4th) 601 at para. 15 (O.C.A.)]
>
> 51 The rationale behind the creation of a third category of offences is that in regulatory situations, it is the defendant who has the relevant knowledge regarding the measures taken to avoid the particular breach in question. It was deemed proper to expect that the defendant would come forward with the evidence of due diligence. Thus, while the prosecution was required to prove beyond a reasonable doubt that the prohibited act has been committed, the defendant had to establish, on a balance of probabilities, that he or she had been duly diligent, taking all reasonable care to avoid offending. Alternatively, the defendant had only to establish the requisite reasonable belief in a state of facts that, if true, would render the act an innocent one.

> 52 Therefore, a strict liability offence requires, at minimum, a fault element amounting to negligence before misconduct will be found. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent in taking steps which a reasonable person would take. [As articulated by Gonthier J. in *R. v. Pontes*, [1995] 3 S.C.R. 44 (in dissent) at para. 79]
>
> 53 Accordingly, while lack of the requisite knowledge or intent constitutes a defence to a full *mens rea* offence, it is not a defence in law to a strict liability offence. Required instead is evidence that establishes on a balance of probabilities that all reasonable steps were taken by the defendant to prevent the commission of the prohibited act.

[64] The presumption that regulatory type offences are strict liability offences has recently been reaffirmed in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, 451 N.R. 113:

> 31 A court inquiring into the nature of an offence must interpret the relevant statutory provision. In doing so, it must take account of the presumption established by this Court that regulatory offences are generally strict liability offences. In *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 16, LeBel J. explained this as follows, citing the presumption of statutory interpretation articulated by this Court in *Sault Ste. Marie*:
>
> > Classifying the offence in one of the three categories now recognized in the case law thus becomes a question of statutory interpretation. Dickson J. noted that regulatory or public welfare offences usually fall into the category of strict liability offences rather than that of *mens rea* offences. As a general rule, in accordance with the common law rule that criminal liability ordinarily presupposes the existence of fault, they are presumed to belong to the intermediate category:
> >
> > Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. [p. 1326]

[65] Apart from this presumption, there is also a notion in some jurisprudence that if a disciplinary tribunal is given the power to determine what type of actions constitute conduct unbecoming, then it must also be able

to determine what, if any, mental element is required to find a person guilty of the charge. This reasoning is best summarized by the Newfoundland Supreme Court in *Dunne v. Law Society of Newfoundland* (2000), 191 Nfld. & P.E.I.R. 129. In explaining that professional misconduct could be a strict liability offence, Rowe J. (as he then was) wrote:

> 30 In my view, the appropriate standard should be akin to strict liability, bearing in mind that professional disciplinary matters differ from criminal or quasi-criminal offences and that Benchers have authority to define professional misconduct within the relevant constitutional, statutory and common law framework.

[66] This line of thinking was also supported by the Federal Court of Canada in *Laperrière v. Macleod*, 2010 FC 97, 362 F.T.R. 189. In explaining the unique nature of professional misconduct claims, the Court stated:

> 90 The *sui generis* nature of professional misconduct proceedings has been recognized by the Federal Court of Appeal within the context of proceedings involving bankruptcy trustees in *Canada (Attorney General) v. Roy*, 2007 FCA 410 at paragraph 11, referring to the decision of the Quebec Court of Appeal in *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822. Consequently, principles of criminal law do not necessarily apply to professional conduct proceedings. However, though professional conduct proceedings are *sui generis*, "there are similarities and overlapping elements in terms of the fault required for a finding of guilt" *Canada (Attorney General) v. Roy, supra*, at paragraph 11).
>
> 91 A *sui generis* approach to professional misconduct cases appears to be appropriate in determining if a particular alleged professional misconduct is subject or not to a defence of due diligence or reasonable care. The availability of such a defence in a particular case will depend on the nature of the alleged misconduct and on the terms of the legislative or regulatory provisions which are claimed to have been breached.

[67] Law societies are statutorily given the power to discipline members and therefore to frame the wording of the charge describing the alleged misconduct. The foregoing reasoning in *Dunne* and *Laperrière*, with which I agree, acknowledges that speaking generally law societies implicitly have the discretion to determine the requisite mental element needed to prove that

misconduct, provided that such discretion is exercised appropriately based on the relevant legislative and regulatory provisions in play.

[68] The charges in this case, unlike in *Merchant* (2009), are not cast as *mens rea* offences. In my view, the Law Society properly framed each count as a strict liability offence. Nothing in the *Act* or the Code of Professional Conduct imparts any type of mental requirement into the offence. There is no express or necessarily implicit reference to any deliberate action or any other conduct that would make the *mens rea* fault standard applicable. The wording of the offences in this case does not, therefore, have the specificity of action present in *Merchant* (2009). As observed in *Merchant* (2009), conduct unbecoming can be established through negligence or total insensibility to the requirements of acceptable practice. Moral turpitude is not required.

[69] In this case, the Law Society did not insert any words that would indicate the conduct unbecoming charge hinged on a finding of intention. Examples of such words are “intentionally” or “knowingly.” The charges in this case merely say “did” (breach) and “did” (counsel and/or assist). “Did” merely refers to the action of doing something and does not, in itself, impart any type of mental element. One of the definitions that the *Oxford English Dictionary* provides for the word is “perform, effect, engage in.” The word “did” alone does not impart any *mens rea* into the charge.

[70] That said, the absence of such words is not determinative if the nature of the charge and the circumstances as a whole nevertheless lead to the conclusion *mens rea* is required. Whether such is the case must be looked at reasonably. In this case, given the nature of the charge, the governing Codes

of Conduct and the circumstances as a whole, it is reasonable the offences are strict liability ones. It is not inherent in a charge of conduct unbecoming by breaching a court order that moral turpitude is required. One can conceive of the charge being established by evidence showing the action required by the court order was not performed and evidence the cause was negligence or inadvertence.

[71] The sections of the Code of Professional Conduct applicable to count 1 and count 2 read as follows:

> Chapter XIII
> The lawyer should encourage public respect for and try to improve the administration of justice.
>
> Chapter I
> The lawyer shall discharge with Integrity all duties owed to the clients, the court, other members of the profession and the public.

[72] The Law Society is justified in holding lawyers to a strict liability standard in this context. A lawyer is an officer of the court and owes a duty thereto. Compliance with court orders is a fundamental aspect of a lawyer's obligations to the court and the rule of law. Strict adherence to the terms of a court order is among the most important duties and responsibilities of a lawyer. Breaching a court order is harmful to the public and the profession, regardless of the subjective state of mind of the lawyer. It would be strange indeed if once having found on an objective basis a lawyer's actions have thwarted the spirit and letter of a court order that such conduct could be absolved by the lawyer's belief he did not thwart the order or had no intention to do so. Despite the harsh penalties that can be associated with conduct unbecoming charges, strict liability standards ensure the public is receiving competent and diligent legal services and respect for the administration of justice is preserved. This ground of appeal fails.

3. Was the decision of the HC unreasonable because it failed to recognize that Mr. Merchant took all reasonable steps to avoid the commission of the offence or had a reasonable belief in a set of facts which, if true, rendered his conduct innocent?

[73] Strict liability offences admit a due diligence defence. In *La Sourveraine*, *supra*, the Court stated:

> 56 The due diligence defence is available if the defendant reasonably believed in a mistaken set of facts that, if true, would have rendered his or her act or omission innocent. A defendant can also avoid liability by showing that he or she took all reasonable steps to avoid the particular event (*Sault Ste. Marie*, at p. 1326). The defence of due diligence is based on an objective standard: it requires consideration of what a reasonable person would have done in similar circumstances.

[74] In relation to count 1, Mr. Merchant argues the mistaken set of facts which if true would render his acts innocent is that he had a reasonable belief he was not breaching the Smith order. This is not a case of mistaken facts but of a mistaken subjective conclusion about whether the offence was being committed. What Mr. Merchant subjectively believed about the commission of the offence is not at issue. The argument fails on that basis alone.

[75] However, in any event, the evidence shows Mr. Merchant did not have an objectively reasonable belief he was not breaching the Smith order nor did he take reasonable steps to avoid the breach of the Smith order. A number of facts lead to this conclusion.

[76] Mr. Merchant was clearly aware during his submissions before this Court in early 2004 of potential regulatory or even criminal jeopardy for failure to follow a court order. Mr. Merchant also stated (T153b–154b) “this set of unfavourable circumstances delivered to me had the law firm in

jeopardy because the law firm was required to -- was a part of that court order." At that time, his comments showed he had considered not only MLG avoiding paying the Smith order but also specific ways of accomplishing that.

[77] The way this was accomplished was by his request to have the settlement cheque payable in the name of M.H., which "was designed to remove the firm from the consequences of the Smith order … the cheques will be payable to him and the firm will not ever be in control of the settlement proceeds" (T187b).

[78] Mr. Outerbridge testified that he recalled Mr. Merchant in July of 2004 explaining the firm was under some form of court order (T142b). Mr. Outerbridge indicated that as a result of those discussions, the decision was made to execute a plan to avoid payment. The plan developed with Mr. Outerbridge and Mr. Neill was to create an indebtedness by M.H. to MLG on July 13, 2004.

[79] While the HC did not explicitly reference what Mr. Merchant could have reasonably believed, it is implicit in their judgment he could not have reasonably believed he was not breaching the Smith order. Based on the evidence and its line of reasoning, this appears to be a reasonable conclusion by the HC.

[80] With respect to count 2, Mr. Merchant argues he exercised due diligence and took all reasonable steps to avoid commission of the prohibited act. It is clear from the evidence that Mr. Merchant did not counsel M.H. to defy the Smith order. However, the charge reads "counsel and/or assist." As early as April 30, 2004, Mr. Deagle informed Mr. Merchant that M.H. was already

planning how to spend the settlement money and that he did not seem to understand that MLG had to take its fees first and that there was a court order to pay $50,000. Mr. Merchant admitted that he did not think it was probable M.H. would, after receiving his money, pay it into court (T187b–T188b). It should have been clear to Mr. Merchant, prior to disbursing the loan proceeds to M.H., that M.H. intended to spend the money rather than pay it to court, despite Mr. Merchant's reminders to M.H. he had a legal obligation to do so. In this context, it is difficult to understand how the scheme by Mr. Merchant to avoid control of the funds and achieve the disbursal of loan proceeds to M.H. could not but have assisted M.H. to defy the order. The whole *raison d'etre* of the Smith order binding MLG was that M.H. might not be inclined to comply with the Smith order on his own. The purpose of the order was to tie MLG's compliance with the order to M.H.'s compliance. The obligation of MLG and M.H. was co-equal.

[81] The evidence before the HC disclosed that M.H. was counselled he had an obligation to pay, while at the same time a scheme was put in place and executed which assisted M.H. to flout his obligations to do so. With respect to count 2, the Committee clearly found that "[t]he Member directed that the settlement cheque be issued contrary to the Release; he held the settlement cheques in his drawer for six weeks and he concocted a scheme to side step the Smith order. Obviously the Member believed M.H. had breached the Smith order as he advised him that he could go to jail if he kept talking." This is a finding by the HC that Mr. Merchant took active steps to assist M.H. to defy the Smith order. This ground of appeal fails.

4. Was the decision of the HC unreasonable because it failed to accept that the Code of Conduct and the common law duty of loyalty to a client is a complete answer to the counts?

[82] Mr. Merchant argues he acted in accordance with the Code of Professional Conduct and his common law duty of loyalty to M.H. and the HC unreasonably dismissed this argument. He argues that if MLG had paid M.H.'s settlement proceeds into court it would have violated its duty to "serve no master other than its client" and it would have been acting contrary to their client's instructions.

[83] It has been a longstanding principle that lawyers have duty of loyalty to their clients and a duty to put the clients' interests above their own or the interests of third parties (*R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631). However, the present circumstances are not truly a case of conflict.

[84] Mr. Merchant's argument is faulty in two respects. First, the Smith order did not create a conflict of legal obligations between MLG and its client. It may be fairly said the Smith order stated that whoever was paid the settlement cheques had to remit the first $50,000 into court. The fact is the Smith order aligned the legal obligations of MLG to pay the money into court with those of M.H. In this sense, their interests were not legally in conflict. In this context, any instructions by M.H. to MLG to not pay the monies into court were instructions to act contrary to the Smith order.

[85] Second, when a client asks a lawyer to breach a court order, that lawyer should withdraw from serving that client. The Law Society's Code of Professional Conduct in the commentary to Chapter XII states "[i]n some

circumstances, the lawyer will be under a duty to withdraw. … Examples are a) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions." Any "conflict" is to be resolved in favour of the court order.

[86] Mr. Merchant had a duty to obey the law such as it was. That duty cannot be supplanted by perceived ethical duties to the client. If client instructions conflict with a lawyer's ethical duties or duties to the court, the lawyer must withdraw. Mr. Merchant did not do so in this case.

[87] If a lawyer's duty to his or her client was completely unfettered, the administration of justice would fail. The Chapter XIII commentary confirms that "the lawyer must not subvert the law by counselling or assisting in activities that are in defiance of it and must do nothing to lessen the respect and confidence of the public in the legal system of which the lawyer is a part." Mr. Merchant's argument that the Smith order required MLG and its lawyers to violate their obligations of integrity and their duty of loyalty and solicitor/client privilege must fail.

[88] It was reasonable for the HC to conclude that to the extent Mr. Merchant felt it necessary to embark on a scheme to avoid paying the Smith order, because of a misperceived duty of loyalty to follow the client's instruction, he made a "patently bad decision." The HC made no error in this respect.

5. Did the HC err by determining that circumventing and breaching a court order are synonymous?

[89] This argument relies on nothing more than semantics and is devoid of merit. Whether it is described as circumventing, working around, sidestepping, thwarting or some other gerund, the HC determined that Mr. Merchant's scheme to remove the firm from the consequences of the Smith order breached an order to pay monies into court. The fact the complaints against Mr. Merchant use only the word breach matters not. On all the evidence, the conclusion the order was breached is reasonable no matter how the scheme is described.

6. Was the decision of the HC unreasonable because it convicted Mr. Merchant on both counts thereby offending the *Kienapple* principle?

[90] The Supreme Court of Canada in *R. v. Kienapple*, [1975] 1 S.C.R. 729, held that multiple convictions should be prohibited where there is no legal and factual distinction between the offences. In *R. v. Barnes*, [1991] 1 S.C.R. 449, Lamer C.J. summarized the *Kienapple* principle as follows:

> **43** Before considering the so-called Kienapple exception to the general rule regarding appellate court jurisdiction, it may be helpful to briefly recall the nature of the Kienapple principle itself. The doctrine of *res judicata,* which has evolved alongside other doctrines designed to prevent unfairness to the accused, has a long history in the criminal law. These doctrines prohibit the trying of an accused twice for the same offence. The decision of this Court in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, extended the traditional formulation of *res judicata* to cover situations where an accused is charged with offences having a close factual and legal relationship. Simply stated, the rule against multiple convictions, or the Kienapple principle, "proposes that an individual should not be subjected to more than one conviction arising out of the same "cause or matter" or the same "delict," consisting of a single criminal act committed in circumstances where the offences alleged are comprised of the same or substantially the same facts and elements," (see Jordan, "Application, and Limitations of the Rule Prohibiting Multiple Convictions: *Kienapple v. The Queen* to *R. v. Prince*" (1985), 14 Man. L.J. 341).

> **44** As Laskin J. (as he then was), for the majority, in *Kienapple v. The Queen*, *supra*, pointed out, the rule formulated in that case is a logical application of *res judicata*. He noted that other concepts such as *autrefois convict* and *issue estoppel* are, as they have been traditionally construed, inappropriate in dealing with the cases envisaged by the rule against multiple convictions. Laskin J. framed the relevant inquiry in these terms, at p. 750:
>
> > whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.
>
> **45** In *R. v. Prince*, [1986] 2 S.C.R. 480, at p. 486, this Court comprehensively reexamined the "nature and scope of the principle of *res judicata* articulated for the majority by Laskin J." While the rule itself remained intact, Chief Justice Dickson, for the Court, set out at length the nature of the questions to be asked in a determination of the application of the rule. The focus of an inquiry into the proper application of the rule must be guided by discussions going to the factual and legal nexus between the offences.

The *Kienapple* principle has been applied in administrative cases (*C.(K.) v. College of Physical Therapists (Alberta)*, 1999 ABCA 253, [1999] 12 W.W.R. 339).

[91] Mr. Merchant first raised this issue as part of his preliminary application to stay proceedings before the HC on March 3, 2011. The HC determined this issue should be dealt with after hearing the case on the merits. It was not dealt with explicitly by the HC in its decision dated December 12, 2011. However, in its reasons, the HC determined count 1 and count 2 had different essential elements. To that extent the HC must have determined implicitly that *Kienapple* did not apply. This is a reasonable approach by the HC in all the circumstances. I will explain.

[92] The counts refer to different actions by Mr. Merchant. The gist of count 1 is Mr. Merchant personally not paying the settlement money as MLG was ordered to do. The gist of count 2 is Mr. Merchant assisting M.H. by setting up the scheme which allowed M.H. to receive and spend a loan equivalent to the

net monies that were available after the legitimate fees of MLG were paid thereby assisting M.H. to avoid paying pursuant to the Smith order. There are distinct elements to each count, as they refer to two separate actions. The essential element on count 1 is failure to pay into court the settlement proceeds that clearly came into Mr. Merchant's hands. The essential element on count 2 is assisting M.H. to thwart the Smith order.

[93] If Mr. Merchant were not bound by the Smith order he could potentially have been found guilty of conduct unbecoming by assisting M.H. in his defiance of the order. Conversely, if Mr. Merchant paid out funds to M.H. who nevertheless complied with the Smith order, Mr. Merchant may have been found guilty of conduct unbecoming for breaching the court order. In my view, the *Kienapple* principle is not offended. It was reasonable in the circumstances of this case for the HC to enter convictions on both counts.

[94] That said, on a practical basis the *Kienapple* issue was addressed by the DC to the apparent satisfaction of Mr. Merchant. The DC heard submissions from Mr. Merchant's counsel on this very issue. At T71(d) and T72(d) he stated:

> Our third point is one that's already been talked about, is the being found guilty of two offences from one factual matrix. I think everyone understands the argument. It's whether you apply *Kienapple* or whether you apply concurrent sentencing. I don't care how you get there, but you should get to one penalty for whatever is the wrongdoing that Mr. Merchant has been found guilty of.
>
> You can get there two ways, but the bottom line is if you don't buy the *Kienapple* allegation or suggestion, then you certainly have to buy the concurrent sentencing in these circumstances. They happened right at the same time. All part of one factual matrix.

> Okay, look. I don't mind sort of standing aside now and just sort of saying, okay, the best way to -- I don't know whether Mr. Merchant will like this or not, but the most prudent way to proceed would be to determine a penalty for each of them and then say they should run concurrently. I mean, why would you leave it open to some other body sort of saying, gee, we've a global penalty here now, and we don't like the finding on one of them, but we like it on the other one. I wonder what the finding would have been if it was only one?
>
> I mean, and I -- you know, I'm putting aside my advocate's hat and sort of saying, gee, that's obviously the best way to proceed, so that's what I would do if I were sitting in your shoes.
>
> Is there one that you kind of think that might not hold water?

Mr. Merchant received concurrent sentences for the convictions.

7. Was the decision of the HC unreasonable because it failed to quash the counts because of delay?

[95] In this case, Mr. Merchant again challenges the preliminary ruling of the HC that the proceedings would not be stayed because of delay in the investigative process. The decision of the HC at para. 16 determining this issue bears repeating:

> 16. Finally, considering the high threshold established in *Blencoe*, regarding the overall contextual analysis and in striking a balance between the interests of the Member and the Law Society, we cannot conclude that there is proven substantial prejudice to the Member that outweighs the Law Society's duty to protect the public interest, based on the material in support of the application. We agree that a substantial amount of time has passed since the underlying initial facts of the charges occurred. However, given that we are not convinced that the Member is substantially prejudiced in his defence, to the point of oppression or otherwise, or that the cause of the delay is attributable solely or in the main to the Law Society, it would be contrary to the public interest and the other applicable principles to stay proceedings. We also decline to consider whether some of the charges are more susceptible to the delay argument than others, based on recollection or other factors, as this was not specifically argued and is further not appropriately open for determination by us at this point.

[96] The Supreme Court of Canada outlined in *Blencoe v. British Columbia (Human Rights Commission)*, 2004 SCC 44, [2000] 2 S.C.R. 307, that delay can be the basis for a stay, but it must be unacceptable to the point that it taints the proceedings. Further, even if the fairness of the hearing has not been compromised, the delay may still amount to an abuse of process but the threshold to meet this standard is very high. In *Wachtler v. College of Physicians and Surgeons of Alberta*, 2009 ABCA 130, [2009] 8 W.W.R. 657, the Alberta Court of Appeal concluded that although a 53 month delay did cause some prejudice to the appellant, it was not enough to reach the high level required to justify a stay of proceedings.

[97] In this case, Mr. Merchant alleges there was an inexplicable 81 month delay from the complaint to the hearing. The HC had before it substantial evidence on the chronology of the investigation and the causes of the delay. It declined to attribute the delay to specific causes or parties. However, the chronology of proceedings in evidence demonstrates a substantial portion of the delay resulted from court proceedings regulating solicitor client privilege issues. The HC concluded in all the circumstances there were no proven substantial prejudice to Mr. Merchant's defence and the cause of the delay was not solely, or in the main, due to the Law Society. Given the facts before it, this was a reasonable conclusion and it was reasonable not to stay the proceedings.

8. Was the decision of the HC unreasonable because it considered and determined counts 1 and 2 concurrently with counts 3 to 8 of the complaint?

[98] Mr. Merchant argues the two sets of counts should never have been heard by the same HC and this, along with certain aspects of the HC's adjudication and determination, raises a reasonable apprehension of bias.

[99] The HC, in addition to count 1 and count 2, also heard six unrelated counts against Mr. Merchant regarding the complaints of T.M. The acts relating to these six counts occurred some years before those in count 1 and count 2. The hearing regarding the T.M. complaints was held in May 2011 and oral submissions were made immediately prior to the hearings on count 1 and count 2 in August 2011. The HC deliberated and determined both count 1 and count 2 and the other six at the same time. Mr. Merchant was ultimately found not guilty of the six counts.

[100] In *Arthur v. Canada* (*Minister of Employment and Immigration*), [1993] 18 Imm. L.R. (2d) 22, 98 D.L.R. (4th) 254, MacGuigan J.A. noted at para. 8 double adjudication by a judge of itself has not been seen to pose any great difficulty. He sums up the law as follows:

> The most accurate statement of the law would thus appear to be that the mere fact of a second hearing before the same adjudicator, without more, does not give rise to reasonable apprehension of bias, but that the presence of other factors indicating a predisposition by the adjudicator as to the issue to be decided on the second hearing may do so. Obviously one consideration of major significance will be the relationship of the issues on the two hearings, and also the finality of the second decision.

I agree with this statement of law. Based on the fact the two matters were unrelated and dealt with different facts and types of conduct, there was nothing improper with the same HC adjudicating both matters.

[101] However, there is a second reason why Mr. Merchant's argument must fail. It may be fairly stated Mr. Merchant made a considered decision not to object. The Federal Court of Canada in *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2007] 1 F.C.R. 107, stated an applicant must raise an allegation of bias or other violation of natural justice at the earliest practical opportunity (para. 213), which is when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection (para. 220). If it is not raised, there is an implied waiver of rights.

[102] This Court considered this issue in *Brand v. College of Physicians and Surgeons of Saskatchewan* (1990), 72 D.L.R. (4th) 446. In that decision the doctor, on appeal, raised the fact there was duplication of hearing panel members in connection with two separate unrelated allegations of misconduct. This Court stated the following:

> Clearly, there is more than just tacit consent to the Pollock charge being heard by a discipline committee chaired by Dr. Doig. One has to conclude that the decision to proceed with the second hearing before a committee chaired by Dr. Doig, without further objection, was based on full knowledge of the existence of the right to object and represented a considered decision not to make such objection, recognizing the consequences of that decision. Such consent disposes of any ground for objection, unless it can be said a perception of bias is so fundamental as to go to the jurisdiction of the Discipline Committee, which jurisdiction could not be restored by consent.

> The contention that perception of bias is so fundamental as to go to jurisdiction and is therefore not subject to waiver does not appear to be the current state of the law. There is a very comprehensive analysis of this question in the judgment of MacGuigan J. on behalf of the Federal Court of Appeal in *Re Energy & Chemical Workers' Union, Local 916 v. Atomic Energy of Canada Ltd.* (1985), 17 Admin. L.R. 1, where the common law position was said to be as follows:
>
> > The right to impugn proceedings tainted by the participation of an adjudicator disqualified by interest or likelihood of bias may be lost by express or implied waiver of the right to object. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity.

[103] Mr. Merchant was fully aware the same HC was slated to hear all allegations in the formal complaint spanning both matters. His counsel made a preliminary motion to the HC which addressed both of the matters, without objection. Although Mr. Merchant raised issues about delay and *Kienapple*, he made no application to sever the allegations and no objection whatsoever in relation to the participation of the same HC on both matters. Contrary to the tack he takes before us, Mr. Merchant argued at the preliminary motion and at sentencing that he was prejudiced by count 1 and count 2, the T.M. complaint, and complaints regarding BP not being heard and determined by the same HC. It may be fairly stated that this position which Mr. Merchant took before the HC negated bias.

[104] The issue of bias resulting from the same HC handling the matters was never raised before the HC. It is raised for the first time before this Court. Given the history of proceedings, there is in my view more than tacit consent. There is an implied waiver by Mr. Merchant of any right to have the counts severed and heard by different HCs.

[105] Mr. Merchant next argues references in the HC's decision to the T.M. matter, the fact the decisions on the two sets of complaints were rendered on the same date and the HC made several unfavourable comments about him on the T.M. matter are evidence of bias nevertheless. These arguments have no merit.

[106] The portions of the T.M. decision referred to by the HC in its decision on count 1 and count 2 provide chronological context and a shortcut to stating the principles respecting applicable onus and standard of proof. As well, I see nothing suggesting bias arising from the fact the two decisions were rendered the same day. The contrary is indicated considering that Mr. Merchant was found not guilty in respect to the T.M. complaints. With respect to the allegation the HC may have made unfavourable comments about Mr. Merchant in the T.M. matter: there was no evidence before us this was the case. This is merely a bald assertion. However, even if it were so, if those comments did not incline the HC to find Mr. Merchant guilty on the T.M. matter, it is hardly likely they played a part in this matter.

[107] There is not a shred of evidence that raises a reasonable apprehension of bias on the part of the HC arising from the fact it heard both sets of complaints. This part of the argument also fails.

9. Did the HC lose jurisdiction by failing to provide its decision within 45 days of the hearing?

[108] Mr. Merchant argues the HC lost jurisdiction as a result of not providing its decision to the Chairperson of the DC within 45 days, as required by s. 53(1) of the *Act*. The hearing was conducted August 2–3, 2011. Final

arguments were made October 4, 2011. The HC decision was provided to the DC on December 12, 2011.

[109] Mr. Merchant admits he consented to the HC rendering its decision late, but argues both he and his counsel were ignorant of the law with respect to the implications of doing so.

[110] In this respect, this Court's ruling in *Law Society of Saskatchewan v. Hawrish* (1998), 161 D.L.R. (4th) 760 is a complete answer. Cameron J.A. explained the procedural nature of the section by writing at p. 764:

> 9 In light of all this, coupled with the unpalatable consequences of holding otherwise, we do not think the legislature intended to ascribe fatal effect to every failure of the hearing committee to report one of its decisions to the Discipline committee within 45 days of the hearing. Were it otherwise, even a mere slip in failing to so report a decision upholding a complaint would sound the death of the proceedings, even though the complaint had already been determined on its merits, with only sentencing remaining.

And so, we regard this aspect of the provision as directory rather than mandatory.

[111] The Supreme Court of Canada in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, held non-compliance of directory provisions may, in certain circumstances, be relieved against. In *B.W. v. Child and Family All Nations Coordinated Response Network*, 2009 MBCA 95, 315 D.L.R. (4th) 323, the Court explained:

> 49 While substantial compliance favours the exercise of discretion to disregard or cure the non-compliance, it must be considered in the context of all of the circumstances, including any prejudice suffered by others. It may be that there has been substantial compliance, but there has also been prejudice suffered by the other party. In the end, it is a question of what is fair and just in the circumstances.

[112] The decision of the HC was rendered 24 days after the expiry of the statutory period deadline. Given the prior delay in this matter, an additional 24 days is miniscule. Mr. Merchant does not argue there is any substantive prejudice caused by the delay. The fact the statutory provision is directory, coupled with the lack of demonstrable prejudice suffered by Mr. Merchant and the fact he consented to the delay, makes it inappropriate to set aside the decision because of a failure to comply with the time lines specified in the *Act*. This is just and fair in the circumstances.

10. Does the HC's failure to sign the decision indicate a failure to maintain a quorum and/or render the decision of no force and effect?

[113] Mr. Merchant argues firstly that unsigned reasons of the HC are of no force and effect (citing in support *Blattgerste v. Heringa*, 2008 BCCA 186, [2008] 11 W.W.R. 47) and secondly a quorum was not maintained throughout its deliberations. As he frames it, the absence of the personal signatures of each committee member on the decision also raises the second issue, i.e., whether each participated in the deliberations. However, Mr. Merchant points to no evidence a quorum was not maintained throughout the deliberations and submits only that there is no evidence it was.

[114] As an initial point, *Blattgerste*, where a judge failed to sign his decision before he died, is inapplicable to this matter. In this case, there is no question of whether or not the decision is final and no one has died.

[115] Moreover, nothing in the *Act* or the Rules of the Law Society of Saskatchewan requires HC or DC decisions to be reduced to writing or to be signed by each of the Benchers participating in the decision or at all. There is no statutory form of, or conditions for, a decision.

[116] The decision of the HC contains internal references to the committee acting as a whole. The HC decision was provided to the parties using the committee member's names in quotation marks on the separate signature lines in place of handwritten signatures. This does not create any confusion as to which committee members participated in the decision and it does not create any unfairness to Mr. Merchant.

[117] In my view, the names in quotation marks are sufficient as signatures in the absence of a handwritten signature to validate the decision. The form and content of the decision as a whole leave no doubt that the HC members have endorsed its contents and that it is a decision of the whole committee. This argument fails.

11. Was the sentence imposed by the Discipline Committee reasonable?

[118] In support of this ground, Mr. Merchant makes a number of arguments, which are collectively variations on the same theme: i.e., that the sentence imposed was unreasonable. Firstly, he argues the sentence is outside the range of sentences for similar offences and is unreasonable. Secondly, he argues the DC acted unreasonably by considering his post-offence conviction as an indication of his character when determining a fit penalty. Thirdly, he submits the DC failed to properly consider mitigating and aggravating factors.

[119] The general approach to sentencing in disciplinary proceedings was explained by Wilkinson J.A. in *Merchant* (2009):

> 98 However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel quoted extensively from *Bolton v.*

> *Law Society*. The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:
>
> > [74] A criminal court judge … is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group -- the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.
>
> 99 Senior counsel bear a particularly heavy burden. They have the name recognition that attracts interest, and simultaneously draws the harsh glare of publicity. As their reputations ebb or fall in the public domain, so may the profession's, and the tainted product is not subject to recall. In light of the fundamental objective of sentencing in disciplinary matters, and the Committee's concern that the collective reputation of the profession has been tarnished by the appellant's conduct, its decision to impose a two-week suspension from practice was an entirely reasonable one.

[120] For our purposes, two principles emerge from this. The first is that the sentence rendered by the DC must be judged on a reasonableness standard. The second is that the administrative law sentencing approach, although similar, is not necessarily congruent with criminal law sentencing.

[121] In deciding on whether a decision is reasonable, one must look to penalties imposed for similar actions as well as any relevant aggravating or mitigating factors. Although the following should be noted:

> [T]he penalties imposed for similar cases of misconduct differ widely, both within and among jurisdictions. This is largely due to the fact that one of the main purposes of the process is to protect the public. It may be entirely appropriate that a lawyer who has proven to be incorrigible be disbarred for the same conduct for which a different lawyer is reprimanded. [Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Carswell, 2011) at 26–43]

Thus, the reasonableness of a sentence will largely depend on the specific circumstances of the offence and the offender.

[122] I am also mindful that in *McLean v. Law Society of Saskatchewan*, 2012 SKCA 7, this Court restated the reasonableness analysis with respect to the penalty as follows:

> 45 With respect to the penalty imposed by the Discipline Committee, it can stand in these circumstances only: (i) if the charges are as serious as the Committee found them to be; and (ii) the penalty is comparable to other penalties imposed in similar circumstances.

[123] In keeping with the approach in *McLean*, I conclude that the charges are indeed as serious as the DC found them to be. I am in full agreement with the facts as the HC found them and as accepted by the DC. This is a case where a lawyer, knowing his firm is bound to act in a certain way by a court order, undermines both the explicit terms of that order and its intent by manipulating both the affairs of his client with a third party and his dealings with his client so as to cause the court order to be breached by the firm and also thereby to assist the client to avoid complying with the court order.

[124] Strict adherence to the terms of a court order is among the most important duties and responsibilities of a lawyer. That this duty is central to the ethical conduct of a lawyer was clearly stated in *Law Society of Upper Canada v. Sussman*, [1995] L.S.D.D. No. 17 (QL):

> As members of the Bar we are all officers of the Court and the burden of responsibility as such is no greater than when resting on the shoulders of the advocate who appears before the Courts. There can be no behaviour more disruptive to our system of justice and more likely to bring its administration into disrepute than a lawyer, while representing a party to a dispute, counselling his or her client to disobey the clear, unequivocal terms of a Court Order. To do so is to undermine the Court's effectiveness, contaminate the esteem with which it is held in the eyes of the citizenry and foment the law of the jungle. Behaviour of this kind is particularly troubling by reason of the highly undesirable example which it provides to ordinary citizens, lawyers and indeed law students ….

[125] I turn now to the issue of whether the penalty is comparable to penalties imposed in other circumstances and the DC's handling of the issue of range of sentence. During argument before the HC, counsel for Mr. Merchant agreed sentences in Saskatchewan, as well as elsewhere in Canada, were relevant. The DC mentioned nine cases to assist it in establishing a national standard and a possible range of sentences. These cases were *Law Society of Alberta v. Nielson*, [1994] L.S.D.D. No. 215 (QL); *Law Society of British Columbia v. Saini*, [2006] L.S.D.D. 160 (QL); *Law Society of British Columbia v. Scholz*, [2008] L.S.D.D. 26 (QL); *Law Society of Upper Canada v. Sussman*, [1995] L.S.D.D. 17 (QL); *Law Society of Alberta v. MacSween*, [2004] L.S.D.D. 61 (QL); *Law Society of British Columbia v. Barron*, [1997] L.S.D.D. 141 (QL); *Law Society of Saskatchewan v. Merchant*, (2009); *Law Society of Saskatchewan v. Miller*, #00-1; and *MacLean*. All but two involved breaches or counselling breaches of court orders.

[126] The DC determined these cases establish a sentencing range of a fine and reprimand to a suspension of two months. In *Miller*, which did not involve a breach of a court order, the lawyer received suspensions of three months and a further six months for breach of the Code of Professional Conduct and for not being candid with the Court. Because of Mr. Merchant's similar behaviour, the Law Society proffered *Miller*, which involved calculated and surreptitious behaviour in support of its argument that suspension time should be doubled. The other case which did not involve a breach of court order was *McLean* where there were numerous kinds of misconduct.

[127] Mr. Merchant also cited to the DC four other cases from four other provinces. These were *Law Society of British Columbia v. Kirkhope*, 2012 LSBC 5; *Law Society of Manitoba v. Bjornson*, [1996] L.S.D.D. 258 (QL); *Doré v. Barreau du Québec*, 2012 SCC 12; and *Law Society of Upper Canada v. Argiris*, [1996] L.S.D.D. 88 (QL). The sentences in these cases ranged from fines to a one month suspension. Although Mr. Merchant argues the DC failed to take these cases into account, the fact they were not mentioned is not fatal to the DC's analysis of a proper range of sentences. The DC need not mention all the cases it considered and there is no indication the DC was unaware of these cases. Indeed, with these cases added to the nine the DC did mention, the sentencing range is not altered but remains a fine and reprimand to two months, leaving aside *Miller*.

[128] In keeping with the admonition, the specific circumstances of a case play a large role in sentencing, a quick summary of some of the cases mentioned by the DC is helpful. In *Sussman*, the lawyer counselled a client to breach the terms of an access order. Some access was denied as a result. The lawyer admitted the offence. Taking into account the lawyer's clean 50 year practice record, the fact he was not a young man and that his health was poor, he was sentenced to a one month suspension. In *Scholz*, the solicitor paid out funds in trust to a company in which he had an interest, contrary to a court order. His intentions were to get a higher rate of interest on the funds. The money was eventually returned with no loss to the client. He was sentenced to a one month suspension and costs of $26,437.00.

[129] In *Nielson*, the lawyer advised a mother to terminate access despite a court order providing access. The lawyer admitted guilt, was reprimanded and

fined $200.00. In *Saini*, the lawyer was served with a court order to deposit an original copy of a will with the court registry. She failed to do so and instead, after some delay, filed the original copy as part of the application to probate the will. She admitted her guilt and was reprimanded and fined $2,500.00.

[130] In *Merchant* (2009) (the BP matter), Mr. Merchant was found guilty of conduct unbecoming for breaching a court order by paying out the husband's share of trust funds on a matrimonial matter contrary to the order and applying the funds against his client's (the wife's) court costs. This occurred while his client had an application pending for security for costs. This Court dismissed Mr. Merchant's argument that a two week suspension was unreasonable in the circumstances of that case.

[131] In *MacSween*, a lawyer was sentenced to a 30 day suspension for having breached a court order by assisting a client to cash a $15,000.00 RSP. He eventually personally reimbursed the money. The committee described the conduct as serious but took into account the facts the lawyer had no record, accepted responsibility, showed genuine remorse and received no personal gain from the breach. In *Barron*, the lawyer breached a court order by paying out the proceeds from the sale of a matrimonial home. The disposition of funds was not unfair to either party. He was sentenced to a two month suspension.

[132] Also of relevance for this inquiry is the summary of decisions of the Law Society found in *McLean*, at para. 54, listing certain factors which have resulted in suspensions greater than one month. These include such conduct as failure to comply with an order of the discipline committee, obtaining a

personal benefit, conflicts of interest, misrepresentation to a court, tribunal or the Law Society and other kinds of misrepresentation. None of these cases involved a breach of a court order. One case listed, *Law Society of Saskatchewan v. Kirkham*, [1999] L.S.D.D. 19, involved a breach of duty to inform the Court respecting police contact with prospective jurors in a criminal trial. Mr. Kirkham was suspended for six months as such misconduct is, admittedly, very serious. I do not, however, take this list of factors as being closed. Added to the list must be breaching of a court order. What is significant about the list in *McLean* is that it reveals a substantial body of Saskatchewan cases where sentences meted out to lawyers are in excess of one month for conduct that, in my view, is less serious than the breach of a court order under consideration in this appeal.

[133] Mr. Merchant argues the appropriate sentencing range consisted of a fine to a 14 day suspension based on disciplinary proceedings from across Canada and *Merchant* (2009) and *McLean* and it was an error for the DC to rely on cases that involved calculated conduct such as *Miller*. Part of his argument is that it was unreasonable for the DC to characterize his conduct as "calculated." There is no merit to that argument. The HC found a pattern of behaviour by Mr. Merchant in attempting to extract MLG from the effects of the Smith order. This was accepted by the DC and from the HC's findings it was open to the DC to reasonably conclude there was calculation involved, and to consider that factor as part of its determination of an appropriate range of penalty.

[134] Mr. Merchant also cited several unique factors in this case, such as delay, co-operation with the investigation, his reminders to M.H. to comply with the Smith order, the staleness of his conduct record, the manner in which the Law Society chose to publish the findings of the HC and his record of great accomplishment as lowering the range. However, these unique factors were considered as part of the analysis of aggravating and mitigating circumstances.

[135] In this case, because of certain aggravating factors, the DC expanded the sentencing range beyond what might typically be expected. These factors were Mr. Merchant acted to breach the Smith order in a calculated manner as mentioned earlier, the breach had the potential to irreversibly and unfairly dispose of money held for the benefit of someone claiming arrears of child support and that Mr. Merchant chose to let his client remain in harm's way in two contempt applications instead of revealing the true nature of the transactions that had occurred. This conduct can be said to touch on Mr. Merchant's obligations to the court, to V.W., a member of the public, and his own client. Additionally, it affected his obligation to the profession to act with integrity at all times. It was open to the DC, based on these factors, to determine such conduct justified a higher sentence than two months. This is reasonable given the seriousness of the offences and the circumstances of the case.

[136] In my view, the DC is not constrained to impose a sentence that is no higher than the highest reported sentence for a similar offence. In crafting a reasonable sentence in the context of the myriad of circumstances of misconduct presented to it, the DC must be free to consider whether to go beyond the range where it is

appropriate and reasonable to do so in order to fulfil its mandate to protect the public and the integrity of the profession. In this case, it was reasonable to consider a sentence in excess of two months because of the elaborate calculation and planning involved and other aggravating factors as previously mentioned.

[137] Mr. Merchant next argues the DC acted unreasonably by considering his conviction for breaching a court order in *Merchant* (2009). Mr. Merchant's argument takes two forms. The first is that the DC unreasonably considered it to be a prior conviction and the second is that the DC unreasonably considered it in respect of his character. He argues although the conviction is irrelevant, the consequent sentence of a two week suspension is apt to this case.

[138] Respecting the first point, the DC did not actually treat it as a prior conviction and took pains to explain that the conviction occurred after the conduct, which formed the subject matter of this case. The only prior conviction to which it gave significant weight was the one in 2000.

[139] On the second point, the DC determined the 2009 conviction should be given some weight and be treated as an indication of the offender's character based on *R. v. Johnston*, [1989] B.C.J. No. 1542 (QL) (B.C.C.A). In that case, the Court stated:

> Other similar offences, whether committed before or after that for which an accused is being sentenced, may well be of considerable importance in determining the character of the accused ….

This is not an unreasonable approach, especially in the context of discipline of lawyers where character plays a significant role. As well it must be remembered the administrative sentencing process is not necessarily constrained by criminal law principles and approaches.

[140] There is no indication any mitigating factors were negated by the DC treating this conviction as it did. The DC did comment Mr. Merchant did not so lack in trustworthiness or otherwise pose risk to the public that disbarment was an option. However, it also commented Mr. Merchant could not claim to have no discipline history and thereby argue his misconduct is out of character. This is understandable in light of Mr. Merchant's prior conviction in 2000 to which it was also undoubtedly referring. It was reasonable for the DC to give some weight to the 2000 matter in this manner.

[141] Mr. Merchant argues mitigating circumstances such as the delay involved, his cooperation with the Law Society, his exhortations to his client to pay the money, and his considerable service to the legal and broader community through his philanthropic efforts were not considered by the DC to reduce the penalty. These arguments must fail.

[142] There is no indication the DC failed to consider these circumstances. The DC properly gave some weight to the delay and explained how this fit into its determination in view the regulator was not at fault. The DC clearly also took into account the other mitigating factors cited by Mr. Merchant.

[143] Mr. Merchant argues the DC also failed to consider two additional mitigating factors: (i) the decision in this matter was published twice, focusing public attention on him, and (ii) he did not act alone in formulating the scheme regarding the money. It was reasonable for the DC to reject these factors as mitigating given the factual findings of the HC and the Law Society's concern regarding solicitor/client privilege.

[144] Mr. Merchant argues the DC improperly considered aggravating factors, such as his conduct was calculated to breach the Smith order. His arguments on this issue rely on his earlier arguments respecting intent. The determination by the DC that Mr. Merchant's actions were calculated to breach the order are reasonable based on the findings of the HC, even if *mens rea* is not a factor. The scheme to extract MLG from the obligations of the order, to have the cheque payable to M.H. and to create a disbursement (loan) that was recouped out of the settlement cheques, would not have been executed without someone overseeing it.

[145] Mr. Merchant argues a second factor was improperly considered as aggravating: the potential to unfairly dispose of money to be held for the benefit of someone claiming child support. The DC was right to consider this factor. The risk and potential consequences created by Mr. Merchant's actions must be assessed at the date the event occurred, not at the time of the hearing. Mr. Merchant argues from a position of hindsight that, because the harm was actually less than it potentially could have been, the risk to which V.W. had been put is not aggravating. This argument clearly holds no water.

[146] Lastly, Mr. Merchant challenges the determination he allowed his client to be in harm's way on two contempt applications rather than reveal the true nature of the transactions. This, as well, is an appropriate and reasonable factor to be considered as aggravating. The contempt applications created an unnecessary risk for his client. The risk of the contempt applications arose directly from the failure to pay the money into court. This risk, as well, is assessed not in hindsight but at the time it was created. It matters not M.H. was ultimately found not in contempt of the Smith order. Consideration of this factor was reasonable.

[147] The DC also noted the lack of some mitigating factors involved in this case, such as the fact the appellant has a history of misconduct and he did not acknowledge his misconduct or demonstrate remorse. Again, in my view, in the context of professional conduct sentencing these are appropriate factors to consider and the DC acted reasonably in doing so.

[148] In short, the DC properly considered all mitigating and aggravating factors. Deference must be given to the DC's determination as to the weight to be put on these factors.

[149] The sentence imposed is justifiable and fit. I say this because this kind of misconduct strikes at the very heart of a lawyer's duty to uphold the letter and spirit of the law and court orders and to act with integrity. It was calculated in that it involved a number of steps over a period of time and involved the creating of a fiction that camouflaged the improper disbursal of settlement proceeds. The misconduct put both M.H. and V.W. at risk.

[150] The penalty imposed by the DC is, in all the circumstances, reasonable.

12. Was the decision of the DC ordering Mr. Merchant to pay $28,869.30 in costs unreasonable?

[151] The DC failed to give reasons why it ordered costs of $28,869.30 payable by Mr. Merchant. He argues this is unreasonable. The details of the costs claimed by the Law Society are known and appear at AB253–255.

[152] Section 53(3)(a)(v)(B) of the *Act* allows the DC to order a member pay the costs of counsel. There is no prohibition in the *Act* against the Law Society properly claiming costs associated with in-house counsel. There is a cost to

the resources which the Law Society allocates to the prosecution of the complainant. Counsel for Mr. Merchant acknowledged costs were significant. He was aware of the details of the costs claimed. Mr. Merchant did not challenge the detailed listing of costs before the DC as he now does before this Court. Rather, he asked for a reduction of the costs claimed only on the basis of delay and the fact he did not receive costs for success on the six count complaint. Mr. Merchant's counsel's arguments before the DC implicitly assumed there would be costs ordered if his client was convicted. One may infer, in the absence of any particular complaint about the detail by Mr. Merchant, that the only decision for the DC was whether to award the amount claimed or some lesser amount based on his arguments. In this context, the lack of explanation for ordering costs is reasonable.

[153] However, in order to ensure fairness to Mr. Merchant on the facts of this case, costs should be dealt with in the same manner as in *Merchant* (2009). Accordingly, in the exercise of our discretion under s. 56(5) of the *Act*, to make any order the court considers appropriate, the costs of the Law Society shall be assessed for reasonableness before an assessment officer which, in this case, shall be the Local Registrar of Court of Queen's Bench in Regina.

[154] In respect of the Local Registrar's decision, the appellant will be entitled to exercise the right of appeal conferred by s. 72 of the *Act*. Upon the Local Registrar certifying the amount payable, and subject to the right of appeal aforesaid, Mr. Merchant will be obliged to pay to the Law Society the costs so certified.

13. Was the decision of the DC a nullity because it lacked a quorum?

[155] Mr. Merchant argues s. 6(7) of the *Act* requires there be 21 benchers present for a DC meeting and that, because there were only 12 members present on this matter, the decision is a nullity. Section 6 does not speak to the issue of how many benchers are required for a quorum.

[156] The quorum for a meeting of benchers is set by Rule 92(3), which states it is ten members. Twelve benchers were present. There was a quorum in this case. This argument fails.

V. CONCLUSION

[157] Based on the standard of review articulated earlier, I can find no basis for disturbing the convictions of Mr. Merchant by the HC or the sentences imposed by the DC. Both the process and outcome reflected in the decisions of the HC and DC fit comfortably with the principles of justification, transparency and intelligibility. The convictions and sentences fall within a range of acceptable outcomes, which are defensible on the facts and law and are reasonable. There will be an order that Mr. Merchant pay the costs of the disciplinary proceeding as determined pursuant to the assessment process described earlier.

[158] The appeal of Mr. Merchant is dismissed with costs to the Law Society of Saskatchewan on the basis of column 2.

DATED at the City of Regina, in the Province of Saskatchewan, this 8th day of May, A.D. 2014.

"Ottenbreit J.A."
Ottenbreit J.A.

I concur

"Richards C.J.S."
Richards C.J.S.

I concur

"Lane J.A."
Lane J.A.