Law Society of Saskatchewan

GARTH BUITENHUIS
HEARING DATE: March 3, 2020
DECISION DATE: April 7, 2020
***Law Society of Saskatchewan v. Buitenhuis*, 2020 SKLSS 2**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF GARTH BUITENHUIS,
A LAWYER OF SASKATOON, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. A hearing was conducted by teleconference on March 3, 2020, before a hearing committee comprised of Gerald Tegart, Q.C. (Chair), John Morrall and Della Stumborg. Garth Buitenhuis ("the member") was in attendance and was represented by Morris Bodnar, Q.C. Timothy F. Huber represented the Conduct Investigation Committee ("the investigation committee"). There were no objections to the constitution or jurisdiction of the hearing committee.

2. An Agreed Statement of Facts and Admissions ("the agreed statement of facts") was filed at the commencement of the hearing as well as a joint submission as to penalty ("the joint submission").

3. The member stands charged with, and entered guilty pleas to, three allegations of conduct unbecoming a lawyer, in that he:

> (Formal Complaint #1)
> did charge the Estate of F.B. a fee that was not fair or reasonable, in that he charged for time spent responding to a Law Society complaint;
>
> (Formal Complaint #2)
> did, without the approval of the Court, enter into a contingent fee agreement for legal services related to a family law dispute;
>
> (Formal Complaint #3)
> did accept cash in an aggregate amount of $249,700.00 in respect of one transaction, contrary to Law Society of Saskatchewan Rule 909.

4. The hearing committee accepts the guilty pleas and makes a finding of conduct unbecoming with respect to each of the three complaints.

FACTS

5. The first seven pages of the agreed statement of facts (which includes the narrative but not its tabbed attachments) are appended to this decision as a schedule. For ease of reference, we provide a brief summary here.

6. The member is and was at all material times a practicing member of the law society.

Complaint #1

7. The first complaint involves the member's representation of the executor of an estate. In 2017 two beneficiaries of the estate filed a complaint against the member with the law society. Law society complaints counsel recommended no further action on the complaint. The member charged the estate in excess of $1,300.00 for his time in responding to the complaint. The law society had issued an ethics ruling in 2000 stating it was unethical for a lawyer to charge a client for time spent to respond to a law society complaint.

Complaint #2

8. The member charged a contingency fee on a family law file in contravention of law society rule 1903:

> 1903. A member shall not enter into a contingent fee agreement:
>
> (a) for services that relate to a child custody or access matter; or
>
> (b) for services that relate to a family law dispute, unless the form and content of the agreement have been approved by the Court.

9. According to the member, he took this file on a contingency fee basis because the client could not afford a retainer. He was unaware of the rule at the time.

Complaint #3

10. The member accepted $249,700.00 in cash from a client toward the purchase of farmland. Rule 909 (which is now Rule 1503 due to a consolidation) provided, in part:

> 909. (1) A member shall not receive or accept cash in an aggregate amount of $7,500.00 or more Canadian dollars in respect of any one client matter or transaction.
> …
>
> (3) Subrule (1) applies when a member engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:
>
> (a) receiving or paying funds;
>
> (b) purchasing or selling securities, real properties or business assets or entities; or
>
> (c) transferring funds by any means.

11. The member was surprised to receive the sum in cash and sent an email to the law society seeking advice. Unfortunately, the email went inadvertently into a junk mail folder and was not

discovered until almost three weeks later. In the meantime, the member deposited the amount to his trust account.

12. The member's client was "bank averse" and preferred to deal in cash. There was no indication the money was derived from illegitimate sources or the client was attempting to launder it.

ANALYSIS AND REASONS

13. The joint submission as to penalty recommends the following penalties with respect to the three charges:

Complaint #1 – Reprimand;

Complaint #2 – $2,000.00 fine;

Complaint #3 - $7,500.00 fine.

14. The conduct investigation committee is not seeking costs.

15. The importance of deference to joint submissions as to penalty in disciplinary matters is now well established, although the several decisions that have considered and reinforced the principles underlying that importance have used various ways to describe them. It has been said a joint submission may be departed from if it is "unfit" or "unreasonable" or "contrary to the public interest" and should not be departed from "unless there are good or cogent reasons": *Rault v Law Society of Saskatchewan*, 2009 SKCA 72 (CanLII). It should be accepted unless it "is outside a range of penalties [that are] reasonable in the circumstances": *Law Society of Upper Canada v Paskar*, [1996] L.S.D.D. No. 189 at para. 81. A joint submission may be disregarded when it is "wholly inappropriate having regard to the nature of the conduct involved": *Law Society of Upper Canada v Orzech*, [1996] L.S.D.D. No. 56 at p. 6. It may be departed from where the "penalty is so disproportionate to the underlying misconduct and circumstances as to be contrary to the administration of justice or would be such as to bring the administration of justice into disrepute": *Re Gay*, [2005] O.C.P.S.D. No. 2 at para. 12.

16. As a practical and workable test, it might first be asked whether the proposed penalty falls within a range of penalties that are reasonable and appropriate in the circumstances of this case. If it falls within that range it should not offend the other principles articulated by past cases.

17. With respect to the first complaint, we must reinforce that members are required to be familiar with ethics rulings and there is a ruling from 2000 directly on point. However, we accept the recommendation that a reprimand is sufficient denunciation given the specific facts of the complaint.

18. In relation to the second complaint, we were referred to *Law Society of Saskatchewan v Siwak*, 2017 SKLSS 6, where a fine of $2,000.00 was imposed in similar circumstances, along with a reprimand and an award of costs. We accept this as an appropriate benchmark in relation to the instant case and accept the joint submission in relation to this complaint.

19. Of the three complaints, the third matter dealing with acceptance of cash beyond the limit allowed by the rules is the most egregious. Money laundering is a very serious problem and governments are taking steps to curtail it. Lawyers can wittingly or unwittingly provide valuable assistance to those engaged in money laundering. Consequently, it is understandable that

governments want to see the activities of lawyers regulated. Law societies and others concerned about the possible erosion of the principle of solicitor-client privilege have successfully argued that the regulatory regimes administered by law societies are a sufficient, even better, way to regulate lawyer activities related to money laundering. Maintaining that position requires law societies to rigorously enforce the rules they administer to accomplish this. One such rule is the no-cash rule.

20. The joint submission lists three cases dealing with the no-cash rule that imposed penalties ranging from a reprimand to a fine of $1,500.00 plus costs in the amount of $2,700.00. The joint submission recommends a fine of $7,500.00, with no award of costs. This is acknowledged to be beyond the range of the cases cited.

21. Earlier in this decision we indicated that the appropriate test, as a practical matter, is whether the submission recommends a penalty that falls within a reasonable and appropriate range. The range to be considered by the hearing committee is not necessarily limited to penalties imposed in the decided cases. Where there are a substantial number of cases, and therefore a comprehensive range established by those cases, it can be appropriate to limit the application of the test to that range. However, a hearing committee should always be mindful that the usual principles relevant to the determination of penalty might require a departure from the range established by the cases alone. The joint submission urges us, in essence, to consider an expanded range based on the cases plus those principles.

22. The joint submission suggests three categories of sentencing principles that are relevant in the instant case: (1) protection of the public; (2) deterrence; and (3) other sentencing considerations. The principles of public protection and deterrence are discussed here with specific reference to the third complaint. The other sentencing considerations assist in reaching overall conclusions related to all three complaints.

Protection of the public

The law society has a duty to protect the public. This is a well understood principle of general application, but is specifically articulated in s. 3.1 of *The Legal Profession Act, 1990*:

> 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times: …
>
> > (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.

A member's failure to understand and apply the no-cash rule, which exists to support the important public policy of suppressing money laundering, must potentially bring into question the "integrity, knowledge, skill, proficiency and competence" of the member himself, with the further potential that the profession's commitment to those same principles is also questioned, based in part on a concern about the law society's ability to govern its members. We accept the assertion in the joint submission that the member's conduct must be dealt with in a way that protects the public and fosters confidence in the legal profession.

Deterrence

There does not appear to be a need to provide specific deterrence in the relation to this member. However, the joint submission provides a compelling argument concerning the

need for a penalty that will provide general deterrence in relation to money laundering and the no-cash rule:

It is acknowledged that the proposed $7,500.00 fine is somewhat (though not markedly) outside of the range of penalty that has formerly been associated with a breach of the "no-cash" rule. The Law Society justifies this more "progressive" approach is required to enhance the clarity of the message being sent to the profession about the seriousness of breaching the "no-cash" rule and the realities of the current societal environment where there is increased scrutiny in relation to the Law Society's ability to mitigate the risk of lawyer's becoming involved in money laundering. This matter is one of three "no-cash" rule breaches currently being prosecuted by the Law Society of Saskatchewan. It is important that the Law Society deter this type of conduct with an appropriate sanction. It appears that the penalties imposed in other matters, perhaps most notably in the *Gosbee* case, do not represent a sufficient deterrence. The profession cannot be allowed to come to a view that the penalties associated with a breach of the "no-cash" rule are a cost of doing business. In the current case, the fine is intended to represent a significant financial penalty for this Member.

Other sentencing considerations

The joint submission lists several aggravating factors, as well as mitigating factors, that normally influence the determination of penalty. The aggravating factors here are the rather large amount of cash received by the member in relation to the third complaint and the totality of the member's conduct in three separate and unrelated acts of conduct unbecoming. The member has a prior discipline history stemming from one proceeding in 2006 involving three estate files where the member charged fees greater than allowed by the tariff, mixed trust funds with other funds and withdrew trust funds without first completing required preliminary steps. He was reprimanded, fined $1,000.00 and required to pay costs of $1,200.00.

There are mitigating factors. The member cooperated with the law society in the investigation, entered into an agreed statement of facts, entered guilty pleas and acknowledged his misconduct. The breach of the no-cash rule did not involve the actual laundering of money or any other illicit activity. Finally, the member made a limited effort to seek guidance from the law society with respect to the large amount of cash he had received, although he did decide to proceed without following up when his enquiry initially went unanswered.

23. We indicated earlier that we are in agreement with the joint submission as it applies to the first and second complaint. With respect to the third complaint, the range of penalties in previously decided cases, with the additional consideration of the sentencing principles discussed above, leads us to conclude that the range of penalties that are reasonable and appropriate in these circumstances extends to include the recommendation in the joint submission with respect to this complaint. Therefore, we accept the recommendations from the parties with respect to all three complaints.

ORDER

24. This order is made pursuant to Rule 1131 of the rules of the Law Society of Saskatchewan enacted pursuant to *The Legal Profession Act, 1990*.

25. With respect to each of the three complaints, the following penalties are imposed:

Complaint #1: The member is reprimanded.

Complaint #2: The member is fined $2,000.00.

Complaint #3: The member is fined $7,500.00.

26. The member has until December 31, 2020, to pay the fines. He may apply to the Executive Director of the Law Society of Saskatchewan for an extension of that time to pay, the granting of which is in the sole discretion of the Executive Director. In the event the member does not pay the fines within the established time frame, or within any altered time frame established by the Executive Director, the member is suspended from the time of his failure to pay the fines until such time as he pays them.

"Gerald Tegart, Q.C.", Chair	"April 7, 2020" Date
"John Morrall"	"April 8/20" Date
"Della Stumborg"	"April 7, 2020" Date

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaints dated February 26, 2019 and October 7, 2019 alleging that GARTH BUITENHUIS, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

Formal Complaint #1

did charge the Estate of F.B. a fee that was not fair or reasonable, in that he charged for time spent responding to a Law Society complaint.

Formal Complaint #2

did, without the approval of the Court, enter into a contingent fee agreement for legal services related to a family law dispute.

Formal Complaint #3

did accept cash in an aggregate amount of $249,700.00 in respect of one transaction, contrary to Law Society of Saskatchewan Rule 909.

JURISDICTION

27. Garth Buitenhuis (the "Member") is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (the "Law Society"), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at Tab 1 is a Certificate of the Deputy Executive Director confirming the Member's status.

28. The Member is currently the subject of three Formal Complaints, the first two being dated February 26, 2019 and the third being dated October 7, 2019, containing the allegations noted above. The Formal Complaints dated February 26, 2019 were served upon the Member on March 15, 2019. The Formal Complaint dated October 7, 2019 was served upon the Member's counsel on October 8, 2019. Attached at Tab 2 are copied of the Formal Complaints with corresponding proof of service. The Member intends to plead guilty to all three of the outstanding allegations set out in the Formal Complaints.

PARTICULARS OF CONDUCT

Formal Complaint #1

29. In this matter, the Member, charged a fee for responding to a Law Society Complaint in contravention of *The Code of Professional Conduct*.

30. B.B. and R.B. are beneficiaries of the estate of F.B. The Member represents the executor for that estate. B.B. and R.B. filed a complaint with the Law Society alleging that the Member failed to provide various documents, that there were errors in the interim distribution to some beneficiaries and that the Member failed to respond to another member of the Law Society. The Member responded to the complaint and Complaints Counsel directed no further action on the complaint on May 1, 2017.

31. On December 3, 2018, the LSS received an inquiry from a C.B. (another beneficiary to the estate) as to whether there should be fees charged related to a Law Society complaint. Upon further inquiry, C.B. provided a copy of an invoice from the Member [Tab 3] where $1,359.75 was charged to the estate under the entry "Law Society Complaint."

32. The Law Society sent a copy of the invoice, along with a prior Ethics Ruling from the year 2000 to the Member highlighting that it was unethical for a Lawyer to charge a client for the time expended to respond to a Law Society complaint and requested a response.

33. On January 4, 2019, the Member responded stating that the complaint was not by a client, but rather family members of the deceased, that the account was presented to the executor and accepted as a legitimate estate expense, and that the issue should be directed to the executor of the estate.

34. The Member now acknowledges that the Executor (who was never one of the complainants) approving the expense to the estate associated with the Member's response to the complaint, does not enable him to charge the estate for responding to a Law Society complaint.

Formal Complaint #2

35. This matter relates to the Member charging a contingency fee on a family law file in contravention of the Rule 1903 of the Rules of the Law Society of Saskatchewan (formerly rule 1502).

36. Law Society rule 1903 states that:

> **1903 A member shall not enter into a contingent fee agreement:**
>
> > **(a) for services that relate to a child custody or access matter; or**
> >
> > **(b) for services that relate to a family law dispute, unless the form and content of the agreement have been approved by the Court.**

37. The Member represented client C.D. in a family law matter. The Member indicates that C.D. was having issues retaining a lawyer because he was not able to provide a retainer. The Member felt the case had merit and in discussion with the client, agreed to take the matter on a contingency basis. Attached hereto at Tab 4 is an unsigned file copy of the Contingency Fee Agreement. The Member did not obtain approval from the Court as contemplated by the rules.

38. The issue was discovered as a result of an investigation by senior Law Society auditor, Pam Harmon. The Member is required to submit monthly trust and general reconciliations to the Law Society for review. When Ms. Harmon reviewed his monthly submission for April 2017, Ms. Harmon noted what appeared to be a rather large legal fee charged to a family law client. Upon further inquiry, she determined that a contingency fee of 20% was initially agreed to. When the matter was ultimately charged, however, the Member reduced the contingency fee from 20% to 10% of the settlement which resulted in fees of $20,000.00 plus taxes ($22,000.00 in total) to be charged to the client. Attached hereto at Tab 5 is a copy of the Member's legal account to C.D. and the trust ledger showing a transfer of $22,000.00 in payment of the account.

39. The Member indicates that this is the only family law file where he has accepted a contingency retainer. At the time he entered into this, he was unaware of the rule prohibiting a contingency fee retainer on a family law file. He indicates he has not entered into any other contingency agreement on a family law matter since.

Formal Complaint #3

40. This matter relates to the Member's acceptance of cash in the amount of $249,700.00 in contravention of Law Society Rule which stated the following:

> 909. (1) A member shall not receive or accept cash in an aggregate amount of $7,500 or more Canadian dollars in respect of any one client matter or transaction.
> …
>
> (3) Subrule (1) applies when a member engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:
>
> (a) receiving or paying funds;
> (b) purchasing or selling securities, real properties or business assets or entities; or
> (c) transferring funds by any means.
>
> …

41. This rule has now been renumbered as rule 1503(1).

42. G.L., a previous client of the Member, contacted him about representing him in the purchase of property. The possession date was June 7, 2019. An appointment with the client was set for June 5, 2019 to make arrangements for payment.

43. On June 5, 2019, the client attended at the office and delivered the entire purchase price in cash. The Member acknowledged that this was a potential problem and contacted his accountant for advice. The accountant suggested that the Member contact the Law Society to provide the background for the instructions.

44. On June 6, 2019, the Member sent the following email to Professional Responsibility Counsel, Stacey McPeek:

> **Dear Ms. McPeek**
> **I have had a recent issue arise involving a sale of farmland that I bring forward.**
> **I was contacted by a family member of a client to represent him in a land purchase which I agreed to. Shortly after I received conveyancing instructions from realtor and advised vendor's solicitor as to how purchaser wished to be registered and when prepared that transfer could be forwarded to our office with trust conditions. As I was advised that there would be no financing contact was by phone to keep my client aware of progress and it was agreed that once transfer was received he would attend at office to put balance of purchase in place to allow for transfer registration.**
> **When attended yesterday (same day as transfer was received) I was unexpectedly given the balance of purchase price in cash being $250 000 .00 rather than cheque instrument.**
> **I gather that is older and has aversion banks. That he feels that cash improves bargaining power.**
> **I also gathered that he has been selling other farmland and downsizing as source of money. That he still farms (has GST. #) and that this quarter section was ideal for his operation by location and what he felt was a good price. I also took into account this sale was through a agent and had deposited $50 000.00 by way of down payment**
> **I have contacted bank and been advised that there would be paperwork required that otherwise would be able to deposit. As time is urgent this would be best for all parties.**
> **Yours Truly,**
> **Garth Buitenhuis**

45. This email was not received immediately by Ms. McPeek as it went directly into her junk email folder.

46. Having heard nothing back from the Law Society, the Member contacted the bank and made arrangements to deposit the funds in his trust account. At no point did the Member follow-up on his email to ensure it was received or to confirm that the Law Society had no issue with him accepting cash in excess of the amount allowed by the Rules.

47. The email was discovered by Ms. McPeek on June 24, 2019.

48. Ms. McPeek referred the matter to the Audit Department for direction. Don Hansen, of the Audit Department, discussed the issue with the Member over the phone. Mr. Hansen explained that the reason for the cash rule and how it could have serious impacts for the Law Society of Saskatchewan from an Anti-Money Laundering/Anti-Terrorist Financing (“AML/ATF”) compliance perspective. The Member acknowledged he was aware of the reasons related to the AML/ATF compliance.

49. The Member indicated that the client had been bank averse and thought that he could improve bargaining power by dealing in cash. The client took satisfaction in dealing with cash and did so on a routine basis. The Member now acknowledges that none of these client traits or client views justifies a deviation from the cash rule limiting cash intake to $7,500.00.

50. There is no indication that the money received by the Member and deposited into his trust account was money derived from illegitimate sources or that the client was attempting to launder the money in question.

PRIOR HISTORY

51. The Member has one prior finding of conduct unbecoming from 2006, a copy of which is attached hereto at Tab 6.