Law Society
of Saskatchewan

DAVID MACKAY
ADMISSIBILITY OF EVIDENCE HEARING: August 9, 2018
ADMISSIBILITY OF EVIDENCE HEARING DECISION DATE: September 20, 2018
HEARING DATES: August 9, 2018, September 26, 2018 & October 31, 2018
DECISION DATE: December 3, 2018
PENALTY HEARING DATE: December 18, 2018
PENALTY DECISION DATE: January 17, 2019
***Law Society of Saskatchewan v. MacKay*, 2019 SKLSS 1**

IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF DAVID MACKAY,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN ON THE ADMISSIBILITY OF EVIDENCE

Committee: Scott Moffat (Chair), Monte Gorchinski and Ron Barsi
Counsel: Tim Huber for the Law Society of Saskatchewan
Robert MacKay for the Member

1. The Hearing of this matter commenced on August 9, 2018. Mr. Tim Huber appeared for the Law Society and Mr. Robert MacKay appeared as counsel for the Member, Mr. David MacKay. There were no objections to the composition of the committee.

2. The Member is charged with conduct unbecoming a lawyer in that he did, after agreeing to trust conditions imposed by Lawyer S in relation to the release of certain settlement funds coming into his possession, fail to comply with those trust conditions by releasing said funds without first ensuring the trust conditions had been met.

3. During the course of the hearing, counsel for the Member objected to the introduction of a document and certain questions. The basis of the objection was that the document and questions were subject to solicitor-client privilege. Counsel for both parties made argument and submitted authority in support of their respective positions. This Committee then adjourned to consider the arguments of the parties.

4. For the reasons that follow, the objection is overruled, the document is admissible and the Member must answer the questions related to that document.

5. The key facts, as outlined in partial agreed statement of facts, were that the Member was retained to act on behalf of the Husband. The Wife had an interest in property in Arizona

and wanted the Husband removed from the title. The Member and Lawyer S, who represented the Wife, corresponded via email regarding the terms of the 'escrow.' The Member also had some communications with his client, the Husband. Funds were provided to the Member and the Member released those funds to the Husband prior to the title registering in Arizona.

6. The Member was called to the stand and during his testimony, counsel for the Law Society sought to tender and question the Member, about a document. As noted, Counsel for the Member objected on the grounds the document was solicitor-client privileged and ultimately, the Committee then adjourned to consider the arguments of the parties.

7. It is of note the document in question was provided by the Member to the Law Society of Saskatchewan during the course of its investigation.

8. Pursuant to section 49 (6) (a) of *The Legal Profession Act*, *1990*, the portion of the hearing dealing with solicitor-client communications was closed. The document in question was tendered for identification purposes and marked as P-3.

9. While the bulk of argument centred on the question of solicitor-client privilege, there was a suggestion that the document was not relevant. Having reviewed the document, it is relevant to the questions this Hearing Committee will ultimately have to answer, namely what were the trust conditions and did the Member breach them? Having reviewed the document, it logically relates to the matter in issue. The Hearing Committee finds the document is relevant.

10. Solicitor-client privilege, the protection of communications between a lawyer and his or her client, is a fundamental principal of the legal system. It permits an individual to make complete disclosure to his or her lawyer and in return receive frank advice. The criteria for the existence of a claim of solicitor-client privilege, as set out by the Supreme Court in *Solosky v. R*, 1979 CarswellNat 4, [1980] 1 SCR 821, are:

1. There must be a communication between a lawyer and his client;
2. The communication must be for the purpose of giving or receiving legal advice; and
3. The communication must be intended to be confidential by the parties.

11. During testimony, the Member suggested he did not necessarily author the document. Counsel for the Member, however, made submissions on the basis of solicitor-client privilege; implicit in this is the recognition the communication was between lawyer and client. The email address used to communicate with Lawyer S and accept service of documents from the Law Society is the same email address on the document. The document was provided by the Member to the Law Society during the course of the investigation. The Committee finds the Member did author the document and it otherwise meets the *Solosky* criteria.

12. Solicitor-client privilege, is not, however, an absolute black hole into which no light may ever be shone. The privilege cannot, for example, be used to shield investigation into a lawyer's ongoing criminal activity. This is but one example. Where a self-governing body, such as the Law Society, is given legislative authority to investigate and govern the conduct of its members, solicitor client privilege yields to the public good in maintaining confidence in the Law Society's ability to regulate its members.

13. The Saskatchewan Court of Appeal, in *Law Society (Saskatchewan) v. Robertson Stromberg*, 1995 CarswellSask 26, 128 Sask. R. 107 (C.A) (Stromberg (C.A.)), affirmed that the

public interest outweighs any solicitor client privilege and a member of the Law Society does not have a right to maintain silence before a disciplinary body of the Law Society. Barclay J., the chamber judge, ordered the production of certain documents over which the law firm asserted solicitor client privilege. In short, Barclay J. held that the policy interests underlining public interest outweighed those supporting solicitor-client privilege:

> In the interest of public policy, lawyers who are under investigation have a duty to co-operate with their governing body and they have no right to claim privilege as a ground to refuse to co-operate in Law Society proceedings. I agree with other jurists who have stated that the practice of a profession is a privilege. The law grants to certain groups a monopoly to carry on certain
> well defined activities and imposes upon the members of those groups an obligation to prevent abuse and to ensure that the monopoly will be exercised for the public good. Those who enjoy these privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. In my view, the public interest in the ethical practice of law outweighs any solicitor-client privilege.
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> *Law Society (Saskatchewan) v. Robertson Stromberg,* 1994 CarswellSask 253, 124 Sask R (Q.B.) at para 77.

14. In upholding the lower court ruling, the Court of Appeal concluded:

> 8 On the question of overriding public policy considerations, which were given priority by the chamber judge over any solicitor-client privilege which might exist with respect to the opinions, he relied on *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821. Dickson J. there said at p. 840:
>
> > The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the
> > rehabilitation of the inmate.
>
> The balancing of interest was done by the chamber judge concluding that societies, such as the Law Society, who are privileged to discipline their own members to maintain standards, must have the fullest opportunity to investigate conduct of their members. We do not see that he made an error in discretion in weighing these factors and concluding that the need for disciplinary proceedings to be and to be seen to be complete is paramount in maintaining public confidence in the manner in which the Society and its members carry out their functions in society. We are not prepared to interfere with his balancing of these conflicting principles.
> *Stromberg* (CA), *supra*.

15. The British Columbia Court of Appeal, in *Skogstad v. Law Society* (British Columbia), 2007 BCCA 310, 2007 CarswellBC 1252, noted that courts across the country have weighed

the competing values of protecting solicitor-client privilege and the need to ensure the integrity of the legal profession. In each case, it is important to review the governing statutory authority.

16. In Law Society of *Saskatchewan v. Merchant*, 2008 SKCA 128, 2008 CarswellSask 655, the member objected to produce to the Law Society investigation certain records relating to dealings with his client on the grounds that they were solicitor client privileged. While the chambers judge had agreed production of the records was not absolutely necessary, the Court of Appeal disagreed.

17. The proper analysis, according to the Court of Appeal, is to ask does the Law Society have the authority to demand records covered by solicitor-client privilege? If the answer to the first question was in the affirmative, then the second point to be considered is whether the authority has been exercised so as not to interfere with the privilege except to the extent absolutely necessary to further the objectives of *The Legal Profession Act, 1990*?

18. Richards, J.A. (as he then was), conducted a detailed review of the legislation as it existed at the time and jurisprudence. He concluded that the Law Society had the authority to demand the production of the privileged documents. However, as a result of the Merchant decision, the legislature amended *The Legal Profession Act, 1990*. Those amendments further clarify that a member cannot not raise 'solicitor-client privilege' as a ground to refuse to provide documents or answer questions. Section 84.1 of *The Legal Profession Act, 1990* currently provides:

> (2) A member shall not <u>in any proceedings pursuant to this Act</u> refuse to answer inquiries or provide any information, member's records or other property within the member's possession or power on the grounds of solicitor and client privilege.
>
> (3) If a member is required to answer inquiries or provide any information, member's records or other property pursuant to subsection (2) and the member may claim solicitor and client privilege with respect to the answers, information, member's records or other property, the member or any other person who may claim the solicitor and client privilege may require that:
>
> (a) all or part of <u>any proceedings pursuant to this Act</u> that deal with the answers, information, member's records or other property be held in private; and
>
> (b) the public be refused access to the information, member's records or other property and to any other document containing the answers.
>
> [emphasis added]

19. The recent decisions in *Alberta v University of Calgary*, 2016 SCC 5, 2016 CarwellAta 2247 and *University of Saskatchewan v Saskatchewan*, 2018 SKCA 34, 2018 CarswellSask 240, cited on behalf of the Member, illustrate that the legislature may, by using clear and unambiguous language, remove solicitor-client privilege.

20. Both sections 84.1 (2) and (3) of The Legal Profession Act, 1990 are clear and unambiguous. The ordinary and grammatical meaning grant the statutory authority to demand and present in any proceeding any record, over which a member wishes to claim solicitor-client privilege. Further, a member cannot use solicitor-client privilege as a ground for refusing to

answer a question.

21. The second issue to be decided is whether the Law Society has exercised its discretion so as not to interfere with the privilege except to the extent absolutely necessary to further the objectives of *The Legal Profession Act, 1990*. The Act gives the Law Society the responsibility of governing the legal profession and ensuring its integrity. Sections 3.1 and 3.2 of *The Legal Profession Act, 1990* currently provide:

> 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
>
> (a) to act in the public interest;
> (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and
> (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.
>
> 3 .2 In any exercise of the society's powers or discharge of its responsibilities or in any proceeding pursuant to this Act, the protection of the public and ethical and competent practice take priority over the interests of the member.

22. As a part of governing the profession and ensuring its integrity, the Law Society has the ability to investigate and discipline its members. Sections 47 to 49 of the Act outline the role, powers and procedures of a hearing committee. In short, those sections provide a legislative framework to conduct the hearing mandated by *The Legal Profession Act, 1990*:

> 47(1) If the written report of the conduct investigation committee includes a direction pursuant to clause 46(1)(a), the chairperson of the discipline committee shall appoint a hearing committee to hear and determine the formal complaint.
>
> 48(2) A hearing committee shall:
>
> (a) hear the formal complaint with respect to which it is appointed; and
> (b) decide whether or not the complaint is well founded, notwithstanding that the existence, interpretation or construction of a contract or the determination of any other question of fact may be involved.

23. *The Legal Profession Act, 1990*, further contemplates situations where evidence touching on matters covered by solicitor-client privilege, is tendered into evidence before a hearing committee:

> 49(6) The hearing committee may exclude the complainant or the public from any part of the hearing if the hearing committee is of the opinion that:
> (a) evidence brought in the presence of the complainant or the public may result in a breach of solicitor and client privilege;
>
> (7) The hearing committee may act pursuant to subsection (6) whether or not a member or any other person who may claim solicitor and client privilege has acted pursuant to subsection 84.1(3).

24. It is against that background and context that the "absolutely necessary" requirement is to be assessed.

25. It was advanced on behalf of the Member that it was not absolutely necessary for the Law Society to tender the solicitor client document in order to ensure a conviction. The Member acknowledges that the Merchant decision gives the Law Society the ability to gather solicitor-client documents during an investigation, but says it is not absolutely necessary to present them to the Hearing Committee in order to obtain a conviction. With respect, this submission misconstrues the "absolutely necessary" requirement. Such an objection could be raised each time solicitor-client privileged documents are tendered to a hearing committee. What then would be the point of the investigation or section 84.1? Such an interpretation would render the investigation hollow and make an absurdity of sections 84.1 and 49 (6).

26. A hearing committee has the duty to hear the complaint and the authority to receive solicitor-client privileged information. Steps have been taken to close the hearing and thereby protect the privileged information. The privilege has been interfered with only to the extend absolutely necessary to achieve the ends sought by *The Legal Profession Act, 1990* as set out above.

27. For the reasons given, the objection that the document, currently marked as P-3, is not admissible as it is covered by solicitor-client privilege is overruled. The Member must answer the questions related to that document.

28. There is one additional procedural matter to address. Pursuant to section 49(6) and 84.1(3) of *The Legal Profession Act, 1990*, the portion of the hearing dealing with solicitor-client privileged matters shall remain closed and neither the complainant nor the public shall have access to the document marked as P-3 without an order of a court of competent jurisdiction.

"Scott Moffat", Chair September 20, 2018

"Monte Gorchinski" September 20, 2018

"Ron Barsi" September 20, 2018

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Committee: Scott Moffat (Chair), Monte Gorchinski and Ron Barsi
Counsel: Tim Huber for the Law Society of Saskatchewan
Robert MacKay for the Member

INTRODUCTION

29. The Hearing of this matter commenced on August 9, 2018, continued by telephone on September 26, 2018 and again in person on October 31, 2018. Mr. Tim Huber appeared for the Law Society and Mr. Robert MacKay appeared as counsel for the Member, Mr. David MacKay. At no time were there objections to the composition of the committee.

30. The Member is charged with conduct unbecoming a lawyer in that he did, after agreeing to trust conditions imposed by Lawyer S in relation to the release of certain settlement funds

coming into his possession, fail to comply with those trust conditions by releasing said funds without first ensuring the trust conditions had been met.

PRELIMINARY MATTERS

31. The Hearing commenced on August 9, 2018. The parties presented a Partial Agreed Statement of Facts. The Member commenced testifying. During his testimony, however, the Member's counsel objected to the introduction of a document and certain questions on the basis that the document and questions were subject to solicitor-client privilege. The Hearing adjourned and, on September 20, 2018, written reasons dismissing the objection were released to the parties. (*Law Society of Saskatchewan v. MacKay*, 20 September 2018) During the September 26, 2018, telephone continuation, counsel for the Member indicated he wished to present further *viva voce* evidence. As such the Hearing was scheduled to continue on October 31, 2018.

32. There was one further preliminary matter that arose, this one on the motion of the Chair. On October 29, 2018, the Chair received a letter by fax from the Member, indicating the Member now represented two individuals who may be in conflict with an estate represented by the Chair. The deceased died on August 10, 2018, the day after this Hearing commenced.

33. By way of background, the process the LSS undertakes in appointing hearing panels begins with conflict checks. Obviously in this case, where the Hearing commenced on August 9, 2018 and the deceased died on August 10, 2018, such procedures would not identify a potential conflict.

34. At the outset of the hearing on August 9, 2018, it was acknowledged by the Member, or on his behalf, that the panel was properly constituted. Nor was any objection lodged on September 26, 2018.

35. Turning now to the fax in question, which was addressed to the Chair and begins, "We understand you act as solicitors for [X], executor for [Y], late of [Z], Saskatchewan. We are consulted by [A] and [B] of [C], Saskatchewan, ..." That letter goes on to address property and debt issues arising within the context of Y's estate.

36. On the face of the October 29, 2018 letter, it appears the acceptance of the new retainer by the Member in a matter where it was readily apparent that a member of the Hearing Committee seized with this matter acted on the other side, was an accident. The Hearing Committee assumes this was inadvertence, as nothing in the letter of October 29, 2018 leads to the conclusion that the Member was deliberately attempting to create a conflict, reasonable apprehension of bias, or was in any other way an attempt to delay this hearing. Again, no issue was raised with the composition of the panel on August 9, 2018, nor was the issue raised on September 26, 2018. The Committee notes that the Member's counsel requested the adjournment of the September hearing specifically so that this Committee could receive further *viva voce* evidence from the Member. Further, with the exception of the Member now participating as counsel, the Y matter is otherwise entirely unrelated to the matters before the Hearing Committee.

37. As previously indicated this Hearing Committee, having heard evidence and issued an interim ruling on the admissibility of evidence, is seized with this matter. Again, there is nothing at this point to indicate this was anything other than inadvertence on the part of the Member. However, out of an abundance of caution, the Chair transferred the Y file to another lawyer in his firm, and will not have further involvement in that matter until the resolution of this hearing,

including delivery of the decision of this hearing panel. Having had the opportunity to review the decision of the Court of Appeal in *Wasylyshen v Law Society of Saskatchewan* (1987), 36 DLR (4th) , it does not appear that simply being opposing counsel in an unrelated matter would be sufficient to raise a reasonable apprehension of bias. As indicated, however, out of an abundance of caution, carriage of the Y estate file was transferred.

38. The Hearing completed on October 31, 2018, without further objection, and the Committee reserved to provide a decision.

FACTS

39. The Husband and Wife resided in Saskatchewan. The Member had been retained to act on behalf of the Husband in divorce and family property division matters. Those matters concluded by May, 2014. The Husband and Wife, through the Wife's family, had an interest in some vacation property located in Arizona (the Arizona Property). It was understood by the Member that the Husband and Wife would be dealing with the issue of the Arizona Property by themselves.

40. Throughout the late fall of 2014, the Wife and her family met with Lawyer S, a member of the Arizona bar, about removing the Husband from the title to the Arizona property. Lawyer S prepared the Quit Claim deed and Affidavit of Value and forwarded them to the Wife. On December 20, 2014, the Wife sent the documents to the Husband who then sought advice from and retained the Member to deal with the issue of the transfer of the Arizona Property. On February 6, 2015, the Member contacted Lawyer S to advise he was acting for the Husband. The Wife, or her family on her behalf, were to pay the Husband $11,439.00 and the Husband was to transfer his interest in the Arizona Property to the Wife. There was also to be a mutual release of any claims related to the property.

41. On February 13, 2015, Lawyer S, sent the following email to the Member:

> How do we plan on doing escrow for this transaction?
>
> For simplicity, I propose the parties meeting at your office. Bev brings a certified check that you deposit to ensure it is "good funds", Craig brings the signed quit claim deed. The quit claim deed is mailed to me. I record it with the Pinal County Recorder. Once I have the recorded quit claim deed, I will email you a copy. Upon receipt of the quit claim deed, the funds are released to Craig.
>
> As far as costs, I propose each party pays their own attorney fees to handle each end of the transaction.
>
> Let me know if this works, or if you have another suggestion.

42. The Member responded on the same day:

> Sounds good but I think we will need some short settlement agreement - specifically Bev has been insisting that Craig pay some share of the expenses to date for the property but since Craig did not and felt that he was unable to use the property he requires some assurance that this settlement will end matters between the parties - a mutual release of all matters between them to date.

43. On March 1, 2015, Lawyer S wrote to the Member stating:

> I have attached a real estate purchase agreement, the quit claim deed and affidavit (required in Arizona, unless the parties divorce decree/order stated who would receive the interest in the home).
> I left the documents in word format, to allow any changes or additions that you feel need to be included.
> Please let me know if you have any questions.

44. The Member wrote to Lawyer S on March 3, 2015:

> I agree with the procedure to close as set out in your February 13 email

45. **[REDACTED]**

46. The Husband attended the Members office in Regina, Saskatchewan on April 12, 2015 and signed the documents. The Husband immediately requested the funds, some $11,439.00, and the Member provided them to the Husband that same day, April 12, 2015.

47. Lawyer S received the documents on May 26, 2015. Unfortunately the documents were not registerable with the Pinal County Recorder as a required document, an affidavit of value sworn by both parties, was not included in the package of documents sent by the Member to Lawyer S. Lawyer S sent an email to the Member on May 26, 2015 advising the Member of the problem. There were numerous emails between the Lawyer S and the Member in an attempt to get the Husband to provide the necessary affidavit. These emails cumulated on January 26, 2016, when Lawyer S emailed the Member demanding return of the money.

48. Shortly thereafter, the necessary affidavit was delivered to Lawyer S and the transaction closed.

49. The Member testified during the course of these proceedings. He has been a Member of the Law Society of Saskatchewan since 1969. He has done thousands of real estate deals in Saskatchewan during his long career. The Member is well familiar with the recommended Uniform Law Society Trust conditions posted on the Law Society Website to be used when conveying property in Saskatchewan. Under those conditions, save for certain exceptions, the money is to be held until title transfers. He also acknowledged this transaction was an “outlier” and he did not know what was the practice for transferring property in Arizona.

50. The Member testified he had an agreement with Lawyer S regarding the transfer of the Arizona property. His position was Lawyer S’s the February 13 email meant that he could release the funds when the Member had received the transfer documents. **[REDACTED]**

ANALYSIS

51. The standard of proof in cases such as this is the civil standard - namely a balance of probabilities. Further, this is a strict liability offence: *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56, *Law Society of Saskatchewan v. Dupont*, 26 October 2018.

52. The Hearing Committee has no hesitation in finding that the Lawyer S’s email of February 13, 2015, imposed trust conditions on the Member and that the Member, by email on March 3, 2015, accepted. While Lawyer S did not use the phrase ‘trust conditions’ he did speak about the terms of ‘escrow.’ *The Dictionary of Canadian Law* defines escrow as:

> Holding something in trust until a contingency happens or a condition is performed.
>
> Dukelow, *Dictionary of Canadian Law* (Scarborough: Carswell, 1991) p. 343.

53. The conditions, set forth in the February 13, 2015, email were:

> For simplicity, I propose the parties meeting at your office. Bev brings a certified check that you deposit to ensure it is "good funds", Craig brings the signed quit claim deed. The quit claim deed is mailed to me. I record it with the Pinal County Recorder. Once I have the recorded quit claim deed, I will email you a copy. Upon receipt of the quit claim deed, the funds are released to Craig.

54. The conditions provide that the Member would receive and hold the money until title registered. This would accord with the usual practice in Saskatchewan. The Uniform Law Society Trust Conditions for real estate conveyancing provides that money not be released until title registers.

55. **[REDACTED]**

56. **[REDACTED]**

57. We are unable to accept that the Member was , on the face of the conditions, entitled to release the funds to the Husband once the Member received the Quit Claim

58. Our interpretation is further underscored by the policy considerations surrounding trust conditions; namely to produce certainty in a transaction.

59. Even if we were wrong in our conclusion that the emails of February 13, 2015 and March 3, 2015 expressly create a trust condition, we would still find that there was an implied trust condition. Section 7.2-11 of the *Code of Professional Conduct*, commentary 7, provides that where a lawyer receives money or property that on reasonable construction is subject to trust conditions or an undertaking, the lawyer is to treat it as such:

> 7.2-11 A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.
>
> [7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these Rules.

60. Commentary 7 was considered in *Law Society of Saskatchewan v. Mah*, 2017 SKLSS 9. In *Mah*, there was no trust condition or written undertaking. On the facts, however, an implied undertaking arose upon that Member accepting the deposit money in a real estate transaction. The Member was found guilty of conduct unbecoming for breaching the implied undertaking.

61. The *Mah* decision is consistent with the decisions of the Hearing Committees of the Law Society of Alberta in *Law Society of Alberta v. Knight*, [2000] LSDD No 47 and *Law Society of Alberta v. Hoffinger*, [2008] LSDD 169.

62. In this case, the Member received money in a real estate transaction knowing it represented payment for his client's interest in the property. He has handled a large number of real estate transactions. He is aware that money and documents are exchanged under trust

conditions where the funds are not released until the transaction registers.

63. Even if there was no express trust condition, the money would be subject to an implied trust condition that the money not be released until the documents were registered.

CONCLUSION

64. We find the Member breached the *Code of Professional Conduct* by releasing the settlement funds coming into his possession without first ensuring the trust conditions had been met. As such, the Member is found guilty of conduct unbecoming a lawyer in that after agreeing to trust conditions imposed by Lawyer S in relation to the release of certain settlement funds coming into his possession, fail to comply with those trust conditions by releasing said funds without first ensuring the trust conditions had been met.

"Scott Moffat", Chair December 3, 2018

"Monte Gorchinski" December 3, 2018

"Ron Barsi" December 3, 2018

PENALTY HEARING DECISION

Committee: Scott Moffat (Chair), Monte Gorchinski and Ron Barsi
Counsel: Tim Huber for the Law Society of Saskatchewan
Robert MacKay for the Member

INTRODUCTION

65. By way of written decision dated December 3, 2018, we found the Member, David MacKay, guilty of one count of conduct unbecoming. Counsel for both parties agreed to make submissions in writing regarding penalty. Those submissions were received by the Committee on December 18, 2018.

RELEVANT FACTS

66. The relevant facts are recounted in our decision of December 3, 2018.

ANALYSIS REGARDING PENALTY

67. Section 53 of *The Legal Profession Act, 1990* (the *LPA*), provides:

> (3) If a hearing committee finds that a formal complaint is well founded, the hearing committee may, by order, do one or more of the following:
>
> (a) assess any penalties or impose any requirements that it considers appropriate, including but not limited to:
>
> (i) directing that the member be disbarred and setting the period, not exceeding five years, during which the person is not eligible to apply for reinstatement;
>
> (ii) suspending the member from practice for a specified period or until specified requirements are met, including requirements that the member:
>
> (A) successfully complete specified classes;
>
> (B) obtain medical treatment or treatment for addiction to drugs or alcohol;

(iii) specifying conditions under which the member may continue to practise, including conditions that the member:

(A) not do specified types of work;
(B) successfully complete specified classes;
(C) not have exclusive control of the member's trust account;
(D) obtain medical treatment or treatment for addiction to drugs or alcohol;
(E) practise only as a partner with, or as an associate or employee of, one or more members that the committee may specify;

(iv) imposing a fine in any amount that the committee may specify;
(v) requiring the member to pay:

(A) the costs of the inquiry, including the costs of the conduct investigation committee and hearing committee;
(B) the costs of the society for counsel during the inquiry; and
(C) all other costs related to the inquiry;

(vi) reprimanding the member;
(vii) permitting the member to resign from the society;

(b) if the formal complaint that has been determined to be well founded relates to the transfer of identified property or funds in an ascertainable amount, require the member to transfer the property or the amount to the rightful owner;
(c) make any direction or set any requirement that the committee considers appropriate.

(4) In addition to an order made pursuant to subsection (3), the hearing committee may order that, if a member fails to make payment in accordance with an order pursuant to subclause (3)(a)(iv) or (v), the member be suspended from practice.

68. In assessing penalty, the primary focus, as set out in sections 3.1 and 3.2 of *The Legal Profession Act, 1990*, is on the protection of the public and ethical and competent practice. Other factors to consider include general and specific deterrence, along with the range of penalty imposed in similar cases. The Committee should consider any aggravating, mitigating or other special factors that are present. (See: *Abrametz v. LSS*, 2017 SKCA 37 (*Abrametz*) , paras 21-31) In *Merchant v LSS*, 2009 SKCA 33, the court wrote:

> [95] ... Not unexpectedly, the reasonable range of sentences in disciplinary matters is elastic. It will be impacted by considerations of age, experience, discipline history, the unique circumstances of the member, and the nature of the conduct complained of.
>
> [...]
>
> [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 is 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 professions, 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.
>
> [citations omitted]

69. Counsel for both parties referred to a number of cases where there were breaches of trust conditions or undertakings: *LSS v. Brown*, 2008 SKLSS 08-06, *LSS v Stinson*, 2008 SKLSS 7, *McLean v LSS*, 2012 SKCA 7, *LSS v. Galey*, 2014 SKLSS 7, *LSS v. Mahon*, 2014 SKLSS 12, *LSS v. Scott*, 2016 SKLSS 5, *LSS v. Mah*, 2017 SKLSS 9, *LSS v. Johnson*, 2011 SKLSS 7. The cases suggest a broad range of penalty, ranging from a reprimand to a suspension. The facts of the cases range from self-reporting with an agreed statement of facts, to a fairly significant loss to a deliberate breach in an attempt to gain leverage in negotiations. Counsel for both parties suggests the Member's conduct falls at the lower range of the spectrum and a reprimand, fine or some combination would be appropriate. We agree.

70. In support of his contention that a $1,500.00 fine was appropriate, counsel for the Law Society specifically referred to *Mah, Galey* and *Mahon*. In each case, there was a joint submission on penalty. The facts of each case were slightly different. In *Mah*, there was an inaccurate representation as to when the funds were paid out. In *Galey*, the funds were released during the negotiation process and *Mahon*, the third party remained liable for the Visa debt that ought to have been paid out with the trust monies.

71. Counsel for the Member, in support of his contention that a reprimand, or no more than a $500.00 fine, was appropriate penalty referred to many of the same cases. He also relied upon the *Johnson* decision, wherein a reprimand was found to be the appropriate penalty. In that case, however, there had been self-reporting.

72. The Member has been at the bar for almost 50 years. He has handled a significant number of real estate transactions and would have been aware that releasing funds to a vendor prior to title registration is not the usual course of action. Also of concern to the committee is the Member's seeming lack of insight and understanding. During the course of his testimony, the Member did not want to admit that trust condition had been imposed, he simply testified he had an "agreement" with the American lawyer.

73. Also of note are the following mitigating factors: there was a partial agreed statement of facts, no disciplinary record is alleged by the Law Society, the value of the transaction was relatively small, some $11,439.00, the wife and her family continued to have possession, and presumably use, of the property throughout. Fortuitously for the Member, there were no intervening registrations and once the necessary affidavit was provided, the transaction closed without further delay.

74. We agree with the Member there is no minimum or standard penalty for a breach of a trust condition or undertaking. As noted above in *Merchant*, the reasonable range of sentences is elastic. Having considered all of the above factors, we assess the penalty to be a reprimand and a $1,000.00 fine.

ANALYSIS REGARDING COSTS

75. The final issue to address is costs. Counsel for the Law Society seeks $11,000.00 in costs broken down as follows: counsel time $7,460.00, court reporter fees of $945.00, room rental of $670.00 and honorarium for hearing committee members of $2,025.00. The submissions on behalf of the member, do not specifically address this issue. The Saskatchewan Court of Appeal in *Abrametz* noted costs are in the discretion of the Hearing Committee, with discretion to be exercised judicially. As such, we have provided these reasons.

76. As previously noted, section 53 (3) (3) of *The LPA*, 1990, provides a Hearing Committee with jurisdiction to award costs. Section 53 (3) (a) (v) states:

> (3) If a hearing committee finds that a formal complaint is well founded, the hearing committee may, by order, do one or more of the following:
> (a) assess any penalties or impose any requirements that it considers appropriate, including but not limited to:
> [...]
> (v) requiring the member to pay:
> (A) the costs of the inquiry, including the costs of the conduct investigation committee and hearing committee;
> (B) the costs of the society for counsel during the inquiry; and
> (C) all other costs related to the inquiry;

77. Rule 490 of the *Rules of the Law Society*, further provides that the costs assessed by a Hearing Committee may (not shall) include costs actually incurred by the Law Society. These include court reporters' fees, Hearing Committee attendance fees, reasonable counsel fees and other disbursements, such a hearing room rental, incurred in relation to the proceedings.

> 490. (1) In calculating the costs payable under section 53(3)(a)(v) of the Act, a Hearing Committee may include part or all of one or more of the following costs actually incurred by the Society
>
> [...]
>
> (d) the court reporter's fee for attendance at a hearing or meeting under this Part;
> (e) the cost of a transcript of a hearing or meeting held under this Part, if the Society
> would otherwise be liable for its cost;

[...]

(g) a Hearing Committee attendance fee of:
(i) $150.00 per half day of hearing for the first three days of hearings; plus
(ii) $500.00 per half day of hearing for each subsequent day of hearing
multiplied by the number of Hearing Committee members in attendance;
(h) reasonable fees or costs of Counsel to the Conduct Investigation Committee;
(i) reasonable disbursements of Counsel to the Conduct Investigation Committee; and
(j) any other amount, arising out of the proceedings, for which the Society would otherwise be liable.

78. The Saskatchewan Court of Appeal in *Abrametz* reviewed the law surrounding an award of costs in law society disciplinary hearings. At paragraphs 44 and 45, Madam Justice Schwann noted that the focus in such a proceeding, unlike a court proceeding, is not to indemnify the opposing party. It results from an aspect of membership in the professional association and it is for the sanctioned member to bear the cost of the disciplinary proceeding. The collective membership is not to bear the expenses. This is sometimes referred to as the membership principle. The result does not necessarily mean full indemnification; the costs are not to be so prohibitive as to prevent a member from defending their right to practice of being able to dispute a misconduct charge.

79. In assessing costs, Madam Justice Schwann, held an analysis of the following factors to be helpful:

a) the balance between the effect of a cost award on the member and the need for the Law Society to effectively administer the disciplinary process;
b) the respective degrees of success of the Law Society and member;
c) the award should not be punitive;
d) the other sanctions imposed and expenses associated therewith; and
e) the time and expense of the investigation and hearing associated with each charge.

80. The Court of Appeal also went on to provide guidance in determining whether the cost award made in that case was punitive. Such an assessment should be made on an individual basis. The Hearing Committee should consider the penalty imposed, including whether the member will be suspended from practice and other financial obligations imposed as a result of its order.

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

81. Turning to the facts of this case, as previously noted, the hearing of this matter proceeded on three separate dates, numerous case management conferences were held. During the first hearing, the Member raised an objection to the introduction of an email document and declined to answer questions on the grounds of solicitor-client privilege. A significant brief, with supporting cases, was filed by the Member in support of his contention. This necessitated an adjournment to the September 26, 2018 date. It is also of note that during the August 9, 2018 hearing, it was specifically discussed the matter would proceed by phone on the return date. The adjournment of the September 26, 2018 date was necessitated by the Member's request at the outset of the September 26, 2018 hearing to provide additional in person testimony.

82. The member faced one charge of conduct unbecoming and was found guilty of the same. This committee determined a reprimand and $1,000.00 fine to be the appropriate penalty. In light of how matters progressed, the time and expenses of the hearing requested by the Law Society are reasonable. The hearing in this matter occurred over three (3) days, there was case management, time was expended in creating a partial agreed statement of fact. Further, the Law Society had to respond to the Member's unsuccessful objection regarding solicitor-client privilege.

83. There was no evidence presented by the Member that the cost award would, in his particular circumstance, be punitive. As noted in *Abrametz*, the onus is on the Member. While not insignificant, this is not a case where the costs requested are hundreds of thousands of dollars. Nor are the other sanctions imposed by this committee likely to substantially interfere with the Member's ability to earn his livelihood. As such, the hearing committee finds a costs award of $11,000.00 is not punitive and is reasonable in the particular circumstances of this case.

CONCLUSION

84. This committee thereby orders that the Member, David MacKay:

a) be reprimanded;
b) shall pay a fine to the Law Society of Saskatchewan in the amount of $1,000.00; and
c) shall pay costs to the Law Society of Saskatchewan in the amount of $11,000.00.

The Member has until 4 p.m. on April, 30, 2019 to comply with the above, failing which a suspension shall be imposed until such time the above have been paid in full.

"Scott Moffat", Chair	January 17, 2019
"Monte Gorchinski"	January 17, 2019
"Ron Barsi"	January 17, 2019

PARTIAL AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated February 17, 2017, alleging the following:

THAT DAVID MACKAY, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

i. did, after agreeing to trust conditions imposed by Lawyer S. in relation to the release of certain settlement funds coming into his possession, fail to comply with those trust conditions by releasing said funds without first ensuring the trust conditions had been met.

JURISDICTION

85. David MacKay (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing Member of the Law Society of Saskatchewan (hereinafter the "Law Society").

86. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated February 17, 2017 a copy of which was served on the Member. Attached at **Tab 1** is a copy of the Formal Complaint with proof of Service.

ORIGIN OF COMPLAINT

87. The Law Society began an investigation into the conduct of the Member after receiving a complaint dated February 2, 2016 [**Tab 2**]. This complaint was filed by T.W. the former spouse of the Member's client, C.W.

88. The party's divorce and property settlement concluded in May of 2014 at which time the Member's services were no longer required and he closed his file. At that time the parties intended to deal with the Arizona property themselves but later the Member's client decided to involve the Member in the transaction.

89. T.W. alleged that the Member failed to adhere to trust conditions imposed in relation to the use of the funds paid to the Member in connection with the proposed settlement arrangement.

PARTICULARS

90. In September, 2014 A.H., sister of the complainant, T.W., contacted a lawyer in Arizona named Lawyer S. about, among other things, removing her former brother-in-law, C.W., from the title to their family owed Arizona property.

91. On September 30, 2014 Lawyer S. responded stating that the process would be difficult and expensive and asked a few clarifying questions.

92. On November 20, 2014, the complainant and her family member, B.H., met with Lawyer S. and on November 24, 2014, Lawyer S. emailed them confirming what was discussed at the meeting and attached a Quit Claim Deed and an Affidavit of Property Value for C.W. to sign and have notarized [**Tab 3**].

93. On December 10, 2014, B.H. forwarded Lawyer S.'s November 24, 2014 email to C.W. [**Tab 4**].

94. On January 13, 2015, C.W. responded **[Tab 4]** saying he wanted to meet with his lawyer, the Member, about the transfer.

95. On January 28, 2015, B.H. emailed to Lawyer S. that T.W. would just pay C.W. out. The price proposed was $11,439.00 [**Tab 5**].

96. After C.W. met with the Member on February 6, 2015, the Member contacted Lawyer S. to discuss the US property transfer.

97. The Member emailed Lawyer S. directly on February 6, 2015.

98. On February 13, 2015 the Member wrote to Lawyer S. advising that the parties were close to a deal and that the parties just needed to document it [**Tab 6**].

99. Later on February 13, 2015, Lawyer S. emailed the Member as follows [**Tab 6**]:

> **How do we plan on doing escrow for this transaction?**
>
> **For simplicity, I propose the parties meeting at your office. [B.H.] brings a certified check that you deposit to ensure it is "good funds", [C.W.] brings the signed quit claim deed. The quit claim deed is mailed to me. I record it with the Pinal County Recorder. Once I have the recorded quit claim deed, I will email you a copy. Upon receipt of the quit claim deed, the funds are released to [C.W.]**
>
> **As far as costs, I propose each party pays their own attorney fees to handle each end of the transaction.**
>
> **Let me know if this works, or if you have another suggestion.**

100. The Member responded shortly thereafter with the following email [**Tab 6**]:

> **Sounds good but I think we will need some short settlement agreement - specifically [B.H.] has been insisting that [C.W.] pay some share of the expenses to date for the property but since [C.W.] did not and felt that he was unable to use the property he requires some assurance that this settlement will end matters between the parties – a mutual release of all matters between them to date.**

101. On March 1, 2015, Lawyer S. emailed [**Tab 6**] the Member a Real Estate Purchase Agreement, a Quit Claim Deed and an Affidavit of Value (all in blank) [**Attachments at Tab 7**] stating in the email the following:

> **I have attached a real estate purchase agreement, the quit claim deed and affidavit (required in Arizona, unless the parties divorce decree/order stated who would receive the interest in the home).**
>
> **I left the documents in word format, to allow any changes or additions that you feel need to be included.**
>
> **Please let me know if you have any questions.**

102. The Member forwarded the March 1, 2015 email to C.W. on March 2, 2015.

103. The Member sent an email to Lawyer S. on March 3, 2015 stating the following [**Tab 8**]:

> **I agree with the procedure to close as set out in your February l3 email. As to the Purchase Agreement I suggest amending paragraph 17 (see attached) so that anything related to the title to the land is settled in Arizona by Arizona law and any claim related to paragraph 4 be settled in Saskatchewan.**

104. On or about April 9, 2015, T.W. delivered to the Member a partially signed copy of the Real Estate Purchase Agreement and a certified cheque for $11,439.00 USD (converted to CDN funds) made payable to the Member's firm. The Affidavit of Value was not delivered at this time.

105. On April 16, 2015, the Member met with C.W., executed the Real Estate Purchase Agreement and Quit Claim Deed with him and mailed those documents to Lawyer S. At, C.W.'s request, the Member released the funds to C.W.

106. On May 26, 2015, Lawyer S. emailed the Member confirming receipt of the Quit Claim Deed but indicated that the Affidavit of Value was not included in the parcel of documents provided by the Member. Lawyer S. indicated he would send the Affidavit of Value to his client to deliver to the Member's office. [**Tab 9**]

107. On May 26, 2015, the Member informed C.W. that the Affidavit would need to be signed and forwarded it by email to C.W. indicating that C.W. could either sign it at his office or before any Notary.

108. On June 9, 2015, C.W. called the Member requesting a price quote if he and T.W. attended to swear the Affidavit of Value. The Member quoted a $40.00 charge for both C.W. and T.W. to attend at his office to have the Affidavit of Value completed. The Member heard nothing further in response.

109. On August 20, 2015, someone delivered an Affidavit of Value to the Member's office. No note or cover letter accompanied the Affidavit of Value. Unknown at that time by the Member, the Affidavit of Value had been partially signed by T.W. but not by C.W. The same day, the Member mailed the partially signed Affidavit of Value **[Tab 10]** to Lawyer S.

110. On August 31, 2015, Lawyer S. emailed the Member stating that he received the signed Affidavit, but it was not signed by C.W. and that he was returning the original by mail. The Member emailed Lawyer S. stating "Okay – sorry, C.W. just dropped it off and I assumed it was signed for use" [**Tab 11**]. The Member had assumed C.W. dropped the Affidavit of Value off.

111. On September 2, 2015 Lawyer S. emailed the Member and forwarded a fresh copy of the partially signed Affidavit needing to be signed by C.W. to the Member. The Member forwarded this document to C.W. on or about September 2, 2015.

112. Between September 2, 2015 and January 12, 2016, the Member telephoned C.W. on more than one occasion, leaving voice messages to call back. C.W. did not return the calls but the Member was aware that the parties agreed to meet regularly regarding parenting of their child.

113. On January 12, 2016, Lawyer S. followed up with the Member indicating that the Affidavit of Value was still outstanding.

114. On January 13, 2016, Lawyer S. emailed the Member stating the following [**Tab 12**]:

> **To help facilitate acquiring signatures and with your approval. Can I instruct my client to meet with your client and obtain his signature on the Affidavit of Value? I will send a new one to my client and cc you so that you are aware. This issue is still outstanding, and I would like to resolve it before the end of the month. Please let me know.**

115. On January 15, 2016, T.W. emailed Lawyer S. [**Tab 12**] stating **"I'm assuming you haven't heard from Mr. MacKay yet? How long do we give him to respond? Is there anything we can do here in Regina? Should we be contacting the Law Society here?"**

116. Lawyer S. responded to T.W. by email stating **"My suggestion is you take the new Affidavit to Craig and both of you sign it together and mail it to me."**

117. On January 25, 2016, Lawyer S. emailed the Member and advised that the transaction was being cancelled and demanded back the funds that were paid to the Member's firm [**Tab 13**].

118. On January 25, 2015, the Member responded to Lawyer S., advising that he would make arrangements to have C.W. attend at his office to sign the Affidavit of Value.

119. January 25, 2016, Lawyer S. emailed the Member:

> **"Thank you for responding. I have attached a blank Affidavit of Value. We will disregard the old one and start over with signatures. After C.W. signs it , let me know and I will send my client's over to pick it up. T.W. will need to sign it and I will have T.W. mail the original down to me. Again, thank you for your help."**

120. On January 29, 2016, the Affidavit of Value was signed by C.W. and delivered to T.W. on February 3, 2016.

121. The documentation was registered in Arizona thereafter and the transaction closed at that time.