Court of Appeal for Saskatchewan
Docket: CACV3203

Citation: *Peet v Law Society of Saskatchewan*, 2019 SKCA 49
Date: 2019-06-04

Between:

Russell Milton Peet

Appellant

And

Law Society of Saskatchewan

Respondent

Before:	Ottenbreit, Whitmore and Leurer JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Whitmore
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Leurer
On Appeal From:	2018 SKLSS 3, Saskatoon
Appeal Heard:	December 4, 2018
Counsel:	Russell Peet appearing on his own behalf Timothy F. Huber for the Respondent

Whitmore J.A.

I. INTRODUCTION

[1] Russell Peet appeals the January 26, 2018, decision of the Hearing Committee [Committee], appointed by the chairperson of the Discipline Committee of the Law Society of Saskatchewan: *Law Society of Saskatchewan v Peet*, 2018 SKLSS 3 [*Committee Decision*]. Mr. Peet pleaded guilty to a charge of conduct unbecoming a lawyer and the Committee imposed a six-month suspension from the practice of law, a fine of $40,000, and assessed costs of $1,865. For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[2] Mr. Peet was admitted as an active member of the Law Society of Saskatchewan in July of 1981. In the years since his admission, Mr. Peet's conduct has resulted in a lengthy disciplinary history. The following summary of that history was provided in the *Committee Decision*:

> 10. Counsel for the Conduct Investigation Committee argued that in determining the appropriate penalty in this matter, it would be appropriate for the Hearing Committee to take into account the previous disciplinary history of [Mr. Peet]. He provided a summary of that history, referencing the dates of the decisions:
>
> a. December 9, 1999
>
> Count #1 - failure to comply with undertakings
>
> - fail to treat a fellow lawyer with courtesy and good faith in that he failed to provide an accounting of trust monies received and disbursed within a reasonable time
>
> Count #2 - fail to respond to the Law Society
>
> Count #3 - fail to treat the Court with courtesy
>
> Count #4 - fail to properly represent clients in estate matters (unreasonable and unexplained delay)
>
> Count #5 - fail to properly represent clients in estate matters (unreasonable and unexplained delay)
>
> Count #6 - fail to respond to correspondence from the Public Trustee
>
> Count #7 - fail to properly represent clients in estate matters (unreasonable and unexplained delay)
>
> - failed to return phone calls and correspondence
>
> - misled executor as to conduct of the file

Count #8 - fail to treat a fellow lawyer with courtesy and good faith

- misleading fellow lawyer regarding progress of file

- breach of undertaking

- failure to respond to correspondence

Outcome: - 3-month suspension held in abeyance pending successful completion of Professional Standards programming, $3,000.00 fine, and costs of $5,497.37

b. December 5, 2002

- failure to comply with undertaking to provide an accounting in an estate matter

Outcome - $5,000.00 fine and costs

c. December 9, 2004

- fail to reply promptly or at all to the Law Society (7 separate counts)

- breach of undertaking

- fail to deal in good faith with another lawyer

- fail to provide competent service

- fail to deliver legal file to successor counsel in a reasonable time (2 separate counts)

- dilatory practice (2 separate counts)

Outcome - 6-month suspension, practice supervision condition, and costs of $9,244.05

d. October 27, 2008

- dilatory practice (estate matter)

Outcome - $7,500.00 fine and $4,323.00 in costs.

e. April 11, 2013

- dilatory practice (estate matter) (2 counts)

- failure to reply promptly to the Law Society

Outcome - 1-month suspension and $16,216.80 in costs.

f. January 23, 2017

- failure to reply promptly to the Law Society

Outcome - 3-month suspension, $7,500.00 fine and $2,571.75 in costs.

[3] The events giving rise to the disciplinary proceedings that led to the present appeal relate to the filing by Mr. Peet of the required reporting forms with the Law Society for the year ending December 31, 2015. The Law Society's auditor response on April 25, 2016, with several inquiries about the forms. The auditor requested a reply within 30 days.

[4] Mr. Peet failed to reply and the auditor sent a follow-up letter dated June 8, 2016, requesting a reply by June 29, 2016. On June 30, 2016, Mr. Peet telephoned the auditor and requested an extension of time until July 4, 2016.

[5] But Mr. Peet, again, did not respond by July 4, 2016, and the auditor sent another letter dated August 3, 2016, requesting a reply by August 24, 2016; failing which, the auditor would report the matter to the Complaints Counsel of the Law Society for consideration of discipline proceedings.

[6] Yet again, Mr. Peet failed to respond and, on August 29, 2016, the auditor referred the matter to the Complaints Counsel. The auditor advised Mr. Peet of his actions.

[7] On September 29, 2016, Mr. Peet replied to the auditor with his response to the auditor's original inquiries. The response was found to be satisfactory.

[8] The Conduct Investigation Committee, in a formal complaint dated January 5, 2017, charged Mr. Peet with conduct unbecoming a lawyer in that he had failed to reply promptly to communications from the Law Society.

[9] When the matter came up for a hearing on April 5, 2017, Mr. Peet entered a plea of guilty to the formal charge and an agreed statement of facts was presented to the Committee. The Committee "accepted the Member's guilty plea, made a finding of conduct unbecoming in relation to the allegation, and heard the representations by the parties concerning the appropriate penalty" (at para 5).

[10] The Conduct Investigation Committee found that Mr. Peet's lengthy disciplinary history, and his consistent downplaying of the seriousness of his conduct, called for a lengthy suspension and a significant fine:

> [23] Counsel stopped short of using the term "ungovernable" in relation to the Member, although he submitted that were the Member's pattern of conduct unbecoming to continue, future hearing committees might have to decide whether it is an appropriate label, and would also have to consider whether severing the Member's relationship with the Law Society altogether would be the logical next step.

[11] For his part, Mr. Peet acknowledged that it had been an "error not to respond more promptly to the communications from the Law Society auditor" (at para 24), but he considered it necessary to prioritize a major piece of litigation ahead of "routine correspondence". He emphasized that there was "no substantive cause for concern with his trust accounts or his record keeping", and the "complaint only dealt with the relatively technical question of whether his response to the Law Society had been unduly delayed" (at para 25). On these bases, Mr. Peet argued that a suspension would be an unnecessarily harsh penalty.

[12] The Committee agreed with the position taken by the Conduct Investigation Committee. It took note not only of the history of previous misconduct but the view taken by Mr. Peet with respect to similar complaints and discipline. The Committee observed that Mr. Peet "has always downplayed the seriousness of this pattern of interaction with the Law Society, noting that while they may technically be a violation of the Code, it has caused no harm to clients and is thus at the 'lower end' of the professional misconduct spectrum" (at para 28). The Committee further observed that "none of the sanctions devised by previous disciplinary panels has brought about lasting change" in Mr. Peet's conduct (at para 30). At several junctures in the *Committee Decision*, the Committee referred to the possibility that Mr. Peet's failure to respond to previous discipline teetered on demonstrating that he was ungovernable and requiring disbarment. The Committee concluded by expressing the view that "any future infractions would make it necessary for a hearing committee to think in those terms" (at para 36).

[13] The Committee imposed the sanctions set out above.

III. ISSUES

[14] Mr. Peet appeals the decision on the basis that the Committee imposed an unreasonably high penalty:

(a) in failing to consider mitigating factors;

(b) in failing to adhere to the principle of progressive discipline; and

(c) in improperly considering an earlier penalty for a similar offence he had committed.

[15] Mr. Peet submits, even without those errors enumerated above, the penalty is unreasonable and cannot stand. Further, Mr. Peet submits the composition of the Committee, being composed of non-benchers, should result in less deference being owed to the decision of the Committee.

IV. STANDARD OF REVIEW

[16] The appropriate standard of review to be applied to decisions of the Committee is reasonableness: *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at paras 38–41, [2014] 6 WWR 643 [*Merchant Law*]. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court explained the application of the reasonableness standard:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. 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.

[17] With that, I turn to Mr. Peet's arguments.

V. ANALYSIS

A. Failure to consider mitigating factors

[18] Mr. Peet's first argument is rooted in the following passage from the *Committee Decision*:

> 32. We are in agreement with counsel for the Conduct Investigation Committee that the disciplinary record of the Member is an aggravating factor that elevates the seriousness of a breach of the Code which might be treated fairly leniently on a first offence. We also agree that there are no mitigating factors in this case; the Member himself acknowledged before us that it had been an error on his part not to respond to the Law Society auditor more promptly. We have come to the conclusion that it is necessary for us to impose a significant sanction in light of the obliviousness shown by the Member to the gravity of the message previous hearing committees have been trying to convey to him.
>
> (Emphasis added)

[19] Mr. Peet submits the Committee erred when it held there were no mitigating factors for it to consider. Mr. Peet says his guilty plea and the agreed statement of facts illustrate his cooperation with the Law Society and are mitigating factors that should have been considered. Mr. Peet adds that the matter under review was a question of administrative compliance, which was satisfactorily resolved, and was not an issue involving planning and deliberation. These factors, he says, should also have been considered.

[20] I would agree with Mr. Peet that it would have been an error for the Committee to completely disregard these mitigating factors. However, in my respectful view, it takes too narrow a view of the *Committee Decision* to conclude that it did this.

[21] The Committee made specific reference to the fact that Mr. Peet had entered a guilty plea and had agreed with the Law Society on the facts acknowledging his guilt. In light of this reference, the Committee's later statement that there were no mitigating factors can best be understood as the Committee taking the view that, in the circumstances of this serial offender, the guilty plea and agreement as to facts could not serve to mitigate the gravity of his ongoing and offending behaviour.

[22] Mr. Peet's record displays a virtually unbroken and continuing pattern of misconduct. Including this charge, Mr. Peet has been found guilty of conduct unbecoming a lawyer 16 times in the last 20 years, 11 of which are charges of failing to respond to the Law Society. In fact, he pleaded guilty to his most recent charge prior to the current charge under review on September 30, 2016, the day after he responded to the Law Society on the current matter.

[23] After going through Mr. Peet's complaints record, the Committee expressed concern that sanctions devised by past disciplinary panels had failed to impress upon Mr. Peet the "seriousness of the pattern of successive infractions he has established" (at para 30). The Committee held Mr. Peet's disciplinary record was an aggravating factor, elevating the seriousness of his misconduct, and expressly concluded: "As we have said earlier in this decision, there is no evidence that the previous pattern of complaints and disciplinary sanctions has made a genuine impression on the Member" (at para 33). The Committee imposed the sanctions in the "hope of convincing the member of the significance of the regulatory regime which governs his conduct as a lawyer … to impose sanctions which may have a greater impact on his thinking than previous penalties apparently have" (at para 35). The Committee then warned Mr. Peet that any future infractions of this kind would force a future Committee to consider a penalty in terms of disbarment.

[24] From these statements, and from a review of Mr. Peet's complaints history, one can readily discern that Mr. Peet's conduct has been a matter of concern for the Law Society for some time and that his conduct has not improved, despite repeated charges and penalties.

[25] Further, while Mr. Peet refers to the offence as a matter of compliance, and sees it as a minor offence, the Committee viewed the offence more gravely:

> 35. … The primary objective of the Law Society is the protection of the public, and it is impossible for it to do this effectively if lawyers who fall under its jurisdiction refuse to treat its regulatory system with respect. The insistence of the Law Society on timely and complete response from its members is not merely a technical rule which members are justified in slighting but is a fundamental aspect of a framework which is designed to ensure that the public can have confidence in the soundness of professional services provided by Saskatchewan lawyers.

[26] It can be taken that the Committee simply did not agree that Mr. Peet's cooperation, agreed statement of facts, or guilty plea were materially mitigating under the circumstances. The Committee was not required to give weight to those factors as mitigating in the circumstances of this case. Accordingly, the Committee's decision not to give effect to these factors was not unreasonable. Further, the Committee did not accede to Mr. Peet's attempt to trivialize his conduct as a mere compliance issue.

[27] Mr. Peet relies on *McLean v Law Society of Saskatchewan*, 2012 SKCA 7, 347 DLR (4th) 414 [*McLean*]. In *McLean*, the Mr. McLean had been found guilty of breaching undertakings. At the sentencing proceeding, Mr. McLean attempted to explain the reasons for his breach, which included a number of extenuating circumstances this Court ultimately agreed were mitigating. The Court found the panel misunderstood Mr. McLean's explanation, leading it into error by effectively treating mitigating factors as aggravating factors, which had a direct impact on the sentence.

[28] It is true that this Court observed the panel in *McLean* did not give much weight to the agreed statement of facts or guilty plea, but that observation was made in the broader context of this Court's discussion of the panel's misapprehension of the member's explanation for his conduct.

[29] Additionally, this Court has endorsed the notion that mitigation, as a general matter, does not carry as much weight in professional disciplinary sentencing as it does in criminal sentencing, as enunciated in *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 WWR 478:

> [98] However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, 2008 ONLSAP 7, 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*, [1994] 1 W.L.R. 512 (C.A.). 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.
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> (Emphasis added)

[30] Mr. Peet's argument based on the Committee's treatment of mitigating factors must fail.

B. Failure to adhere to the principle of progressive discipline

[31] Mr. Peet submits the Committee erred in failing to adhere to the principle of progressive discipline when it referred to the decision in *Law Society of Saskatchewan v Peet*, 2017 SKLSS 2 [*Peet 2017*], in assessing his penalty in the matter under review. In *Peet 2017*, Mr. Peet was suspended for three months, was given a fine of $7,500, and was assessed costs of $2,571.75. He says it was inappropriate to consider that matter because the penalty was imposed *after* the conduct of the current offence took place and before a penalty was imposed for the current offence.

[32] Mr. Peet says there was no opportunity for him to learn from the mistake underpinning *Peet 2017* or to heed the warning that penalty would have given him. Mr. Peet submits this is an inappropriate application of the principle of progressive discipline in sentencing, which the Committee purported to follow. Rather, says Mr. Peet, the Committee should have referred to the decision concerning his offence in *Law Society of Saskatchewan v Peet*, 2013 SKLSS 5 [*Peet 2013*], where he received a penalty of a 30-day suspension and $16,216.80 in costs. He submits the Committee and should have considered a progressive penalty from the standpoint of that decision, not from *Peet 2017*.

[33] The Law Society agrees the Committee considered the *Peet 2017* decision but submits that it was appropriate for it to do so. It says post-offence convictions for earlier conduct can be viewed as an indication of character, especially when the earlier investigation was for a similar offence.

[34] In my respectful view, Mr. Peet misinterprets the point that the Committee placed on *Peet 2017*. The Committee was concerned that the conduct implicated in that decision occurred during the currency of the investigation into the present complaint – at a time when Mr. Peet should have been attuned to the need to pay attention to requests from his profession's governing body. In this context, the relevance of the conduct at issue in *Peet 2017* was to underscore the Committee's pessimism that anything short of a significant sanction would fail to impress on Mr. Peet "the seriousness of the pattern of successive infractions" (at para 30) he had established as well as the impact of his behaviour in undermining "the credibility of the Law Society, and possibly also the legal profession, in the eyes of the public" (at para 30). It is in this context that the Committee then made specific reference to the principle of progressive discipline:

> 31. It must be remembered that the principle of progressive discipline is founded on the notion that a person whose conduct is considered unacceptable should be given an opportunity to modify the impugned behavior and pursue a new course. If this does not have the desired effect in the first instance, a more stringent sanction is applied in order to persuade the offending party that there is indeed a need to change. This idea is based on a faith in the potential for rehabilitation of people who have broken the rules, but there will always be cases where this proposition is in doubt. The idea of progressive discipline cannot be seen as a strait jacket for disciplinary proceedings. It is necessary for those responsible for formulating a disciplinary regime in a particular case to be able to look critically at the likelihood of redemption. The Member's own submissions, suggesting as they do that he still has difficulty understanding the seriousness of the Law Society's concerns, are discouraging in this respect.
>
> (Emphasis added)

[35] Nothing in the *Committee Decision* suggests the Committee somehow failed to appreciate that *Peet 2017* involved a penalty imposed after the within conduct. The Committee clearly considered the relevant sentencing principles, including the principle of progressive discipline. The Committee was properly concerned that the credibility of the Law Society and the legal profession were at stake and would be affected by its decision. It is also clear the Committee did not view its sentencing discretion as being restrained by the principle of progressive discipline: "progressive discipline cannot be seen as a strait jacket for disciplinary proceedings" (at para 31). In light of this, it must be considered whether the Committee is bound to apply the principle of progressive discipline. If so, then the more specific question of how the principle applies to the facts of this case must be answered.

[36] In *Murray Lessing (Re)*, 2013 LSBC 29 [*Lessing*], the hearing panel restated the framework for applying the principle of progressive discipline. The first part of its analysis was concerned with the Law Society rules in force in British Columbia, which stated the "panel may consider the professional conduct record of the respondent in determining a disciplinary action under this Rule" (at para 69). (A functionally equivalent provision can be found at Rule 450(11)(a) of the *Rules of the Law Society of Saskatchewan*.) At the conclusion of its discussion in *Lessing*, the panel said the following with respect to the principle of progressive discipline:

> [73] In regard to progressive discipline, this Review Panel does not consider that *Law Society of BC v. Batchelor*, 2013 LSBC 9, stands for the proposition that progressive discipline must be applied in all circumstances. At the same time, the Review Panel does not believe that progressive discipline can only be applied to similar matters.

> [74] Progressive discipline should not be applied in all cases. A lawyer may steal money from a client. In such a case, we generally skip a reprimand, a fine or even a suspension and go directly to disbarment. Equally, a lawyer may have in the past engaged in professional misconduct requiring a suspension. Subsequently that lawyer may be cited for a minor infraction of the rules. In such a situation, progressive discipline may not apply, and a small fine may be more appropriate.
>
> (Emphasis added)

[37] Thus, the British Columbia panel was of the view that whether progressive discipline is an appropriate principle to apply in any given situation is a contextual determination. This view is supported in *Law Society of Saskatchewan v Hardy*, 2012 SKLSS 3 [*Hardy*], where the hearing panel described "progressive discipline as valid and important" (at para 32) and appropriate to consider in the situation before it. However, it was not framed by that hearing panel as a mandatory rule: "Considering the Member's history with similar infractions … it is clear that a more significant suspension than imposed previously for similar behaviours is warranted" (at para 34) – see also *Walsh v The Law Society of Manitoba*, 2006 MBCA 154 at para 17, 2012 Man R (2d) 5.

[38] In *Camgoz v College of Physicians and Surgeons (Sask.)* (1993), 114 Sask R 161 (QB) [*Camgoz*], Grotsky J. reviewed the factors to be considered in arriving at a sentence for conduct unbecoming of a doctor. He made reference to progressive discipline at paragraphs 46 and 49 and went on to say the following:

> [50] The above factors are not to be considered as being an exhaustive list of the factors to be considered by the respondent in its future considerations of like matters. Nor are the factors identified by me listed in order of their importance. The noted factors identified by me are those which I consider to be generally applicable to the consideration of a proper penalty to be imposed following conviction of a member for unbecoming, improper, unprofessional and discreditable conduct. The factors to be considered in a particular case will of course vary, as will their particular relevance, in each case under consideration.

[39] This view was recently endorsed by Meschishnick J. in *College of Physicians and Surgeons of Saskatchewan v Ali*, 2016 SKQB 42, [2016] 7 WWR 554 [*Ali*]:

> [71] As noted earlier in these reasons, Justice Grotsky in *Camgoz* was very careful in para. 56 to point that while he considered the enumerated factors to be those "generally applicable to the consideration of a proper penalty … The factors to be considered in a particular case will of course vary, as will their particular relevance, in each case under consideration".

> [72] Any reference in the decisions of this Court that might be read as saying that Council was bound to apply the *Camgoz* factors and only those factors, would be a misreading of those decisions.

[40] However, some tribunal decisions take the application of progressive discipline as more than just a factor and characterize it as an imperative consideration, absent exceptional circumstances: *Law Society of Upper Canada v Shifman*, 2014 ONLSTH 208 at para 29; *Law Society of Upper Canada v Thomas*, ONLSTH 208 at para 31; and *Law Society of Upper Canada v Raytek*, 2016 ONLSTH 190.

[41] Nevertheless, the decision of the Law Society of British Columbia in *Lessing* and the decisions of the Saskatchewan Court of Queen's Bench in *Camgoz* and *Ali* indicate a hearing committee is not bound to apply the principle of progressive discipline. All that is required is consideration of progressive discipline as one of many sentencing factors. The Committee in the within case did that. I am of the view this is as it should be. A hearing committee should not be unnecessarily restricted in performing its duties.

[42] I will now consider whether the Committee erred in how it applied the principle of progressive discipline.

[43] The Committee noted that progressive discipline "is founded on the idea that disciplinary penalties should escalate from milder to more serious sanctions" (at para 22). The justification for progressive discipline is that, as penalties get more severe, the offender will learn from the sanctions and be less likely to continue the offending activity in the future. The opportunity to learn from mistakes is thus a critical aspect of the justification.

[44] A difficulty arises where, as in the present case, a sentence from a previous infraction is handed down after the conduct making up the infraction under consideration has occurred. In theory, a penalized member would then be deprived of the opportunity to learn from past mistakes. Justice Kyle commented on this concept in *Lambert v College of Physicians and Surgeons (Sask.)* (1991), 89 Sask R 203 (QB) [*Lambert*]:

> [4] In sentencing miscreants it is common practice to impose higher sentences for second offences upon the assumption that the first was apparently an insufficient deterrent. However, where two offences occur before the trial and punishment of the first offence, it may be inappropriate to treat the second occurrence as a repeat offence because, as in this case, the accused considers himself innocent of the first offence, professing that he was entitled to behave as he did, until the first conviction takes place. Dr. Lambert has apparently committed no similar offence since that first conviction and therefore his sentence for the second offence should be more or less the same as that applied in the first case. To have imposed double the sentence for the second offence seems, in the circumstances, unfair. The sentence will accordingly be reduced to three months, of which nine days have already been served.

Also see paragraph 46 of *Camgoz*.

[45] I question whether Kyle J. would have taken a similar view if a record like that of Mr. Peet's had been in play. Justice Kyle's reasoning is premised on the fact that Dr. Lambert would have been completely deprived of his ability to learn from the first infraction. That cannot be said of Mr. Peet, who has had numerous prior infractions and numerous penalties imposed.

[46] In *Wasylyshen v Law Society of Saskatchewan* (1987), 36 DLR (4th) 214 (Sask CA) [*Wasylyshen*], this Court reviewed, *inter alia*, the sentence handed down to a member by the Committee. The member had been engaged to act for two brothers on two separate matters. The first matter concerned only one brother and was related to an industrial accident for which that brother sought damages. The second matter concerned both brothers and was related to a car accident for which they both sought damages. The member took on the first matter and then took on the second matter only a few months later. After three years of failure on the part of the member to move matters forward, the brothers both complained to the Law Society. After finding the member guilty of misconduct, the Committee sentenced the member for both matters simultaneously. Upon appeal, the member argued the Committee "should not have taken into account the fact that the appellant had been found guilty previously of unprofessional conduct, since his conduct on that occasion actually occurred after what happened here" (at para 41(a)). Justice Cameron addressed that argument:

> [42] With respect I do not think there is any merit in these complaints. The Discipline Committee was quite entitled to have regard for the fact the appellant had been found guilty on another occasion of conduct unbecoming a lawyer. The fact the transaction underlying that finding occurred after the events which gave rise to the present finding is, in the circumstances, and having regard for the nature of the proceedings, simply immaterial.

[47] Although not directly on point, there are important similarities between the *Wasylyshen* matter and the present matter. The most obvious is that, in both cases, the penalty was informed by a finding of guilt of an unrelated offence when that finding was unknown to the member at the time he engaged in the conduct for which he was being penalized. Importantly, in *Wasylyshen*, Cameron J.A. was willing to uphold the penalty on the basis that, although the penalized conduct took place in another discrete transaction, the nature of that conduct was the same. It was therefore acceptable for the Committee to consider all of the offender's conduct when arriving at the penalty that it ultimately handed down. The same argument is available on the facts of the present matter. As stated earlier, Mr. Peet has had an extensive history of offences similar to the current offence, including those covered by *Peet 2013* and *Peet 2017*.

[48] In *Ali*, the facts were substantially similar to the facts in the matter under review. The Court of Queen's Bench summarized the facts and argument as follows:

> [94] To summarize, at the time of the events giving rise to the Current Offences (June–August 2011), Dr. Ali's record showed:
>
> - previous convictions in relation to the 2004 Offences for which he was sentence to a three-month suspension and to take a boundaries course which he did; and
> - previous conviction in relation to the 2011 Offences (which took place in 2008) but he had not yet been sentenced for that conduct.
>
> [95] Counsel for Dr. Ali submits that Council failed to understand this important distinction in the chronology of events and in doing so failed to consider the "Coke Principle" of sentencing endorsed in *R v Skolnick*, [1982] 2 SCR 47, which suggests that before a more severe penalty can be imposed for second or subsequent offences, there must be a conviction on the first or subsequent offence. Dr. Ali further argues this principle extends to sentencing. That is, before a stronger penalty can be assessed for a previous violation, the sentence for the previous violation must also have been in place prior to the events leading to the second conviction.

[49] Dr. Ali was making a similar argument to that which Mr. Peet has presented to this Court; namely, Mr. Peet requests this Court to find that the Committee erred in failing to apply the Coke Principle in determining his sentence. (The Coke Principle states that a harsher penalty for a subsequent offence cannot be imposed unless the previous conviction was already recorded at the time of the commission of the subsequent offence (*R v Skolnick*, [1982] 2 SCR 47)). The Court in *Ali* held it was enough for the disciplinary panel to take notice of the chronology of events and the Coke Principle in its sentencing decision. The panel was not bound to apply the Coke Principle in arriving at a sentence: *Ali* at para 97–98 (see also, *Law Society of Ontario v Grewal*, 2018 ONLSTH 143 at paras 5 and 7–8).

[50] After referring at length to Mr. Peet's penalty for the previous infractions, the Committee imposed the penalty for the current matter. According to Mr. Peet, this represents an improper escalation in penalty. He cites the following paragraph from *McLean*:

> [53] When the Committee developed their reasons in this case, it would have been clear that Mr. McLean's four-month suspension and indefinite supervision order could not stand together with the two-week suspension imposed on Mr. Merchant. One of them had to have been wrongly decided. While deference is owed to the Committee's assessment of *Merchant 2009* [2009 SKCA 33], it is worth noting that Mr. McLean, who would have had no notice that the earlier decision would not be considered a good precedent, prior to receiving the Committee's reasons, can rightly have a sense of grievance. Moreover, even when *Merchant 2009* is set to one side, it is still necessary to assess the fitness of the penalty in this case, having regard for the objective gravity of the counts to which Mr. McLean pled guilty, all of the decisions relied upon by the Committee and other decisions of the Law Society.

[51] The comments in *McLean* were made in a situation where a later-in-time decision expressly referred to the precedent of an earlier decision respecting another member. Mr. Peet says that the Committee had to expressly disapprove of his earlier behaviour in order to support the current penalty. As the Committee did not do so, he submits the sanction cannot stand.

[52] The *McLean* decision is distinguishable on a critical fact. In *McLean*, this Court's comments were in relation to an earlier decision respecting an infraction by another member of the Law Society. Here, of course, Mr. Peet was the offending member in both matters. It is true he had committed the offence currently under review before he received the penalty for the earlier infraction, but it is also true he was blithely ignoring requests for a response from the Law Society at the same time his penalty was being considered for the earlier similar offence. At the very least, he had to know that this type of conduct would be aggravating. With his record of not just the one earlier, similar infraction, but having amassed a record of 16 other charges (10 of which are for the same offence as the behaviour under review), Mr. Peet simply cannot say that he has not had ample opportunity to learn from his past conduct or to endeavour to reform himself.

[53] Therefore, I am of the view that it was open to the Committee to consider *Peet 2017*, and the conduct at issue therein, in the context of deciding the matter under review. Its decision to do so does not represent an error in the application of the principle of progressive discipline.

[54] This argument must fail.

C. The reasonableness of the penalty

[55] Mr. Peet submits the penalty is so much more severe than previous penalties for similar offences that it is unreasonable. He says the Committee acknowledged the six-month suspension and the $40,000 fine represented a "considerable escalation from previous disciplinary penalties imposed on this member" (*Committee Decision* at para 35).

[56] When one looks at whether the penalty imposed is reasonable, a reference to *Merchant Law* provides guidance:

> [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] [quoting *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708] 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).
> >
> > …
> >
> > [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).

[57] The *Merchant Law* decision also makes reference to *Law Society of New Brunswick* v *Ryan*, 2003 SCC 20, [2003] 1 SCR 247 [*Ryan*], wherein Iacobucci J. noted the following:

> [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*, [[1997] 1 SCR 748] 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)

[58] This Court put it succinctly in *McLean*:

> [45] In the case at hand, the review for reasonableness raises concerns regarding both arms of the *Dunsmuir* test: (i) the existence of justification for the reasons; and (ii) the defensibility of the outcome. The review for reasonableness, however, is not a mechanical exercise (see *Newfoundland [Nurses']*). Even if the reasons cannot be justified based on the record, deference is owed to the decision-maker, if the outcome is, nonetheless, defensible. 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.

[59] Here, the Committee provided clear reasons for its decision. It rejected Mr. Peet's argument that his offence was minor: e.g., "a guideline for three requests from the LSS for response is not a reasonable guideline" (*Committee Decision* at para 16), "in light of the obliviousness shown by the Member to the gravity of the message" (at para 32), or that "he considers these interactions with the Law Society as part of the cost of doing business" (at para 33). The Committee obviously viewed Mr. Peet's infractions, in the context of his record, as very serious, compromising the profession's privilege of self-regulation, and nearing the point of labelling Mr. Peet's conduct as approaching "ungovernable". The Committee was of the view "that only robust sanctions have any hope of attracting the attention" of Mr. Peet (at para 33). The Committee clearly expressed why it imposed what must be considered a very severe penalty and expressed that a subsequent infraction may attract disbarment.

[60] In *Law Society of Upper Canada v Novak*, 2014 ONLSTH 237, the member was found guilty of unbecoming conduct and had many unspecified previous charges. A charge of failure to respond to the Law Society resulted in a suspension of nine months, with no fine mentioned: see also *Hauser, Re*, 1995 CanLII 1401 (Ont LST); *Law Society of Upper Canada v Luizos*, 2009

ONLSHP 2, where (with many unspecified previous convictions) a conviction of failure to respond resulted in a three month suspension; *Law Society of Upper Canada v Webster*, 2012 ONLSHP 202, where a failure to cooperate with a Law Society investigation resulted in a six-month suspension; and *Welder (Re)*, 2014 LSBC 20, where a conflict of interest conviction resulted in a one-year suspension for a member with six previous convictions.

[61] Fines for professional misconduct have been as imposed as high as $25,000: see *Perrick (Re)*, 2015 LSBC 42; *Walsh v The Law Society of Manitoba*, 2006 MBCA 154, 212 Man R (2d) 5.

[62] Certainly, the sanction attracted by Mr. Peet's conduct exceeded many of those that have been handed down in Saskatchewan and elsewhere. However, that is not to say the sanction is unreasonable. By any standard, Mr. Peet's continuing flaunting of the Law Society's authority is excessive and merits a significant penalty. The penalty is not directly comparable to other penalties because the circumstances here are worse than any available comparators. When one considers Mr. Peet's record of previous offences and convictions, I am unable to say the penalty is unreasonable.

[63] I will now turn to Mr. Peet's final submission.

D. Composition of the Committee

[64] Mr. Peet's original submission was that none of the three members of the Committee were elected benchers and that this was a fatal flaw. While he now concedes that in light of ss. 2(1)(g.1), 6(6) and 47(1) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, this ground of appeal cannot stand, nevertheless he argues the composition of a hearing committee, such as this, is a factor to consider in determining how much deference should be shown to a decision of the Committee. In other words, he says that because the Committee was not made up of persons who are benchers and practicing lawyers, they have less expertise in the area of the legal profession and their decisions should be more closely reviewed. Mr. Peet submits the Supreme Court's decision in *Ryan* supports this contention.

[65] I begin by observing that the complaint against Mr. Peet had nothing to do with the issues that required the professional expertise of a lawyer. Rather, the gravamen of the complaint relates to the simple, but vitally important, principle relating to a member's relationship with, and responsibility to be responsive to, the profession's governing body.

[66] In any event, I do not view *Ryan* as supporting Mr. Peet's proposition. In *Ryan*, the Supreme Court referred to four contextual factors, including "the expertise of the tribunal relative to that of the reviewing court on the issue in question" (at para 27), as determining the applicable standard of review. It appears from the discussion of the issue in *Ryan* that the expertise at issue relates to the institutional composition of the tribunal (see, in particular, paragraphs 30–34). Mr. Peet refers to no authority to suggest that the standard of review varies depending on the expertise of the specific individual members of the tribunal.

[67] Moreover, the suggestion that there might be a different standard of review, depending on the specific composition of a tribunal, seems contrary to other directions given in *Ryan*. Justice Iacobucci, on behalf of the Supreme Court, went on at some length to explain there is no spectrum or continuum contained in the notion of reasonableness because it would, in effect, "create an infinite number of standards" (at para 44). Justice Iacobucci continued as follows:

> [46] … If the standard of reasonableness could "float" this would remove the discipline involved in judicial review: courts could hold that decisions were unreasonable by adjusting the standard towards correctness instead of explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.

[68] It should be noted that *Ryan* was decided at a time when there were three standards of review: correctness, reasonableness, and patent unreasonableness. The Supreme Court's decision in *Dunsmuir* to collapse reasonableness and patent unreasonableness into a singular standard can only be taken as further indication that there is no room for a standard that will "float along a spectrum" (*Ryan* at para 44).

[69] I view the foregoing as a complete answer to this ground of appeal and find it cannot succeed.

VI. CONCLUSION

[70] I would dismiss the appeal with costs to the Law Society in the usual way.

[71] As Mr. Peet is currently practicing law, I would delay the effect of this judgment for 30 days to enable Mr. Peet to arrange his affairs.

"Whitmore J.A."

Whitmore J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Leurer J.A."

Leurer J.A.