Law Society of Saskatchewan

EVATT ANTHONY MERCHANT, Q.C.
HEARING DATE: July 12, 2019
DECISION DATE: September 26, 2019
PENALTY HEARING DATE: July 9, 2020
DECISION DATE: September 28, 2020
***Law Society of Saskatchewan v. Merchant*, 2020 SKLSS 6**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF EVATT ANTHONY MERCHANT, Q.C.,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Hearing Committee:	**Beth Bilson, Q.C., Chair** **Heather Hodgson** **Alma Wiebe, Q.C.**
Counsel for the Member:	**Gord Kuski, Q.C.** **Amanda Quayle**
Counsel for the Conduct Investigation Committee:	**Tim Huber**

1. A Hearing Committee appointed by the Law Society of Saskatchewan (the "Hearing Committee") composed of Beth Bilson, Q.C. (Chair), Heather Hodgson and Alma Wiebe, Q.C., convened on Friday, July 12, in Regina to hear the complaint against Evatt Anthony Merchant (the "Member"). The Member was represented by Gord Kuski, Q.C. and Amanda Quayle. The Conduct Investigation Committee was represented by Tim Huber.

2. Neither counsel raised any objection to the jurisdiction or the composition of the Hearing Committee.

3. An Amended Formal Complaint dated October 12, 2016, was provided to the Hearing Committee. The complaint alleged that the Member was guilty of conduct unbecoming in that he:

a) did in relation to a client of his firm, J.S., induce J.S. to provide a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement when such conduct was prohibited; and

b) did in relation to a client of his firm, J.S., cause a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement to be acted upon when such conduct was prohibited.

4. Counsel provided the Hearing Committee with an Agreed Statement of Facts. This statement read as follows:

a) Evatt Francis Anthony Merchant (Tony Merchant) (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"), and accordingly is subject to the provisions of The Legal Profession Act, 1990 (hereinafter the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at TAB 1 is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's practicing status.

b) The Member is the subject of an Amended Formal Complaint dated October 12, 2016. The original Formal Complaint containing the exact same allegations as the Amended Formal Complaint, but with a different Hearing Committee, was issued on January 29, 2016. Attached at TAB 2 are copies of both the original Formal Complaint and the Amended Formal Complaint with proof of service. The prosecution of the Amended Formal Complaint was held in abeyance by agreement while related matters were addressed by the courts.

Background of the Complaint

c) This matter was brought to the attention of the Law Society by Crawford Class Actions (“Crawford”), an organization appointed by the Court to monitor the Indian Residential School settlement process. Crawford made the complaint against the Member on behalf of the Member's client J.S. J.S. later adopted the materials provided by Crawford in her own complaint.

Facts

d) In June 2000, the Member's firm, Merchant Law Group (MLG) began representing a residential school survivor, J.S., eventually assisting her with her claim via the Independent Assessment Process (IAP) under the Indian Residential School Settlement Agreement (Settlement Agreement). The Member and his firm were parties to the Settlement Agreement. MLG also acted for J.S. with respect to at least one other legal matter unrelated to the IAP claim, as well as for her son, C.S., both with respect to his own IAP claim and other unrelated criminal matters.

e) On June 26, 2000, J.S. signed an assignment to MLG of any proceeds from J.S.'s Residential School Claim "necessary to pay for the reasonable accounts of Merchant Law Group on all legal matters undertaken for me including without limiting the generality of the foregoing, work regarding my Residential School Claim and any foreclosure action...now or in the future."

f) That assignment was provided prior to the Settlement Agreement coming into effect on May 6, 2006. It became unenforceable because of provisions contained

within the Settlement Agreement, specifically, Article 18.01 [TAB 3] which states that "[n]o amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement."

g) On January 28, 2014, Adjudicator Dirk Silversides granted J.S. compensation under the IAP in the amount of $93,000.00. Canada's contribution towards legal fees was $13,950.00. An additional $559.62 was awarded for payment of disbursements. On March 18, 2014, the Government of Canada issued a cheque for the total amount of $107,509.62 payable to Merchant Law Group in trust for J.S. representing the settlement proceeds.

h) At the time Canada issued this cheque, it appears that J.S. was about 69 years old.

i) On March 28, 2014, Mr. Alberts of the Merchant law firm drafted (but did not send) a letter addressed to J.S. enclosing a cheque in the amount of $54,949.17, together with an account for professional services rendered in connection with her IAP claim.

j) The account contemplated a contingency fee of 30%, or $27,900 (plus G.S.T. and P.S.T.) and disbursements, for an "invoice total" of $31,249.62. According to a "trust listing" attached to the account, this amount was to be deducted from the funds being held in trust for J.S. The listing also reflected the deduction of a total of $21,310.83, being the total of seven prior accounts of MLG relating to other services on behalf of J.S. and her son dating back to 2003. According to the listing, the $21,310.83 was to be deducted from the funds held in trust, which would leave net proceeds of $54,949.17 in trust. Mr. Alberts' draft letter did not mention these earlier accounts, but stated in part:

> The Adjudicator will conduct a review of the amount of fees that we are entitled to collect. After we receive the Fee Decision we will forward an additional cheque to you.
>
> Please sign the enclosed receipt and return it to us in the enclosed self-addressed stamped envelope.

k) On the same date as the draft letter, Mr. Alberts contacted J.S. to inquire of J.S. if she would agree to pay the various old accounts. In an internal memorandum to Mr. Tony Merchant [TAB 5], a legal assistant advised the Member that J.S. was "not willing to pay these accounts because she said her son has his own IAP action and he can pay his own accounts. C.S. does not have an IAP claim. He got awarded $0 at trial because the judge did not believe him."

l) This information led Mr. Alberts to not to send the letter of March 28 or to make the deductions from trust contemplated by the trust listing.

m) However, on April 7, 2014, the Member did send a letter to J.S. The Member's April 7, 2014 letter is attached at TAB 6. The letter stated in part:

n)

You agreed to pay accounts for C.S. in connection with criminal charges that he faced and on the basis of your having promised to pay those accounts, we provided legal services to C.S. and you.

In the case of two of those accounts, one regarding a criminal matter and the other regarding a family law matter, these were really your accounts where you were the client. Those accounts were for $754.30 and $442.77. We could legally withhold that money because those are your debts but we are not prepared over $1,200 to get into a fight if you instruct me that you will not even pay these debts.

Regarding 5 other debts that you also owe in amounts of $1,545.30, $972.75, $6,787.64, $6,840.44, and $3,967.63, we have no legal right to enforce assignments against you, notwithstanding the fact that for these 5 other criminal defence matters on behalf of C.S., you agreed and promised that you would pay the accounts out of the money that we expected you would receive from your IAP claim.

Those 5 criminal defence debts on behalf of C.S. as well as the criminal defence debt of $754.30 where you were the client with C.S. and the $442.77 where you were the client in connection with a family law matter, totals $21,310.83.

You owe the money. You agreed to pay the money. That should not be confused with the fact that we do not have legally enforceable assignments by which we may legally hold back the money from the funds. Do not confuse your obligation both morally and legally with the fact that the assignments are not legally enforceable. We could sue you for the $21,310.83. My expectation is we would succeed with that law suit and obtain a judgment against you. We could then seize your assets, your car, your bank account, or whatever, in order to collect these debts that you owe.

I understand that you told Mr. Alberts that you are not prepared to have these debts paid out of the IAP money that you have received. You said that C.S. can pay his own debts because he had a claim. He did not have a claim. He was not truthful. He was not believed. He did not get an award. When the legal work was done for him based on your agreeing to pay, we relied on your word and your promise to pay and we did not rely on the prospect of being paid out of money going to C.S.

In fairness and acting honestly, you should instruct us to pay the $21,310.83 out of the money that we are going to send to you or instruct us to pay a part of that money if you decide that you will not pay it all, even though it is all owing, and decide that you will instruct us to pay $15,000 or $10,000 out of the money that you owe.

However, if you contact me and instruct me not to deduct any of the money, we will follow those instructions and pay $76,260.00 without deduction.

Incidentally not just with debts like this that are owed to our law firm, but with debts owing by others who have IAP claims where money is owing to other law firms, to suppliers of good or services, for funeral services, cars, loans or whatever, we regularly contact our clients, in a manner similar to my contact with you, and remind

our clients that they owe the money even if the assignments are not legally enforceable, and seek instructions.

Tell us what you want us to do. We will pay $76,260.00 to you or keep $21,310.83 or keep some lesser sum if you instruct us to keep some amount to pay your debts.Enclosed with the April 7, 2014 letter was a new account dated April 7, 2014 which was identical to that proposed in the March 28 draft letter, and the same "trust listing" that contemplated deduction of the further $21,310.83 in total for the 'old' accounts of J.S. and C.S [Tab 7].

o) After receiving Mr. Merchant's letter, J.S. confirmed in a phone conversation with a legal assistant that same day (April 7) that she wanted to apply IAP funds to these outstanding accounts. J.S. attended the offices of MLG and met with that legal assistant. During that meeting, J.S. signed written instructions [Tab 8] directing MLG to pay the outstanding unrelated accounts out of her IAP settlement monies. The instructions were as follows:

I J.S. instruct Merchant Law Group to pay criminal accounts of C.S. and my family law account out of my IAP settlement money.
"J.S."

p) Two cheques totaling $54,949.17 — representing $76,260.00 less $21,310.83 for the "old accounts" pertaining to J.S. and C.S. — were issued by MLG to J.S. on April 7, 2014. The firm acted upon the direction to pay the unrelated "old accounts".

q) In reasons dated May 9, 2014, Adjudicator Dirk Silversides issued a Schedule 2 ruling concerning a legal fee review for fairness and reasonableness based on MLG's time and billing records for J.S.'s IAP claim. While MLG had proposed total legal fees of $20,100.00, the Adjudicator approved legal fees and taxes totaling $17,391.00. Taking into account Canada's $13,950.00 contribution to legal fees, the Adjudicator determined the amount payable to J.S. was $89,559.00. MLG issued an additional cheque to J.S. in the amount of $13,299.00 to account for the revised fee with a cover letter and revised account [Tab 9].

r) The fact that J.S. had signed a document agreeing to pay portions of her proceeds to MLG to satisfy outstanding legal accounts for unrelated legal work came to the attention of the Daniel Shapiro, then Chief Adjudicator for the IAP. Shapiro confronted the Member with the issue on May 28, 2014.

s) In an explanatory letter to the Chief Adjudicator dated July 21, 2014, Mr. Kuski, as counsel for MLG, informed him, among other things, that a portion of J.S.'s IAP award had been applied to satisfy outstanding accounts for other unrelated legal matters at J.S.'s direction.

t) On October 1, 2014, the Independent Special Advisor to the Court Monitor, Ian Pitfield, informed Mr. Kuski that the Chief Adjudicator had forwarded to him J.S.'s complaint concerning the application of her IAP fees to MLG's unrelated legal accounts. Mr. Pitfield directed MLG to repay J.S. the sum of $21,310.83. In support of this direction, Mr. Pitfield wrote that there was no evidence that J.S. was a party to an enforceable obligation to pay her son's accounts, nor that she was provided independent legal advice prior to accepting any such obligation, nor that there was any consideration for the handwritten direction she had allegedly signed on April

7, 2014. Mr. Pitfield also raised concerns that the content of Mr. Merchant's letter to J.S. suggested these funds were inappropriately procured.

u) On October 23, 2014, MLG brought a request for a direction that it is entitled to retain the amount of $21,310.83 pursuant to J.S.'s written instructions.

v) That application yielded the following Court Decisions:
Fontaine v. Canada (Attorney Genera/),2016 BCSC 1306 [TAB 10]; and
Canada (Attorney General) v. Merchant Law Group LLP, 2017 BCCA 198 [TAB 11].

[NOTE: Because of the similarity of the names in many of the cases concerning the IRSSA, the Hearing Committee will refer to these two cases as *MLG* 2016 BCSC and *MLG* 2017 BCCA.]

w) The British Columbia Superior Court ruled that the $21,310.83 was impermissibly withheld as it constituted an assignment prohibited by the Settlement Agreement. The Court directed MLG to pay J.S. $21,310.83 forthwith, with interest, and he complied. The British Columbia Court of Appeal upheld the Superior Court's decision. The Member sought leave to appeal to the Supreme Court of Canada. Leave was denied on or about August 2, 2018.

5. The documents referred to by tab numbers in the Agreed Statement of Facts were also provided to the Hearing Committee. In addition, the Member provided correspondence with the Law Society from 2012-2013. The Member also submitted a book of authorities that was consented to by counsel for the Conduct Investigation Committee.

6. This complaint arose in the context of the legal framework established to address claims made for compensation by survivors of the residential school system for First Nations children overseen by the Government of Canada and operated largely by various religious organizations. In the late 1990s and early 2000s a significant number of individual and class actions were launched on behalf of former residential school students alleging physical, sexual and psychological abuse, as well as cultural loss and estrangement from their families. In 2006, after protracted and complex negotiations involving Canada, the religious organizations and counsel representing individual and class claimants, the Indian Residential School Settlement Agreement (the “IRSSA”) was concluded. This agreement had a number of components; the aspects of the IRSSA most relevant to this complaint were those outlining a common process for addressing the large number of existing or anticipated claims for compensation. The IRSSA was approved, with some revisions, by the Ontario Superior Court of Justice in *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481, and was subsequently approved by superior courts in eight other provinces.

7. It is not necessary for the purposes of this decision to describe in detail the provisions of the IRSSA, but several features of the agreement pertinent to this complaint should be mentioned. Under the agreement, all claimants who could demonstrate that they had attended a residential school would receive a Common Experience Payment (CEP) based on the length of time they had been at the school. In addition, a claim could be made under an Independent Assessment Process (IAP) for compensation based on treatment that inflicted damage on individuals beyond the cultural and familial deprivation common to all survivors.

8. Given that the IRSSA had its roots in class action litigation, and that the Government of Canada would continue to be one of the parties subject to the claims being made, Winkler, J. made it clear in the *Baxter* decision that the courts would be responsible for overseeing the regime put in place for determining the claims, rather than leaving it up to the federal government to administer the process, as the IRSSA originally contemplated. The courts eventually developed a protocol for the ongoing monitoring of the adjudicative process put in place to determine the IAP claims. One component of this monitoring system was to require lawyers and others involved to make requests for direction to the courts in the event of any dispute or uncertainty about the process; such a request for direction from the Member was the subject of the decisions of the British Columbia Supreme Court in *MLG* 2016 BCSC and the British Columbia Court of Appeal in *MLG* 2017 BCCA alluded to in the Agreed Statement of Facts.

9. It should also be noted that a portion of the agreement as approved by the courts was devoted to the legal fees charged by counsel to the claimants. It was agreed that, aside from work already completed or in progress when the agreement was approved, lawyers would not charge fees to the claimants in relation to the CEP. In connection with the IAP, the Government of Canada agreed to pay legal fees calculated as 15% of any IAP payments, which would be paid to lawyers as an addition to the IAP payment itself. In addition, lawyers could charge fees of up to an additional 15% which could be charged against the IAP payment, though these proposed fees were made subject to review by the adjudicator determining the IAP claim. The IAP payment could be held in trust by the lawyer or law firm while the final amount of permissible fees was being determined.

10. Central to the issues before the Hearing Committee is a difference of opinion over the possible meaning of Section 18.01 of the IRSSA, which reads as follows:

> 18.01 No Assignments
> No amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement.
>
> A related statutory provision which was the subject of comment in the courts was section 67 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 [FAA], which reads as follows:
>
> 67. Except as provided for in this Act or any other Act of Parliament,
> a) a Crown debt is not assignable; and
> b) no transaction purporting to be an assignment of Crown debt is effective to confer on any person any rights or remedies of that debt.

11. As the Agreed Statement of Facts indicates, the Member began representing the residential school claimant J.S., on whose behalf the complaint was submitted, in 2000. At that time she signed an assignment permitting the Member's law firm to deduct legal fees owing from any amount she stood to receive under the processes then in place for determining residential school claims, which were focused on the class action litigation. In this respect, the Member was using one of the mechanisms commonly resorted to by lawyers to ensure that their legal fees would be paid. Counsel for the Member indicated in his submissions to us that the Member has not relied on this assignment in taking the steps to collect his fees that led to the complaint and the request for direction heard by the BC courts. The Agreed Statement of Facts describes these more recent developments.

12. Counsel for the Conduct Investigation Committee argued that the regime established by the courts in relation to the process of determining IAP payments constituted a significant departure from the usual methods available to lawyers for collecting their fees. Though section 18.01 of the IRSSA referred to "assignments" this had been broadly interpreted by the supervising courts to make the point that the intent was – aside from legal fees related to the IAP itself, which, subject to the review by the adjudicator, could be withheld by the lawyer or law firm – that the IAP payment be paid to the claimant and was not to be subject to any other deductions by the lawyer. He argued that the Member was in a position to be familiar with the body of jurisprudence developed around section 18.01, and that he would know that a "workaround" such as the one the Member had devised was not consistent with the spirit of that body of decisions.

13. Counsel for the Conduct Investigation Committee further alluded to the direction given by J.S. to deduct from the IAP funds being held in trust by the Member's law firm sums for legal work done for J.S. and her son unrelated to her IAP claim. He argued that this direction was made in response to a letter from the Member dated April 7 which was of an inappropriately threatening nature.

14. Counsel for the Member acknowledged that the legal arguments advanced on behalf of the Member in the BC courts had not been successful, and that the courts had found that the method used by the Member to obtain the agreement of J.S. to the deduction of legal fees not related to the IAP constituted an assignment prohibited by section 18.01. He argued, however, that the Member's reliance on what he saw as a legitimate agreement by J.S. to direct the disposition of funds owing to her, though it turned out to be mistaken in law, was sincere, and that the failure to persuade the courts that his interpretation of section 18.01 was legally correct did not mean his conduct was unethical.

15. He also argued that the term "assignment" is a legal term of art, with a meaning well-understood by lawyers. Though he acknowledged that the courts had interpreted section 18.01 to include ways of dealing with deductions from trust funds that were not, strictly speaking, assignments, the core meaning of the term remained the same, and the Member could not be faulted for making an agreement with his client that he did not think was covered by the existing interpretations of section 18.01. When it was brought to the Member's attention that a complaint had been made about this agreement, he asked the supervising courts for a ruling to clarify the matter, as he was entitled to do. Counsel disagreed that the letter of April 7, 2014 was threatening in tone. He said that it is open to lawyers to pursue the payment of legal fees owed to them by their clients in a variety of ways, and here the Member was simply stressing the debt he was owed by J.S. for legal fees, and proposing that she authorize him to settle the debt using money he knew was available for her to dispose of. Counsel for the Member argued that the course of action taken by the Member was consistent with the kind of steps taken by lawyers in the normal course of events to ensure the payment of their fees, and the fact that the Member drew a mistaken conclusion that he sincerely believed to be legally correct does not mean that he was guilty of conduct unbecoming a lawyer.

16. Counsel for the Member also pointed to correspondence between the Member and the Law Society from 2012 and 2013, in which the Member asked for some guidance about another residential school claimant, who also owed his law firm money for legal work unrelated to the residential schools claim. He was asking to know whether paying money from the trust account into court on an interpleader basis would constitute an ethical violation. After an exchange between the Member and the Complaints Counsel for the Law Society, the inquiry was referred to the Ethics Committee. That committee decided that providing an answer would require a legal interpretation of the IRSSA, which they did not think fell within their purview. Counsel argued that

the Law Society had thus led the Member to view this kind of question as a legal rather than an ethical question, and it is not surprising that he carried this view into his dealings with JS concerning the payment of her legal fees.

17. Counsel for the Member also argued that it is conceivable that the legal question itself might have been resolved differently had the request for direction been heard in Saskatchewan rather than in BC. He cited to us two Saskatchewan decisions, *Merchant Law Group v. Compushare Ltd.*, 2008 SKCA 173 [*Compushare*] and *Saskatchewan Government Insurance v. Merchant*, 2011 SKQB 174 [*SGI*], which he argued demonstrated two different approaches to the disputed issues. He argued that the Member's request for direction in this case might have led to a different outcome had it been determined by a Saskatchewan court.

18. Counsel for the Member provided the Hearing Committee with a book of authorities. Though we found them all informative, we looked especially closely at a number of decisions of the courts supervising the implementation of the IRSSA. We would draw attention in particular to: *Baxter*, cited *supra* at paragraph 6; *Fontaine v. Canada (Attorney General)*, 2007 BCSC 1641 [*Levesque* 2007 BCSC]; *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329 [*Levesque* 2008 BCCA]; *Daniels v. Daniels*, 2011 MBCA 94; *Compushare*, cited *supra* at paragraph 17; *SGI*, cited *supra* at paragraph 17; *MLG* 2016 BCSC; and *MLG* 2017 BCCA. These cases involved slightly different scenarios; some of them were related to CEP rather than IAP payments, for example, and some of them dealt with the issue of when the funds could be said to be under the control of a lawyer or of a claimant. They all, however, reveal something about the nature of the system that was established to carry out the provisions of the IRSSA.

19. We wish to make it clear that we understand that the decisions in *MLG* 2016 BCSC and *MLG* 2017 BCCA – the ones that address the conduct of the Member that is the subject of the complaint before us – were made after he had taken those actions, and we must assess their relevance in that context. These decisions do shed light, however, on how the supervising courts understood the nature of the regime that had been put in place to administer the IRSSA. In our view, since the courts had oversight of the implementation of the agreement, it is relevant to our assessment of the Member's conduct to examine how the courts characterized the regime that had been established and their expectations of counsel operating within it.

20. Several features of this system are clear as early as the *Baxter* case, the decision in which the Ontario Superior Court of Justice approved the IRSSA, at the same time directing that modifications be made to the agreement that had been reached by the parties. One of these directions concerned the payment of legal fees. At paragraph 73 of the decision, Winkler J. made the following comment:

> As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees… I cannot accede to this submission. During argument, I expressed concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best.

21. At paragraph 74, he continued:

> In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

22. This concern led the court to create the process by which the adjudicator determining an IAP claim would also assess the reasonableness of proposed legal fees beyond the 15% that the federal government would pay on top of the amount of any IAP settlement. An appeal could be made to the chief adjudicator. Winkler, J. said at paragraph 78:

> Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the adjudicator, will be considered void.

23. Though the comments in paragraph 73 and 74 of *Baxter* relate specifically to the creation of a process for assessing legal fees related to legal representation in the IAP itself, and this must certainly be taken into account, there are in our view two points of broader significance that can be identified in Winkler J's judgment. One is the desire of the courts to ensure that the process would protect the interests of a group of claimants who could not be expected to grapple with the ordinary requirements of the legal system, and who were thus entitled to a process more tailored to their circumstances.

24. The other thing we would point to in connection to these passages is the use of the term "direction to pay" rather than "assignment" in paragraph 78. Although the term "assignment" was used in section 18.01 of the agreement, Winkler, J. seemed to view the term "direction to pay" as appropriate to describe what was being prohibited.

25. The point we are making here is that, at the foundation of the regime established to administer the IRSSA, the courts were characterizing the claimants as a special and vulnerable population in need of judicial vigilance to protect their interests, and that they were concerned about ensuring that the payments under the agreement, aside from an amount determined to constitute reasonable fees for their legal representation in the IAP, should get into the hands of the claimants without further deductions.

26. In *Levesque* 2007 BCSC and *Levesque* 2008 BCCA, a lawyer advising a CEP claimant argued that a document containing direction to pay a debt owing to a third party should be viewed as separate from an executed assignment relating to the same debt, that assignment being prohibited by Section 18.01 of the IRSSA and section 67 of the FAA. In *Levesque* 2007 BCSC, Brenner J. concluded at paragraph 30:

The essence of the respondents' argument is that if one separates the direction to pay from any assignments or other pending instructions, the payment as directed by the CEP claimant to a party other than solely him or herself cannot be impugned. I disagree, To sanction such a procedure where the CEP monies are subject to a pre-existing "assignment" or "assignment of proceeds of claim" would be to elevate form over substance. It would contravene the clear intention of the Settlement Agreement as well as the FAA.

27. In *Levesque* 2008 BCCA, Saunders J.A. upheld the lower court decision, and commented:

> The effect of the transaction was to assign wholly the amounts payable under the Settlement Agreement to lenders, contrary to s. 18.01 of the Settlement Agreement. It is not beyond human experience that a compensation scheme broadcast widely (as was this one) would attract people seeking a share of the proceeds in arrangements such as these. I think it may be safely said that the purpose of s. 18.01 was to limit the potential for the class members to be fleeced of their funds, or any portion of them, before they were received by the individual. That it was intended they should receive the entire payment is apparent from the restriction in the Settlement Agreement to their counsel charging fees in respect to these payments. In other words, an end run around the Settlement Agreement ought not to be countenanced.

28. Madam Justice Saunders also emphasized the distinctive nature of the IRSSA process, at paragraph 16:

> The process whereby these complicated, long-standing and culturally significant claims have been settled, and the settlement administered, is *sui generis*…. In my view, this appeal is but another marker of unique proceedings that have led to this landmark resolution.

29. We are, of course, aware both that the *Levesque* decisions dealt with purported disposition of funds received under the IRSSA prior to those funds being received by either the lawyer or the claimant, and also that they concerned the CEP, which was governed by slightly different rules. It should be remembered, however, that Section 18.01 of the agreement covered both CEP and IAP funds; in this respect, it is instructive that the courts held that the differentiation between an assignment and another kind of instrument which led to the same result should be rejected. The decisions also reiterate the concern of the courts that the interest of the claimants in these funds should be protected and given priority.

30. In *MLG* 2016 BCSC, Brown, J. found that the April 2014 direction from J.S. to pay legal fees to the Member fell within the prohibition in Section 18.01 of the IRSSA, and was also a violation of Section 67 of the FAA (the Court of Appeal found it unnecessary to reach a conclusion in relation to the latter). In arriving at this conclusion, Brown J. said at paragraph 62:

[Article 18.01]'s purpose is to protect vulnerable class members…Further, the meaning of this provision and the question of whether a certain arrangement is captured by it should be considered in light of one of the overarching purposes of the IRSSA, which is to "make right wrongs committed in the course of a failed government policy": *Levesque* 2008 BCCA at paragraph 41.

31. Brown, J. referred to the comments of Winkler, J. at paragraph 78 of *Baxter*, cited above at paragraph 22, to the effect that all directions to pay to "any person other than the claimant" an amount in excess of the amount approved by the adjudicator must be regarded as void. She also referred to Expectations of Legal Practice issued by the chief adjudicator in 2013; although she indicated these were not binding on the Court, she clearly saw them as pertinent and did not state any reservations about their content.

32. In *MLG* 2017 BCCA, Newbury, J.A. also considered the significance of *Baxter*, and characterized it in these terms, at paragraph 5:

> This was the first step in the evolution of a complex framework of orders, rules, guidelines, protocols and directions – essentially a discrete body of law – intended to ensure *inter alia* that compensation paid under the Settlement Agreement would reach the plaintiffs without deductions that were not fair or appropriate.

33. Newbury, J.A. also referred to the Chief Adjudicator's Expectations of Legal Practice, pointing at paragraph 16 to the following passage from that document:

> 12. Lawyers must not:…
> b) withhold any part of the compensation amount payable to the claimant for any purpose, other than legal fees approved by the adjudicator. The lawyer must not deduct any third party assignments, cash advances, directions to pay, disbursements, costs associated with the management of the file, or anything else, from the amount payable to the claimant.

34. In upholding the decision of the British Columbia Supreme Court, Newbury, J.A. said the following, at paragraph 41:

> By agreeing to act for J.S. in the IAP, [the Member] must be taken to have been aware that it was subject to the terms of the Settlement Agreement, the Implementation Orders, court judgments interpreting them, and the policies of the Chief Adjudicator, all discussed above, and that it would not be operating under the usual rules generally applicable to lawyers in the relevant province. As we have seen, the 'entire' procedure for the resolution of the plaintiffs' claims in this action was to be supervised by the courts. Part of the procedure that has been specified is that assignments or directions to pay under which *any amount in excess of a lawyer's approved fees*, are null and void.
>
> The Court went on to say that "the direction to pay in this case offends a prohibition that has been woven into the cloth of the administration of the Settlement Agreement."

35. We have concluded that the actions of the Member in obtaining and acting on a direction from J.S. to deduct an amount from her IAP payment at the time those funds were in the Member's trust account did constitute conduct unbecoming a lawyer. One of our reasons for this has to do with the extensive involvement the Member has had with the process for determining the claims of residential school survivors as that process has unfolded. There can be few lawyers in Canada who are in a position to know more about the initiation of the class actions that predated the conclusion of the IRSSA or about the negotiations that led to the agreement, or who have been a participant in more court proceedings about the meaning of the agreement and how it should be administered. In particular, he has been at least an observer and often a party in the cases where the payment of legal fees and the meaning of Section 18.01 have been at issue.

36. As we read these decisions, though they deal with different scenarios, different types of methods for payment and different kinds of actors, the bottom line is that the intention of the protection in Section 18.01 is that – save for an amount of legal fees related to pursuing the process under the agreement itself found to be reasonable – the full amount obtained under the IRSSA is to be placed in the hands of the claimant without additional deductions. As early as the *Baxter* decision, the supervising courts made it clear that the term "assignment" in Section 18.01 would not be interpreted in a narrow or technical way, but would be taken to include other forms

of directions to pay under which claimants purportedly gave instructions for sums to be deducted from their payments under the settlement agreement. Given the judicial comments we have sampled above, it is hard to know how the courts could have been much clearer on this point. It is not credible to us that the Member could have had any lingering doubt that the proper course for dealing with the IAP funds in his trust account was to turn them over to the claimant J.S., or that he could have held a sincere belief that there was still some remaining mechanism that would be seen as a permissible method of deducting money from the IAP payment when mechanisms virtually indistinguishable from this one had been rejected. Though the Member denies that he "withheld" money as prohibited by the Expectations of Legal Practice, it is hard to know how else to characterize maintaining control of a sum of money which had never been put in the hands of the client.

37. It is also clear from the judicial decisions that the rationale for this approach was that the claimant population was seen as particularly vulnerable. From the *Baxter* case on, the courts made it clear that they did not consider the usual methods for determining and collecting legal fees to include adequate means of protecting the interests of the claimant group. Though the system that was put in place incorporated procedures that would to some extent assure lawyers that their work on the residential schools claims would be sufficiently rewarded, Winkler, J. rejected the proposition that the existing safeguards for clients would be enough. It should be noted that in *MLG* 2016 BCSC, at paragraph 64, Brown, J. observed that a claimant "remains in a position of vulnerability vis-à-vis the holder of the trust account."

38. Since the whole premise of the system of adjudication and court supervision that was put in place under the IRSSA was that claimants are a vulnerable group in need of special protection, we must also state our concern about the means by which the Member obtained the signed direction from J.S. that has been in dispute. We do not agree with the submission of counsel for the Member that the letter of April 7, 2014, is benign or unthreatening in tone. J.S. had already indicated that she did not wish to have any outstanding legal fees for matters unrelated to her IAP claim taken out of the trust account, and that she viewed it as her son's responsibility to pay his own legal bills. Though it is true that the letter did ask for the client's instructions, the alternative was presented as a lawsuit in which the law firm would be able to "seize your assets, your car, your bank account, or whatever" in order to collect the debt. In our view, this language was not in keeping with a lawyer's obligation to treat clients, and particularly vulnerable clients, with courtesy and consideration.

39. The Member made a request for guidance to the Law Society in 2012, which concerned another case. It should be noted that this request concerned somewhat similar circumstances, in that it related to the question of whether there was some way the Member could have access to IAP funds to pay legal fees owed for work unrelated to the IAP claim. It can be distinguished, however, on the grounds that the proposal there was to place the money in court where the claimant could dispute the payment of the legal fees; it did not concern the kind of direction from a claimant that is at issue here. In her initial response, the Complaints Counsel for the Law Society cautioned the Member as follows:

From an "ethical perspective" I am of the view that it would be an onerous requirement to expect the IAP client to retain counsel or appear on his own behalf to argue before the Court against your claim to the monies remaining in trust. I understand that the IAP claim is difficult for the client in the first instance and to request that the adjudicator assess his lawyer's IAP account adds a layer of further difficulty. To then subject the client to a third level of legal process in order to claim the monies remaining if your account is reduced by the adjudicator would be, in my respectful view, inappropriate.

40. This comment must, of course, be seen in the context of the ultimate decision of the Ethics Committee of the Law Society to decline to provide an ethics ruling on the grounds that they saw the question of whether an interpleader action would be appropriate as in the first instance a legal question. Whatever their reasons for coming to that conclusion, it does not seem to us that a reluctance to comment on the particular vehicle of an interpleader action in a situation similar to that before us can be taken to have given the Member license to adopt other mechanisms for avoiding the consequences of what appears to be a clear "off limits" policy for settling third party claims or claims for legal fees other than those related to the IAP out of funds which were received as an IAP payment and which were still in the hands of the lawyer.

41. Counsel for the Member argued that the status of such methods as the Member adopted in this case must be viewed as unresolved in Saskatchewan, given the apparently inconsistent decisions in *Compushare* and *SGI*, both cited *supra* at paragraph 17. We are not persuaded by this argument. For one thing, the *Compushare* decision of the Saskatchewan Court of Queen's Bench was dated March 22, 2007; this was only days after the approval of the IRSSA in the same court on March 8, 2007. This may help to explain why there was no reference to Section 18.01 of the IRSSA (or to Section 67 of the FAA) in either the Queen's Bench or Court of Appeal decisions in *Compushare*. While it is true that the courts dealt with the issue in that case according to traditional commercial law principles, this approach was clearly repudiated in subsequent cases where Section 18.01 was considered.

42. In *SGI*, Zarzeczny, J. pointed out that the Court was unable to consider the impact of Section 18.01 of the IRSSA because the agreement had not been incorporated into the Agreed Statement of Facts submitted by the parties. He also pointed out that Section 67 of the FAA had not been cited in *Compushare*, and went on to approve the decision based on that provision to resist paying SGI under an assignment against payments made under the agreement.

43. It is hard to say that either of these cases is strongly supportive of the argument that the Member's legal fate might have been different had the Saskatchewan courts been asked to decide the legal issues in the current case. *Compushare* did not refer to Section 18.01 at all, and in *SGI*, the Court felt precluded from fully addressing this provision because of the failure to reference the agreement in the Agreed Statement of Facts. Speculation about a likely outcome in a Saskatchewan court seems somewhat fruitless in this context.

44. We would also note that the courts administering the IRSSA have evidently made considerable efforts to create a coherent national approach to the issues arising under their supervision of the agreement. Through the administrative protocol, the system of reference to supervising judges, and the cross-referencing of cases from one jurisdiction to another, it can be seen that the courts have tried to develop consistency in the way the settlement agreement is administered. Not all procedural and legal distinctions between provinces can be eliminated, but the supervising judges have not favoured the creation of a province-specific approach over all.

45. The Hearing Committee acknowledges that a lawyer who advances an incorrect legal proposition based on a sincerely-held belief should not be held to have committed an infraction of professional obligations for this reason alone. As we stated above, however, we are not persuaded that this is an accurate description of the circumstances here. The Member has been immersed in the IAP and the system under which the IRSSA was administered, and has had many opportunities to digest the message of the courts and the administrators of the system that the IAP payments determined through adjudication were to be kept intact except for legal fees also assessed under the scheme. We do not dispute that lawyers are entitled to be paid for the

work that they do, and that the legal system has sanctioned a number of mechanisms for pursuing these debts. Under this regime, however, the funds awarded to residential schools claimants through the IAP have been characterized as having special status, and it is not believable that the Member had any basis for believing that an assignment according to a particular limited meaning was the only mechanism he was not entitled to use to obtain the fees he claimed were owed. We are also of the view that the way he extracted from J.S. her instruction to pay the legal fees was not in keeping with the clear intention of the IRSSA regime to protect a vulnerable group.

46. For the reasons we have given, the Hearing Committee finds that the Member is guilty of conduct unbecoming a lawyer under both counts of the complaint: that he induced J.S. to provide an assignment prohibited under Section 18.01 of the IRSSA, and that he acted on that improper assignment. We will remain seised of this matter pending a determination of appropriate sanctions.

DATED at Saskatoon, Saskatchewan, the 26th day of September, 2019.

"Beth Bilson, Q.C.," Chair

"Heather Hodgson"

"Alma Wiebe, Q.C."

PENALTY HEARING DECISION

Hearing Committee:	**Beth Bilson, Q.C., Chair** **Heather Hodgson** **Alma Wiebe, Q.C.**
Counsel for the Member:	**Gord Kuski, Q.C.** **Amanda Quayle**
Counsel for the Conduct Investigation Committee:	**Tim Huber**

47. A Hearing Committee appointed by the Law Society of Saskatchewan (the "Hearing Committee") composed of Beth Bilson, Q.C. (Chair), Heather Hodgson and Alma Wiebe, Q.C., convened on Thursday, July 9, 2020, in Regina to hear submissions on penalty following the disposition of a complaint against Evatt Anthony Merchant (the "Member"). The Member was represented by Gord Kuski, Q.C. and Amanda Quayle. The Conduct Investigation Committee was represented by Tim Huber.

48. Neither of the parties made any objection to the composition or the jurisdiction of the Hearing Committee.

49. In a decision dated September 26, 2019, the Hearing Committee found the Member guilty of conduct unbecoming in relation to two complaints filed on behalf of his client J.S., whom the Member and his firm had represented in the Independent Assessment Process (IAP) established under the Indian Residential School Settlement Agreement (IRSSA). The complaints as set out in an Amended Formal Complaint dated October 12, 2016 alleged that the Member was guilty of conduct unbecoming in that he:

a) did in relation to a client of his firm, J.S., induce J.S. to provide a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement when such conduct was prohibited; and

b) did in relation to a client of his firm, J.S., cause a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement to be acted upon when such conduct was prohibited.

50. At the hearing of the complaints, the Hearing Committee was provided with an Agreed Statement of Facts which is appended to this decision. Counsel also provided the Hearing Committee with certain correspondence between the Member and the Law Society of Saskatchewan dating from 2012-2013, and a book of relevant authorities.

51. The basis for our conclusion that the Member was guilty of conduct unbecoming is laid out in our decision, and it is not necessary to reproduce our analysis fully. We would draw attention to three key aspects of our findings, however. First, we would note that the conduct that was raised for scrutiny by the complaint took place in the context of a process that had been carefully designed by superior courts across the country to determine and protect the rights of vulnerable people who had lived through or been affected by the trauma wrought by residential schools.

52. A second essential aspect of our decision was the conclusion that we did not believe that the Member had made a sincere mistake in interpreting the IRSSA, given his immersion in the litigation surrounding the legacy of residential schools. We did not find credible the argument advanced on his behalf that he had held a good-faith belief that the kind of agreement he had reached with his client to have legal fees for matters other than participation in the IAP was exempt from the prohibition in Section 18.01 of the IRSSA against assignment of settlement payments to anyone other than the residential school survivor. We were satisfied that the courts had made perfectly clear that the term “assignment” included any form of direction to put part or all of the settlement proceeds – barring reasonable permitted legal fees arising from the IAP itself – into the hands of anyone but the claimant, and that the Member was in an excellent, perhaps a unique, position to have heard and understood this message.

53. A third key finding was that the letter sent to J.S. over the signature of the Member was intimidating. It was shortly after receiving this letter that J.S. went to the office of the Member’s law firm and left a brief handwritten note agreeing to turn over part of the funds received in the IAP settlement for payment of outstanding legal fees for other matters.

Framework for Assessing Penalty

54. Our authority to make a determination as to penalty is grounded in the self-governing mandate conferred on the Law Society of Saskatchewan by *The Legal Profession Act, 1990* and by the *Rules of the Law Society*. We held in our 2019 decision that the Member had committed an infraction of the *Code of Professional Conduct*; the following passages are particularly relevant in the context of a penalty decision:

> 1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> *Commentary*
> [1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer’s trustworthiness,

the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
[2] The principle of integrity is a key element of each rule of the Code.
[3] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.

55. The proper approach to determining a penalty is set out in the *Rules* as follows:

1131(1) This Rule applies if the Hearing Committee makes a finding of conduct unbecoming with respect to a Formal Complaint.
(2) The Hearing Committee:
- (a) may consider any relevant information respecting the member's professional conduct history; and
- (b) shall invite Discipline Counsel and the member to make submissions as to penalty.

(3) 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 courses;
    - (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 restitution, in any amount that the Committee may specify, to any aggrieved party;
  - (vi) requiring the member to pay costs of the inquiry calculated in accordance with Rule 1135;
  - (vii) reprimanding the member;
  - (viii) permitting the member to resign from the Society;
- (b) if the Formal Complaint 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 other direction or set any additional requirement that the Committee considers appropriate.

56. Counsel for both parties referred to a number of principles which should guide the determination of penalty in professional disciplinary proceedings. The major considerations are protection of the public, maintenance of public confidence in the legal system, specific and general deterrence, and fairness to the professional person found to have committed misconduct.

57. In Saskatchewan, as in other Canadian jurisdictions, professional regulation of lawyers is carried out through a provincial law society. The primary objective of that regulation is the protection of the public by cultivating, certifying and maintaining standards of competence and probity for those who wish to engage in the practice of law. This mandate is carried out in a number of ways, through, for example, providing practice advice and educational opportunities. It is also carried out through maintaining a process for the adjudication of complaints about the conduct of lawyers, and for sanctioning conduct found to be unacceptable. The overarching importance of the principle of protecting the public and ensuring public confidence in the profession means that hearing bodies under the *Rules* of the Law Society have a somewhat different role than other adjudicative tribunals, for example, a judge sentencing a criminal defendant. In *Bolton v. Law Society*, [1994] 1 W.L.R. 512 (C.A.), the English Court of Appeal made this point in the following terms:

> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again...and [he] may also be able to point to real efforts to...redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness...The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

58. Thus, the protection of the welfare of members of the public, and the maintenance of public confidence in the profession are critical factors in deciding on an appropriate penalty when a member of a profession behaves in a way that undermines those important considerations.

59. Deterrence is another consideration this Hearing Committee must keep in mind. The idea of specific deterrence speaks to the effort that must be made to arrive at a penalty that will bring home to the member that the impugned conduct should not be repeated, and that will induce the member to reflect on the expectations of the legislature, the judiciary, the profession and the public of how lawyers should conduct themselves. The concept of general deterrence calls on a disciplinary tribunal to consider what signal a particular penalty will send to other lawyers, and how it might influence their adherence to the *Code of Professional Conduct*.

60. Though the *Bolton* decision, quoted above at paragraph 11, places the reputation of the profession above the fortunes of individual members as a consideration in imposing a penalty, an adjudicative body must nonetheless ensure that they conduct fair proceedings, and give adequate consideration to the interests of the lawyer against whom a complaint has been made. In the case

of penalty determinations, one of the important mechanisms for this is to look carefully at how comparator cases have been dealt with in the past.

Analysis

61. At the outset of the hearing with respect to penalty, counsel for the Member provided the Hearing Committee with written submissions, accompanied by appended material that mainly consisted of examples of press coverage of a number of class actions and other significant litigation initiated by the Member. The material also included a letter from a Vice-Chief of the Federation of Sovereign Indigenous Nations attesting to the support his organization had received from the Member, a submission made by the Member to the United Nations Human Rights Committee concerning the issue of indeterminate sentences, a letter from the Public Legal Counsel for the John Howard Society supporting the Member's submission on penalty, and an affidavit from the staff member in the office of the Member's law firm who had interacted with J.S. Counsel also submitted a book of authorities.

62. Counsel for the Conduct Investigation Committee also made written submissions, and appended a number of cases that he thought would assist the Hearing Committee.

63. Both counsel also made oral submissions to the Committee. As might be expected, they took quite different approaches to the formulation of an appropriate penalty. Counsel for the Conduct Investigation Committee argued that the conduct of the Member had been akin to the defiance of a court order, and he provided a number of disciplinary decisions where that had been an issue: *Law Society of British Columbia v. Saini*, [2006] L.S.D.D. No. 160; *Law Society of British Columbia v. Scholz*, [2008] L.S.D.D. No. 26; *Law Society of Upper Canada v. Sussman*, [1995] L.S.D.D. No. 17; *Law Society of Alberta v. McSween*, [2004] L.S.D.D. No. 61; *Law Society of British Columbia v. Barron*, [1997] L.S.D.D. No. 141; *Law Society of Saskatchewan v. Merchant*, #06-06 [*Merchant 2006*]; *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 [*Merchant* 2014]. He noted that the penalties imposed in these cases ranged from the reprimand and fine in *Saini* to the three-month suspension and costs upheld by the Court of Appeal in *Merchant* 2014. He also noted that, unlike the cases involving the Member himself, none of the lawyers being disciplined in the other cases had any prior disciplinary history.

64. Counsel for the Conduct Investigation Committee argued that the three-month suspension imposed on the Member in the Hearing Committee's decision in 2012 should be the starting point in considering an appropriate penalty in this case. He argued that the principle of progressive discipline would suggest that, given the previous disciplinary history of the Member and the analogous nature of the conduct found to be unbecoming in the two most recent disciplinary cases (*Merchant* 2006 and *Merchant* 2014), it is necessary in this case to consider a more severe penalty.

65. He acknowledged that he felt little optimism that a more stringent penalty would have more of an impact on the Member's conduct than previous penalties. He referred the Hearing Committee to the May 2006 decision of a hearing committee in *Law Society of Manitoba v. Walsh*, and the subsequent December 2006 decision of the Manitoba Court of Appeal in *Walsh v. Law Society of Manitoba*, 2006 MBCA 154. In the *Walsh* decision, the hearing committee was addressing complaints against a lawyer with a lengthy disciplinary history; the panel noted the following with respect to the concept of general deterrence:

With the benefit of the hindsight that comes with being the tenth Discipline Panel to deal with Mr. Walsh, we can say that Mr. Walsh's history has turned the concept of "general deterrence" on its head. The Society tells students in its Bar Admission course that they must live by the word and

the spirit of the Code of Professional Conduct or they will (professionally) die by it. But a cynic would point to Mr. Walsh's record as evidence that such admonitions from the Society have a hollow ring. Mr. Walsh's record is the exact opposite of general deterrence. Something must be done to end that illusion.

66. Although the hearing panel in *Walsh* also expressed frustration at the failure of the member in that case to learn from previous penalties, they noted that maintaining public confidence in the legal profession required the regulatory body to devise a penalty that would make it clear to the public that more than *pro forma* chastisement in the form of a fine was considered necessary.

67. The hearing committee in *Law Society of Saskatchewan v. Peet*, 2018 SKLSS 3 (upheld by the Court of Appeal in *Peet v. Law Society of Saskatchewan*, 2019 SKCA 49) considered the *Walsh* case in relation to complaints brought against a Saskatchewan lawyer with a significant disciplinary record. The complaint in this particular case alleged that the member had failed to communicate with the Law Society in a timely fashion. The hearing committee made the following comment at paragraph 30:

> It is clear, however, that none of the sanctions devised by previous disciplinary panels has brought about lasting change in the conduct of the Member. Counsel for the Conduct Investigation Committee seemed at somewhat of a loss to provide guidance to this Hearing Committee about what sanctions would be appropriate, and we share his pessimism that any sanction we could impose, other than perhaps disbarment, would impress on the Member the seriousness of the pattern of successive infractions he has established. We also share the concern of counsel, so well-articulated in the *Walsh* decision, that the apparent inability of the Law Society to regulate the conduct of this Member has the capacity to undermine the credibility of the Law Society, and possibly also the legal profession, in the eyes of the public.

68. In the *Peet* decision, the hearing committee also made the following comment on the concept of progressive discipline, at paragraph 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.

69. Despite his reservations about the likelihood that further sanctions would bring about change in the Member’s conduct in the future, counsel for the Conduct Investigation Committee argued that the Hearing Committee should rely on the principle of progressive discipline, and

should impose a more stringent penalty than the one attached to the last finding of conduct unbecoming in 2012.

70. Counsel for the Member took quite a different approach to the calibration of an appropriate penalty. He argued that the material he placed before the Hearing Committee painted a picture of a member of the legal profession with a strong sense of social responsibility, who had made important contributions to the justice system and in particular to the welfare of Indigenous clients and other vulnerable people. He noted that the Member had initiated important class action litigation, including the litigation that led to the IRSSA, and had provided significant amounts of services *pro bono*. Though he acknowledged that the Hearing Committee had found that the mechanism adopted by the Member for obtaining funds from the settlement payment made to J.S. constituted conduct unbecoming, he downplayed the seriousness of this infraction, and argued that it did not warrant the kind of escalated penalty urged by counsel for the Conduct Investigation Committee. He alluded to the comments made about progressive discipline in the *Peet* disciplinary decision quoted above at paragraph 22. He said that when the hearing committee noted that progressive discipline should not be a "strait jacket" in disciplinary proceedings, they were contemplating situations where a rigid process of escalating penalties in a sequence of disciplinary cases would not be appropriate. He argued that this is one such case. He provided the Hearing Committee with several cases dealing with progressive discipline in the context of employment: *Jones v. New Brunswick*, [1980] 1980 CarswellNB 194 (NB PSLRB)l; *Industrial Family (Hamilton) Credit Union Ltd. V. O.P.E.I.U., Local 343*, [1995] 41 CLAS 312 (Ont Arb); *Okanagan Spring Brewery and SEIU, Local 2 (Article 12.03), Re*, [2019] 143 CLAS 206 (BC Arb). The adjudicators in these cases emphasise that progressive discipline should not be seen as a rigid formula for determining sanctions for successive infractions; rather, it is a flexible tool that encourages an employer to consider how or whether an escalated penalty might bring about changes in an employee's conduct. It should be noted that the comments in those cases illustrate two different implications of this flexibility: that an employer does not necessarily have to escalate the level of penalty where some different approach might suffice; and, on the other hand, that an employer is not bound to small increments in discipline where new conduct is significantly more serious than previous infractions, or where the exercise of progressive discipline has not produced the hoped-for result.

71. Counsel for the Member asked the Hearing Committee to consider a number of disciplinary cases where the conduct of a member could be characterized as comparable in seriousness to that of the Member here: *Law Society of Saskatchewan v. Garth Buitenhuis*, 2020 SKLSS 2; *Law Society of Saskatchewan v. Balon*, 2016 SKLSS 8; *Law Society of Saskatchewan v. Dupont*, 2019 SKLSS 3; *Law Society of Saskatchewan v. Martens*, 2016 SKLSS 12; *Re Cherkewich*, 2014 SKLSS 3, and; *Law Society of Saskatchewan v. Siwak*, 2017 SKLSS 6. Though these cases addressed different kinds of conduct, from falsification of documents to contemptuous conduct, counsel suggested they could be characterized as being of a similar level of seriousness. In all of these cases, the disciplinary penalty was some combination of reprimand and fine.

72. Counsel also referred us to the case of *Law Society of Upper Canada v. Keshen*, 2017 ONLSTH 90. In that case, after a number of days of hearing of evidence, the proceedings were stopped and the member, who had represented residential school survivors in the claims process, was invited to appear before the tribunal to discuss his conduct. This approach was agreed on with the assistance of First Nations Elders and the consent of the complainants. Counsel for the Member saw this as an instructive example of the use of creative strategies to address the conduct of lawyers. In our view, this case can be distinguished from our present circumstances

because the unusual approach to addressing the conduct of the Ontario lawyer in that case arose from an agreement among the parties.

73. Counsel for the Member said that the imposition of a lengthy suspension in this case would be unwarranted. He referred us to the decision of the Court of Appeal in *Sterling Gilbert McLean v. Law Society of Saskatchewan*, 2012 SKCA 7. In that case, the Court examined the previous disciplinary decisions of the Law Society where a suspension had been imposed as the penalty, and concluded at paragraph 54:

> With one exception, suspensions greater than one month involve one or more of the following aspects: (i) failure to comply with an Order of the Discipline Committee regarding trust accounts; (ii) a personal benefit taken or accruing to the member; (iii) a conflict of interest on the part of either the member or the client; (iv) a misrepresentation to a court, a tribunal or the Law Society itself; (v) a misrepresentation as to the legal status of affairs knowing that someone will rely on the misrepresentation to their detriment; and (vi) multiple and egregious failures to respond to the Law Society.
>
> We would note here that this list must be seen as a factual statement of the penalties imposed by the Law Society up to that point in time, and not as an exhaustive or prescriptive list intended to limit the circumstances in which a suspension of longer than one month can be considered. Indeed, the Member himself was the subject of a three-month suspension imposed in 2012 under circumstances which do not on the face of it fall within this list, and that penalty was upheld by the Court of Appeal.

74. He disputed the analogy made by counsel for the Conduct Investigation Committee between the two most recent disciplinary cases involving this Member, which rested on a finding that the Member had disregarded a court order, and the circumstances in this case, where there was no court order involved. In those two cases, *Merchant* 2006 and *Merchant* 2014, the respective hearing committees and the courts had emphasised the importance of compliance with judicial orders to the effective operation of the justice system. The situation in the case before this Hearing Committee did not engage that concern, as the Member had not disregarded any order from a court, and the efforts of counsel for the Conduct Investigation Committee to link the two scenarios should be disregarded.

75. Counsel for the Member also revived the argument made at the hearing that the judicial outcome of the Member's request for direction in 2016, which was heard by the courts in British Columbia, might have had a different outcome had the case been heard in Saskatchewan. In this connection, he cited again the decisions in *Merchant Law Group v. Compushare Ltd.*, 2008 SKCA 173 and *Saskatchewan Government Insurance v. Merchant*, 2011 SKQB 174. As we commented in our 2019 decision (at paragraphs 41 to 43), we have concluded that neither of these cases addressed the application of Section 18.01 of the IRSSA, and it is impossible to say that the outcome of a case in Saskatchewan would have differed. In any case, in the jurisprudence arising from the IRSSA, the courts have made significant efforts to develop a coherent set of principles.

76. Counsel for the Member also commented on the disruption that would be caused to the Member's full and complicated schedule of important litigation were these proceedings to result in a suspension. He provided us with a timetable indicating the nature of the Member's projected work over the coming months, and argued that interrupting this work would not be helpful to clients or to the public. He proposed an alternate approach to penalty in these circumstances. This

proposal was that the Member contribute a minimum of 300 hours of *pro bono* services to vulnerable members of the community through the John Howard Society of Saskatchewan. He presented a letter signed by Pierre Hawkins, the Public Legal Counsel of the society, indicating that this help would be welcome, and that he would be willing to certify the Member's compliance with this commitment.

77. Determining what would be an appropriate penalty in this case has been quite difficult. Though we are not referring to every piece of material and every case provided to us, we reviewed all of the material carefully. This included going back to the analysis that led us to conclude that the Member's actions constituted conduct unbecoming, as well as thinking carefully about the principles that underlie the determination of penalties in a professional context. We cannot say that we found a great deal of guidance in the cases presented by counsel for both parties as comparators. In the case of this Member, the combination of his seniority at the bar, his high public profile, his direct involvement in the establishment and implementation of the regime we found him to have flouted, and the previous disciplinary history, make this an unusual situation, to say the least.

78. In this instance, we think the goal of maintaining public confidence in the legal profession and the legal system is particularly important. Counsel for the Member succeeded in demonstrating that the activities of the Member enjoy a high public profile. This is, of course, a double-edged sword. On the one hand, the Member has received public credit for his accomplishments. On the other hand, the actions of the Member are subjected to more public scrutiny than is the case with most lawyers, and his conduct has an accordingly larger influence on how the public perceive lawyers and their work.

79. We do not mean to suggest by this comment that the work the Member does is inherently more significant than that of other lawyers; we have not given significant weight to the argument made by counsel for the Member that he should be spared a penalty that would disrupt his projected schedule because of the large scale and high profile of the litigation he has undertaken. It is perhaps trite to observe that any meaningful penalty must have some disruptive effect in order to remind a member of the legal profession of the importance of the ethical canons that lawyers are expected to adhere to in their practice.

80. The purpose of professional discipline is not punitive. It is largely intended to be corrective, though, in extreme circumstances, where a professional person is guilty of conduct that is entirely inconsistent with professional obligations, or where they seem incapable of learning from their mistakes, a regulatory body may exercise its authority to deny that person continued licensure. The idea of progressive discipline is linked to this corrective goal. As counsel for the Member argued, and as the hearing committee in *Peet*, quoted above at paragraph 22, agreed, the concept of progressive discipline does not represent a rigid formula or scale that should be applied without regard to the seriousness of the latest offence or its place in an apparent pattern of behaviour. Thus, if an employee goes from an instance of mild insolence to a physical attack on another employee, it may be appropriate to impose a harsher sanction for the latter offence than a mechanical application of incremental penalties would suggest. Conversely, if a harsh penalty has been imposed on a previous occasion, and a new charge is made related to what seems like much less serious conduct, it may be appropriate to deal with it more leniently. The point is that disciplinary bodies should not feel constrained by the principle of progressive discipline to cease paying attention to the trajectory of an individual's disciplinary history or the nature of the conduct in question.

81. The concept of progressive discipline is a reminder, however, that the objective underlying a disciplinary sanction is to bring about a change in behaviour, to induce the individual who has been found guilty of misconduct to examine their behaviour and to change it to align better with public expectations of professional people. The premise of the concept is that, if a professional person who has been sanctioned goes on to commit further offences, a disciplinary committee may be justified in imposing a harsher penalty on the grounds that the offender did not respond to the message sent by the first sanction. It is relevant to consider, in this case, whether the conduct of the Member on this occasion should be seen in the context of the earlier instances of discipline against him.

82. Counsel for the Member argued against making this link on two grounds. The first, as we have seen, was that he disagreed with the argument of counsel for the Conduct Investigation Committee that the conduct of the Member in 2014 was analogous to the breach of a court order.

83. Secondly, he pointed to the length of time between the last offence and the decision of this Hearing Committee in 2019, with no further complaints about the Member's conduct during that interval. It is true that there are different ways of calculating the sequence of events here, and that calculation is complicated by the judicial proceedings that have taken place in relation both to the earlier complaint and this one. We would point out, however, that the misconduct identified in our 2019 decision occurred in 2014, and the penalty in the previous case had been imposed in 2012. We conclude that the passage of time should not be considered to be a mitigating factor here.

84. With respect to the argument that the conduct of the Member that is the subject of the complaint here is not analogous to the previous two cases in which he was sanctioned, which involved the breach of a court order, we do not understand counsel for the Conduct Investigation Committee to have argued that this conduct was exactly the same. Clearly, the dignity and effectiveness of the legal system depends in part on the compliance of the parties with judicial decisions, and it is particularly troubling if lawyers themselves do not provide an example to their clients and the public of conscientious respect for the authority of the judiciary. This point was made by Pritchard, J. when she took the unusual step of ordering costs personally against the Member in legal proceedings related to the same actions that resulted in the disciplinary decision of the Law Society in 2006. It also helps to explain the escalation of the penalty from a two-week suspension along with a reprimand, fines and costs in 2006, to a three-month suspension in 2012, along with costs.

85. As we pointed out in our 2019 decision, the scheme for administering and monitoring the payment of compensation to residential school survivors under the IRSSA was created and has been vigilantly tracked by the courts. In a series of rulings commenting on the nature and purpose of the scheme, which we outlined in our earlier decision, the courts have repeatedly emphasised the distinctiveness of the regime they have put in place, and noted that its primary objective is to protect the interests of a vulnerable group of people whose ability to advance their rights under the usual protocols of the justice system has been impaired by historic wrongs. Though the regime clearly provides that lawyers representing claimants will have appropriate payment for their efforts, it is also clear that the interests of lawyers are of secondary importance in this context, and that the compensation awarded to claimants is intended to go directly into their hands, aside from the fees and costs approved for their legal representation. In *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329, Saunders J.A. commented as follows on the nature of the IRSSA, at paragraph 16:

> The process whereby these complicated, longstanding and culturally significant claims have been settled, and the settlement administered, is *sui generis*…. In my view, this appeal is but another marker of unique proceedings that have led to this landmark resolution.

86. In *Canada (Attorney General) v. Merchant Law Group LLP*, 2017 BCCA 198 [*MLG 2017*], which commented on the request for direction made by the Member in relation to the conduct we are considering here, Newbury, J.A. characterized the regime in these terms, at paragraph 5:

> This [the decision in *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481, which gave initial approval to the IRSSA] was the first step in the evolution of a complex framework of orders, rules, guidelines, protocols and directions – essentially a discrete body of law – intended to ensure *inter alia* that compensation paid under the Settlement Agreement would reach the plaintiffs without deductions that were not fair or appropriate.

87. Newbury, J.A. also referred with approval to the Chief Adjudicator's Expectations of Legal Practice, pointing at paragraph 16 to the following passage from that document:

> 12. Lawyers must not:… b) withhold any part of the compensation amount payable to the claimant for any purpose, other than legal fees approved by the adjudicator. The lawyer must not deduct any third party assignments, cash advances, directions to pay, disbursements, costs associated with the management of the file, or anything else, from the amount payable to the claimant.

88. In upholding the decision of the British Columbia Supreme Court, Newbury, J.A. said the following, at paragraph 41:

> By agreeing to act for J.S. in the IAP, [the Member] must be taken to have been aware that it was subject to the terms of the Settlement Agreement, the Implementation Orders, court judgments interpreting them, and the policies of the Chief Adjudicator, all discussed above, and that it would not be operating under the usual rules generally applicable to lawyers in the relevant province. As we have seen, the 'entire' procedure for the resolution of the plaintiffs' claims in this action was to be supervised by the courts. Part of the procedure that has been specified is that assignments or directions to pay under which any amount in excess of a lawyer's approved fees, are null and void.
>
> The Court went on to say that "the direction to pay in this case offends a prohibition that has been woven into the cloth of the administration of the Settlement Agreement."

89. It is clear from these and other comments of the courts that they see themselves as the guardians and overseers of the IRSSA, and that they see the body of orders, commentary and rules that have resulted from their oversight as having legal force.

90. In this light, we agree with the argument made by counsel for the Conduct Investigation Committee that the conduct of the Member in this instance is analogous to the two earlier cases where his conduct involved non-compliance with court orders. True, there was no direct court order to the Member prior to his decision to interact with J.S. in the way he chose to do, but, as we observed in our earlier decision, the courts had on a number of occasions stated clearly that

they saw as unacceptable all mechanisms for diverting the proceeds of the settlement from the claimants.

91. We would note here that counsel for the Member argued in his written submissions that the Member did not have any direct role in representing J.S. during the IAP hearings, and that he was not present when a staff member in his office obtained the written "direction" from J.S. to deduct amounts from her settlement payment. We do not accept this effort by counsel to distance his client from the behaviour we have found to be conduct unbecoming. Aside from the fact that this argument was not made at the original hearing, and the Hearing Committee did not hear evidence to support it at that time, it was not denied that the Member sent the letter of April 7, 2014 to the client, and that letter certainly indicates that he was aware of the strategy for attempting to collect the outstanding fees.

92. In our 2019 decision, we stated that we did not find it credible that the Member held a sincere belief that the method by which he chose to obtain payment from J.S. of the legal fees arising from matters other than the IAP was an appropriate way of proceeding under the IRSSA. The Member has not only been involved in representing claimants through the IAP. He was one of the architects of the process itself, and his challenges to aspects of the process and requests for direction have contributed to the creation of the "discrete body of law" now surrounding the IRSSA. He was in a position, probably unique, certainly unusual, to be familiar with the precepts developed by the courts and the tone and tenor of their thinking about this distinctive legal regime.

93. We read the decisions of the British Columbia courts in response to his request for direction in relation to his dealings with J.S. as expressing similar reservations about not only the legality but the propriety of the Member's conduct. As an example, we quote here a comment of Brown, J. in *Fontaine v. Canada (Attorney General)*, 2016 BCSC 1306, at paragraph 64:

> As is evident, in my view, from the April 7, 2014 letter from Mr. Merchant to J.S., the claimant is open to being threatened or pressured into "consenting" to use funds as suggested to her by the holder of the account and may be required to exercise resolve repeatedly in the face of threats or pressure to gain her right to the physical receipt of those funds in full. Further, concluding that a claimant's direction to pay concerning IAP funds held in trust is an assignment within the meaning of Article 18.01 prevents, as the Monitor submits, unscrupulous counsel from effectively using the [Settlement Agreement] process in aid of the collection of a debt from a client. [This emphasis was added by Newbury, J.A. in *MLG 2017*.]

94. We have commented above on the importance of maintaining public confidence in the legal profession and the justice system, and on the value of deterrence, as principles in imposing a penalty on the Member. As part of the determination of an appropriate penalty, we must also consider any aggravating or mitigating factors that attend this particular case.

95. The only mitigating factor here is that, following the decision of the British Columbia Supreme Court in 2016, the Member remitted the disputed amount to his client.

96. We would note a number of aggravating factors, however. The most critical of these is the disciplinary history of the Member. In the two most recent instances of discipline against the Member, we have identified similarities in the conduct, which has involved efforts on the part of the Member to escape the effects of court orders and legal requirements that he knew or ought to have known applied to the circumstances. As we found that there was no credible basis on which the Member could claim that was sincere in his belief that the mechanism of obtaining

payment from J.S. was permitted, we must conclude that his action represented an “end-run” around limitations he knew or ought to have known applied in these circumstances. It is surely one of the most important obligations of a lawyer to refrain from conduct that will render the justice system less effectual or demonstrate disrespect for the processes and decisions of the courts.

97. The Member has been a licensed lawyer for a very long time. The conduct described in the complaint was not the action of an untried member of the profession who might still be learning how to find a balance between firmness and aggression, plain speaking and bullying, innovative strategy and cutting ethical corners. It is unclear why the Member has failed to take instruction from earlier instances in which he was disciplined, but that resistance to learning lessons from the judgments of his professional peers must also be seen as an aggravating factor here.

98. Furthermore, the efforts of the Member here were directed at obtaining a benefit for himself and his firm, not at zealous representation of his client.

99. As a final aggravating factor, we reiterate our concern that the Member directed this strategy at a client he knew to be a member of vulnerable group. There seems to be a misalignment between the paragon of dedication to social justice described in the material presented by counsel for the Member, and the tone of disrespect and intimidation we found the Member to have employed in his interaction with this client. Our role here is to determine what sanction is appropriate for conduct we have found to be professional misconduct, and we have concluded that, however deserved the descriptions in counsel’s material may be, they do not offset the seriousness of the infraction committed by the Member in this case.

100. We would commend counsel for the Member for attempting to find an innovative way to sanction the Member without disruption to the continuing obligations he has to his clients over the coming months. We are somewhat concerned, however, about characterizing *pro bono* activity as a penalty. According to his counsel, the Member already has demonstrated a commitment to *pro bono* work, and it is hard to see what the instructive effect would be of sentencing the Member to pursue activities he already does voluntarily. We must decline to accept the proposal that the Member be sentenced to do work for the John Howard Society.

101. Despite the efforts of counsel for the Member to downplay the seriousness of this matter, we see these circumstances as deserving of a significant penalty. The background of previous discipline of what we have found to be analogous conduct, the resistance of the Member to modifying his conduct in the wake of that discipline, the fact that his conduct was directed towards a client he knew to be vulnerable – all of these things speak to the need to devise a penalty that bring home to the Member the importance for someone of his seniority and high public profile of complying with the canons of his profession.

102. We would also say that we think this is a case where the idea of progressive discipline is appropriate. Though we do not know why the Member has not amended his conduct in the face of successive disciplinary penalties, it is apparent that he has not. As we have said, it is our view that the infractions that were the subject of the complaint here are of comparable gravity to the previous instances of discipline, and we do not think there is an argument for imposing a less serious penalty than the three month suspension that was imposed on the last occasion.

103. For the purposes of imposing a penalty, we are treating the two counts of the complaint – that the Member induced J.S. to consent to a form of assignment, and that he followed through by implementing that supposed assignment – together, and not imposing separate penalties.

CONCLUSION

104. We have decided that a suspension eight months in length is the appropriate penalty in this instance, as well as the payment of costs of these proceedings in the amount of $10,643.00. It is reasonable under the circumstances to allow the Member some time to put his practice in order before beginning the period of suspension, so we are directing that the Member begin serving his suspension as of February 1, 2021.

DATED at Saskatoon, this 28th day of September, 2020.

"Beth Bilson, Q.C.," Chair

"Alma Wiebe, Q.C."

"Heather Hodgson"

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Amended Formal Complaint dated October 12, 2016 alleging that EVATT FRANCIS ANTHONY MERCHANT of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

1. **did in relation to a client of his firm, J.S., induce J.S. to provide a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement when such conduct was prohibited; and**

2. **did in relation to a client of his firm, J.S., cause a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement to be acted upon when such conduct was prohibited.**

Jurisdiction

105. Evatt Francis Anthony Merchant (Tony Merchant) (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"), and accordingly is subject to the provisions of *The Legal Profession Act*, *1990* (hereinafter the "Act") as well as the *Rules of the Law Society of Saskatchewan* (the "Rules"). Attached at **TAB 1** is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's practicing status.

106. The Member is the subject of an Amended Formal Complaint dated October 12, 2016. The original Formal Complaint containing the exact same allegations as the Amended Formal Complaint, but with a different Hearing Committee was issued on January 29, 2016. Attached at **TAB 2** are copies of both the original Formal Complaint and the Amended Formal Complaint with proof of service. The prosecution of the Amended Formal Complaint was held in abeyance by agreement while related matters were addressed by the courts.

Background of the Complaint

107. This matter was brought to the attention of the Law Society by Crawford Class Actions (Crawford), an organization appointed by the Court to monitor the Indian Residential School settlement process. Crawford made the complaint against the Member on behalf of the Member's client J.S. J.S. later adopted the materials provided by Crawford in her own complaint.

Facts

108. In June 2000, the Member's firm, Merchant Law Group (MLG) began representing a residential school survivor, J.S., eventually assisting her with her claim via the Independent Assessment Process (IAP) under the Indian Residential School Settlement Agreement (Settlement Agreement). The Member and his firm were parties to the Settlement Agreement. MLG also acted for J.S. with respect to at least one other legal matter unrelated to the IAP claim, as well as for her son, C.S., both with respect to his own IAP claim and other unrelated criminal matters.

109. On June 26, 2000, J.S. signed an assignment to MLG of any proceeds from J.S.'s Residential School Claim "necessary to pay for the reasonable accounts of Merchant Law Group on all legal matters undertaken for me including without limiting the generality of the foregoing, work regarding my Residential School Claim and any foreclosure action…now or in the future."

110. That assignment was provided prior to the Settlement Agreement coming into effect on May 6, 2006. It became unenforceable because of provisions contained within the Settlement Agreement, specifically, Article 18.01 [**TAB 3**] which states that "[n]o amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement."

111. On January 28, 2014, Adjudicator Dirk Silversides granted J.S. compensation under the IAP in the amount of $93,000.00. Canada's contribution towards legal fees was $13,950.00. An additional $559.62 was awarded for payment of disbursements. On March 18, 2014, the Government of Canada issued a cheque for the total amount of $107,509.62 payable to Merchant Law Group in trust for J.S. representing the settlement proceeds.

112. At the time Canada issued this cheque, it appears that J.S. was about 69 years old.

113. On March 28, 2014, Mr. Alberts of the Merchant law firm drafted (but did not send) a letter addressed to J.S. enclosing a cheque in the amount of $54,949.17, together with an account for professional services rendered in connection with her IAP claim **[TAB 4]**. The account contemplated a contingency fee of 30%, or $27,900 (plus G.S.T. and P.S.T.) and disbursements, for an "invoice total" of $31,249.62. According to a "trust listing" attached to the account, this amount was to be deducted from the funds being held in trust for J.S. The listing also reflected the deduction of a total of $21,310.83, being the total of seven prior accounts of MLG relating to other services on behalf of J.S. and her son dating back to 2003. According to the listing, the $21,310.83 was to be deducted from the funds held in trust, which would leave net proceeds of $54,949.17 in trust. Mr. Alberts' draft letter did not mention these earlier accounts, but stated in part:

> The Adjudicator will conduct a review of the amount of fees that we are entitled to collect. After we receive the Fee Decision we will forward an additional cheque to you.

> Please sign the enclosed receipt and return it to us in the enclosed self-addressed stamped envelope.

114. On the same date as the draft letter, Mr. Alberts contacted J.S. to inquire of J.S. if she would agree to pay the various old accounts. In an internal memorandum to Mr. Tony Merchant [**TAB 5],** a legal assistant advised the Member that J.S. was "not willing to pay these accounts because she said her son has his own IAP action and he can pay his own accounts. C.S. does not have an IAP claim. He got awarded $0 at trial because the judge did not believe him."

115. This information led Mr. Alberts to not to send the letter of March 28 or to make the deductions from trust contemplated by the trust listing.

116. However, on April 7, 2014, the Member did send a letter to J.S. The Member's April 7, 2014 letter is attached at **TAB 6**. The letter stated in part:

> You agreed to pay accounts for C.S. in connection with criminal charges that he faced and on the basis of your having promised to pay those accounts, we provided legal services to C.S. and you.
>
> In the case of two of those accounts, one regarding a criminal matter and the other regarding a family law matter, these were really your accounts where you were the client. Those accounts were for $754.30 and $442.77. We could legally withhold that money because those are your debts but we are not prepared over $1,200 to get into a fight if you instruct me that you will not even pay these debts.
>
> Regarding 5 other debts that you also owe in amounts of $1,545.30, $972.75, $6,787.64, $6,840.44, and $3,967.63, we have no legal right to enforce assignments against you, notwithstanding the fact that for these 5 other criminal defence matters on behalf of C.S., you agreed and promised that you would pay the accounts out of the money that we expected you would receive from your IAP claim.
>
> Those 5 criminal defence debts on behalf of C.S. as well as the criminal defence debt of $754.30 where you were the client with C.S. and the $442.77 where you were the client in connection with a family law matter, totals $21,310.83.
>
> You owe the money. You agreed to pay the money. That should not be confused with the fact that we do not have legally enforceable assignments by which we may legally hold back the money from the funds. Do not confuse your obligation both morally and legally with the fact that the assignments are not legally enforceable. We could sue you for the $21,310.83. My expectation is we would succeed with that law suit and obtain a judgment against you. We could then seize your assets, your car, your bank account, or whatever, in order to collect these debts that you owe.
>
> I understand that you told Mr. Alberts that you are not prepared to have these debts paid out of the IAP money that you have received. You said that C.S. can pay his own debts because he had a claim. He did not have a claim. He was not truthful. He was not believed. He did not get an award. When the legal work was done for him based on your agreeing to pay, we relied on your word and your promise to pay and we did not rely on the prospect of being paid out of money going to C.S.

> In fairness and acting honestly, you should instruct us to pay the $21,310.83 out of the money that we are going to send to you or instruct us to pay a part of that money if you decide that you will not pay it all, even though it is all owing, and decide that you will instruct us to pay $15,000 or $10,000 out of the money that you owe.
>
> However, if you contact me and instruct me not to deduct any of the money, we will follow those instructions and pay $76,260.00 without deduction.
>
> Incidentally not just with debts like this that are owed to our law firm, but with debts owing by others who have IAP claims where money is owing to other law firms, to suppliers of good or services, for funeral services, cars, loans or whatever, we regularly contact our clients, in a manner similar to my contact with you, and remind our clients that they owe the money even if the assignments are not legally enforceable, and seek instructions.
>
> Tell us what you want us to do. We will pay $76,260.00 to you or keep $21,310.83 or keep some lesser sum if you instruct us to keep some amount to pay your debts.

117. Enclosed with the April 7, 2014 letter was a new account dated April 7, 2014 which was identical to that proposed in the March 28 draft letter, and the same "trust listing" that contemplated deduction of the further $21,310.83 in total for the 'old' accounts of J.S. and C.S **[Tab 7].**

118. After receiving Mr. Merchant's letter, J.S. confirmed in a phone conversation with a legal assistant that same day (April 7) that she wanted to apply IAP funds to these outstanding accounts. J.S. attended the offices of MLG and met with that legal assistant. During that meeting, J.S. signed written instructions **[Tab 8]** directing MLG to pay the outstanding unrelated accounts out of her IAP settlement monies. The instructions were as follows:

> I J.S. instruct Merchant Law Group to pay criminal accounts of C.S. and my family law account out of my IAP settlement money.
>
> "J.S."

119. Two cheques totaling $54,949.17 – representing $76,260.00 less $21,310.83 for the "old accounts" pertaining to J.S. and C.S. – were issued by MLG to J.S. on April 7, 2014. The firm acted upon the direction to pay the unrelated "old accounts".

120. In reasons dated May 9, 2014, Adjudicator Dirk Silversides issued a Schedule 2 ruling concerning a legal fee review for fairness and reasonableness based on MLG's time and billing records for J.S.'s IAP claim. While MLG had proposed total legal fees of $20,100.00, the Adjudicator approved legal fees and taxes totaling $17,391.00. Taking into account Canada's $13,950.00 contribution to legal fees, the Adjudicator determined the amount payable to J.S. was $89,559.00. MLG issued an additional cheque to J.S. in the amount of $13,299.00 to account for the revised fee with a cover letter and revised account **[Tab 9].**

121. The fact that J.S. had signed a document agreeing to pay portions of her proceeds to MLG to satisfy outstanding legal accounts for unrelated legal work came to the attention of the Daniel Shapiro, then Chief Adjudicator for the IAP. Shapiro confronted the Member with the issue on May 28, 2014.

122. In an explanatory letter to the Chief Adjudicator dated July 21, 2014, Mr. Kuski, as counsel for MLG, informed him, among other things, that a portion of J.S.'s IAP award had been applied to satisfy outstanding accounts for other unrelated legal matters at J.S.'s direction.

123. On October 1, 2014, the Independent Special Advisor to the Court Monitor, Ian Pitfield, informed Mr. Kuski that the Chief Adjudicator had forwarded to him J.S.'s complaint concerning the application of her IAP fees to MLG's unrelated legal accounts. Mr. Pitfield directed MLG to repay J.S. the sum of $21,310.83. In support of this direction, Mr. Pitfield wrote that there was no evidence that J.S. was a party to an enforceable obligation to pay her son's accounts, nor that she was provided independent legal advice prior to accepting any such obligation, nor that there was any consideration for the handwritten direction she had allegedly signed on April 7, 2014. Mr. Pitfield also raised concerns that the content of Mr. Merchant's letter to J.S. suggested these funds were inappropriately procured.

124. On October 23, 2014, MLG brought a request for a direction that it is entitled to retain the amount of $21,310.83 pursuant to J.S.'s written instructions.

125. That application yielded the following Court Decisions:

Fontaine v. Canada (Attorney General),2016 BCSC 1306 [**TAB 10**]; and
Canada (Attorney General) v. Merchant Law Group LLP, 2017 BCCA 198 [**TAB 11**].

126. The British Columbia Superior Court ruled that the $21,310.83 was impermissibly withheld as it constituted an assignment prohibited by the Settlement Agreement. The Court directed MLG to pay J.S. $21,310.83 forthwith, with interest, and he complied. The British Columbia Court of Appeal upheld the Superior Court's decision. The Member sought leave to appeal to the Supreme Court of Canada. Leave was denied on or about August 2, 2018.