THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2009 SKCA 33 Date: 20090311

Between: Docket: 1266

E.F. Anthony Merchant, Q.C.

Appellant

- and -

Law Society of Saskatchewan

Respondent

Coram:
Richards, Hunter and Wilkinson JJ.A.

Counsel:
Gordon J. Kuski, Q.C. for the Appellant
Gary D. Young, Q.C. for the Respondent

Appeal:

From:	Decision of the Hearing Committee of the Law Society of Saskatchewan
Heard:	October 22, 2007
Disposition:	Appeal allowed in part
Written Reasons:	March 11, 2009
By:	The Honourable Madam Justice Wilkinson
In Concurrence:	The Honourable Mr. Justice Richards The Honourable Madam Justice Hunter

Wilkinson J.A.

I. Overview

[1] The appellant was disciplined by the Law Society for two counts of conduct unbecoming a barrister and solicitor. In this appeal, he challenges the reasonableness of the Hearing Committee's findings of misconduct, and the sentences that were imposed in consequence. In particular, he alleges the Committee erred in its determination of the mental element necessary to support the findings of misconduct, and in applying a standard of proof that was inadequate to justify those findings.

[2] The findings resulted in a reprimand and a fine of $2,500 for one count of marketing services in a manner reasonably capable of misleading the public, and a two-week suspension from practice for one count of unauthorized withdrawal of trust funds. The two incidents were unrelated.

[3] The three-member Hearing Committee ordered the appellant to bear the costs of the disciplinary and sentencing hearings, which occupied two and a half days in total. While disciplinary proceedings are, for the most part, handled by a staff solicitor, in this case the respondent elected to retain outside counsel to handle the matter on its behalf. As a result, the Law Society's costs of prosecution and sentencing exceeded $60,000, a figure reflecting the solicitor-client bill of costs it incurred in seeing matters through to conclusion.

[4] In the first incident, the appellant commenced a class action after a train derailment near the City of Estevan caused the evacuation of a number of homes and businesses in the vicinity. In a mail campaign, the appellant sent a letter and Retainer Agreement to 150 Estevan residents inviting them to engage the appellant's services in the class action.

[5] Unknown to the appellant, his legal assistant attached an obsolete form of retainer agreement, one that had caused controversy for the appellant a few years earlier during his involvement with residential school claims. That controversy also resulted in disciplinary action being taken. The appellant was sanctioned for using a form of retainer agreement that was considered misleading when read in conjunction with the firm's letter of solicitation.

[6] The citation in the Estevan complaint stated that:

> 1. [the appellant] is guilty of conduct unbecoming a lawyer in that he did correspond to various residents of Estevan, Saskatchewan, by letter dated August 10, 2004, with attached Retainer Agreement, which letter and Retainer Agreement, were reasonably capable of misleading the recipient or the intended recipients. (reference: Chapter XIV of the Law Society of Saskatchewan Code of Professional Conduct, Rule 1601(2)(c) of the Rules of the Law Society of Saskatchewan)[1]

[7] The Hearing Committee found that inconsistencies between the Estevan letter and the terms of the attached Retainer Agreement offended Rule 1601(2)(c) of the Rules of the Law Society of Saskatchewan. The Rule states:

> (2) Any marketing activity undertaken or authorized by a member must not be:
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> …

[1] Report of the Hearing Committee at p. 3.

> (c) reasonably capable of misleading the recipient or intended recipient; or
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> …

[8] In *The Legal Profession Act, 1990*[2] (the "*Act*"), s. 2(1)(d) defines conduct unbecoming as follows:

> (d) **"conduct unbecoming"** means any act or conduct, whether or not disgraceful or dishonourable, that:
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> (i) is inimical to the best interests of the public or the members; or
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> (ii) tends to harm the standing of the legal profession generally;
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> and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);

[9] Although the wording of the charge indicated a deliberate or intended course of action, the conduct unbecoming, as ultimately found by the Hearing Committee, consisted of negligence on the appellant's part in failing to safeguard against staff errors of the kind that occurred.

[10] The Sentencing Committee comprised of 14 Benchers gave express recognition to the fact that the appellant's conduct was "negligent" rather than deliberate, and handed down a formal reprimand and a $2,500 fine. However, the appellant was ordered to pay costs in the amount of $21,663.18 representing the costs of the disciplinary hearing and an additional $2,592.54 for the costs of the sentencing hearing.

[11] In the second incident (commonly referred to as the "Court Order complaint"), the appellant was representing the wife in a matrimonial dispute, and had been ordered by the Court to hold the proceeds of sale of the family

[2] S.S. 1990-91, c. L-10.1.

home in trust for the wife and her husband [B.P.] until the trial of the action, or further court order. Following the trial, which addressed the usual spectrum of family law issues including division of property, the Court of Queen's Bench ordered the sale proceeds to be distributed between the husband and wife in specified amounts. The appellant resisted B.P.'s demands for payment of his share, and later used the funds to satisfy the court costs assessed in the wife's favour. The Court ordered the funds be returned to the appellant's trust account. Months later, the Court eventually approved payment of some of the wife's court costs from the husband's funds, but less than the amount originally taken by the appellant.

[12] The charge related to the Court Order complaint stated that:

> 1. [the appellant] is guilty of conduct unbecoming a lawyer in that he did withdraw or authorize the withdrawal of trust funds belonging to B.P. contrary to Court Order or without the consent of B.P.
> (reference: Code of Professional Conduct, Chapter IX, Chapter XIII and Chapter XIX)[3]

[13] The Sentencing Committee denounced the appellant for transferring trust funds in direct contravention of a court order. It imposed a two-week suspension from practice and, as in the Estevan matter, ordered the appellant to pay costs of the entire proceedings in the amount of $38,939.26.

II. The Grounds of Appeal: The Estevan Complaint

[14] The appellant's position with respect to the Estevan matter is contained in these grounds of appeal:

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[3] *Supra* note 1 at p. 17.

(1) A single, inadvertent mistake made by a lawyer's assistant cannot justify a determination of conduct unbecoming on the part of a lawyer, and the Hearing Committee's decision is unreasonable.

(2) The Hearing Committee erred in basing its determination of conduct unbecoming on failure to implement proper safeguards in office procedures, when that was not the complaint actually levied against the appellant.

[15] The appellant says the charge was not cast in terms of "failure to supervise staff" or "failure to implement safeguards against administrative error" and he did not come prepared to meet a charge on those terms. He was instead facing an allegation of knowingly engaging in an act or conduct capable of misleading the public, when he had no knowledge and no active intent to mislead. He argues intent is a necessary element of a charge of conduct unbecoming in the form in which it was laid, and, accordingly, innocent or negligent mistake is insufficient in law to support a finding of professional misconduct.

III. The Grounds of Appeal: The Court Order Complaint

[16] The appellant's salient points, all of which were rejected by the Hearing Committee, are these:

(1) The direction to pay B.P. was not a formal "court order".

(2) The appellant did not have a guilty mind, because he believed he possessed a right of equitable set-off in relation to the funds.

(3) The burden of proof resting on the Law Society in this instance should be proof beyond a reasonable doubt.

(4) The Court subsequently approved payment from the husband's share to satisfy the wife's costs, and this militates against a finding of conduct unbecoming.

[17] With respect to the first point, the appellant argues the court order he is alleged to have breached is not a court order *per se*, as it was never reduced to formal judgment.

[18] Alternatively, the charge as drafted is impermissibly vague, as the court order he is alleged to have breached is not identified.

[19] The appellant further submits he had no wrongful intent in withdrawing the funds and believed that a triangulated form of equitable set-off was available to him, arising from the fact that B.P. was indebted to the wife for court costs, the wife was indebted to the appellant for legal fees, and the appellant was indebted to B.P. for his share of the family home proceeds.

[20] He argues that breach of a court order is in the nature of a quasi-criminal offence tantamount to contempt of court and, therefore, the Law Society should have been required to establish conduct unbecoming on the specified ground to the same high degree expected in a criminal matter, that is, on proof beyond a reasonable doubt.

[21] Finally, he submits that the consequences of his conduct were negligible because the Court eventually approved the payment of court costs from the husband's share of the proceeds, albeit some months after the fact.

IV. The Grounds of Appeal Common to Both Matters

[22] With respect to both matters, the appellant questions the sufficiency of the Hearing Committee's reasons in finding the complaints well-founded. He submits if Law Society Rules were breached, there is a second discrete analytical step that must be taken which offers a tenable explanation (*per Law Society of New Brunswick v. Ryan*[4]) as to how and why a breach of the Rules constitutes "conduct unbecoming" as defined by *The Legal Profession Act, 1990*. The Committee failed to perform this discrete analysis, and in the appellant's view, arrived at an unreasonable result.

[23] As to the penalty phase, the appellant says there was a failure to apply a principled or reasoned approach to the determination of the appropriate sentence. The costs orders were punitive, he says, yet received no recognition as such when the Sentencing Committee fashioned its punishment. He contends that validating orders of such a prohibitive nature will effectively deny lawyers a fair chance to dispute allegations of professional misconduct and defend themselves against complaints.

V. The Standard of Review

[24] While a broad right of appeal is conferred by s. 56(1) of *The Legal Profession Act, 1990*, the appellate role in these matters has been construed more narrowly for the reasons canvassed in *Merchant v. Law Society of Saskatchewan*.[5] There, the majority settled on a "reasonableness standard".

[4] 2003 SCC 20, [2003] 1 S.C.R. 247.
[5] 2002 SKCA 60, 213 D.L.R. (4th) 457.

The decision under appeal in that case similarly involved a finding of conduct unbecoming.

[25] Here, the appellant conceded at the outset that the Committee decisions, both at hearing and sentencing, should be reviewed on a reasonableness standard. It is therefore unnecessary to do more than advert to *Dunsmuir v. New Brunswick*[6] and its salutary reminder that when a court conducts a review for reasonableness, it will inquire into the qualities that make a decision reasonable both in outcome and in analytical expression. Thus, the review is about justification, transparency and intelligibility in the decision-making process, and whether the decision is situated within the range of acceptable outcomes.[7]

[26] Nothing in recent case law has diminished the force of Justice Iacobucci's observations in *Pearlman v. Manitoba Law Society Judicial Committee*,[8] where he stated:

> … I note that courts have recognized that Benchers are in the best position to determine issues of misconduct and incompetence. For example, in *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292-93):
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> > No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

VI. The "Estevan Complaint"

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[6] 2008 SCC 9, 291 D.L.R. (4th) 577.
[7] *Ibid*. at para. 47.
[8] [1991] 2 S.C.R. 869 at 880.

[27] On August 8, 2004, a Canadian Pacific Railway train derailed near the City of Estevan Saskatchewan. On August 10, 2004, the appellant solicited a large number of prospective claimants by mail, advising that his law firm had commenced a class action on their behalf seeking fair and appropriate compensation for any disruption or financial loss caused as a result of their evacuation. Attached to each letter was a form of Retainer Agreement for those interested in accepting the law firm's services in the matter.

[28] The letter of August 10, 2004, was a marketing activity within the meaning of Rule 1601, and no issue was taken with that characterization. The letter contained a simple and straightforward representation, stating:

> I … ask that you sign the enclosed agreement which would provide that we will receive 25% of anything that we recover for you. *If we recover nothing, you would pay nothing …"* [Emphasis added]

[29] In contrast, the enclosed Retainer Agreement provided that the client would be responsible for all court costs and other out-of-pocket expenses incurred by the firm in the investigation and advancement of the client's claim, if the law firm decided the action ought not be pursued.

[30] The Estevan complaint is best understood against the backdrop of the earlier matter involving the residential school claims. Disciplinary proceedings were taken against the appellant for soliciting residential school claimants using a process that bore some similarity to the Estevan mail-out. Then, as now, the Hearing Committee's focus was on the potentially

misleading effect of differences between the letter and the Retainer Agreement.

[31] The finding of "conduct unbecoming" in the residential school matter, which was sustained on appeal,[9] prompted the law firm to amend its Retainer Agreement to include this sentence:

> "[I]f this Agreement is at variance with any written communication from Merchant Law Group, then the interpretation most favourable to the client will govern".

[32] In the appellant's view, this amendment "foolproofed" his materials, and responded completely to the concerns that prompted the earlier disciplinary proceedings.

[33] The appellant testified before the Committee that the form of retainer agreement attached to the Estevan letters should never have been used. It was an obsolete version, and it was inadvertently attached to the letter by a member of his staff. The appellant's senior assistant happened to be away at the time, and unknown to the appellant, a less experienced staff member was pressed into service in the preparation and assembling of the mail-out. It was advantageous to the firm to be first out of the gate with the class action. Thus, there was a concentrated effort to have a statement of claim issued and the mail-out completed on August 10, 2004.

[34] Before mailing, the appellant reviewed the letter, but not the retainer agreement. He testified that when he was later notified by the Law Society

[9] *Supra* note 5.

that a complaint had been made, he was shocked and upset to learn the wrong form of retainer had been used. The retainer agreement had a critical omission. It did not contain the provision stating that in the event of variance in the content of written communication, the interpretation most favourable to the client would govern.

[35] The Hearing Committee expressly accepted that the agreement was attached in error. It said, nonetheless, the appellant had been disciplined once before for similar misconduct and could not explain how the mistake had happened again. The Hearing Committee stressed the appellant was responsible for the documents emanating from his office and that he had failed to offer them evidence of procedures or preventative measures to safeguard against such mistakes. It relied on *Law Society of Upper Canada v. A Member*,[10] where a distinguished panel took the view that professional misconduct could be based on administrative inefficiency and the inadequacy of preventative safeguards. There, the member admitted he had never taken steps or instituted appropriate measures to ensure a staff member was sending out appropriate real estate documents.

[36] The appellant argued before us that the Hearing Committee erred in finding professional misconduct based on acts of carelessness or omission when that was not the substance of the charge leveled against him. Rather, he stood accused of engaging in a conscious course of conduct or committing an intentional act that might be reasonably capable of misleading the public. He

[10] [2002] L.S.D.D. No. 91 (Q.L.).

had defended the charge on the basis that the requisite mental element (knowledge of the act, or intent to commit the act) was entirely absent. That was the case he had come prepared to meet based on the particular framing of the citation. He says the Committee recognized and accepted that the retainer agreement was attached inadvertently, and it followed that his defence should have succeeded and the Committee should properly have held that the charge was not well founded. Accordingly, he contends the Committee's decision was unreasonable.

[37] It is apparent that before the formal charge was laid, there was very limited discussion between the appellant and respondent on the subject of the letter and the Retainer Agreement. According to the appellant, the mail-out was not given any particular prominence in the list of concerns raised by the initial complaint. It was made by an Estevan lawyer who, rather ironically, was among the 150 residents targeted in the mail-out. The appellant responded in a 41-page letter to the Law Society, and admitted he had only addressed the issue of the letter and Retainer Agreement in a cursory fashion in the course of his reply. He explained this in his testimony:[11]

> Q Okay. Now, when you received this indication from the Law Society that there was some concern about several aspects of this thing, did you explain to them that [*sic*] this mistake that you're now talking about?
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> A I did, but only in the briefest of terms. It was the last item of a complex letter, and I said that it had been mailed by Jamie Lupanko, and a mistake had been made as to the retainer agreement. But I didn't go into all of this detail, and I wasn't ever asked and there was some procedural things that seemed wrong, but that's why I'm here.

[11] Appeal Book, Volume II, Transcript of Discipline Committee Proceedings at p. 76.

[38] Matters had indeed progressed rather quickly. The formal citation issued without any further discussion of the issue of the letter/retainer Agreement. The appellant's oblique reference to "procedural things that seemed wrong" included the dearth of communication between the parties and the Law Society's failure to broach the issues with him directly in face-to-face meetings, contrary to his understanding of long-standing practice in these matters. The Law Society had also omitted to advise him that the Estevan lawyer had responded in writing to the appellant's 41-page missive. The appellant claimed he only learned of this development after the complaint had been referred to the investigation committee, although he did allow that the respondent later apologized to him for the oversight. The gist of it all from the appellant's perspective is that there was a significant rush to judgment on the Law Society's part. The respondent, on the other hand, attributes the various failures in communication to the appellant's highly confrontational approach in his dealings with the Law Society.

[39] As a result, it was not until the day of the hearing itself that the appellant supplied a full explanation of the error that had occurred. He produced a copy of the amended retainer agreement containing the "variance" provision, the one that should have been attached to his correspondence. It seems this was the first time the Hearing Committee was made aware of the change in the appellant's practice in his approach to forwarding retainer agreements to prospective clients. Likewise, it was the first time he offered the respondent a full explanation regarding the history behind the amendment, and his

reasons for making it. He testified it had been his practice to use the amended form of retainer agreement since at least 2000 or earlier.[12]

[40] These unexpected and last-minute disclosures upset the applecart. As the appellant's counsel acknowledged, the Law Society may well have been spurred on by the impression the appellant was deliberately flouting its earlier ruling. The appellant did nothing to correct that impression and takes the view, unsurprisingly, that as the accused he need only respond to the case brought against him.

[41] In argument before the Hearing Committee, counsel for the Law Society directly confronted the question whether the appellant's right to make full answer and defence had been compromised in any way by the manner in which the charge had been framed. He acknowledged it was not being suggested that the offence charged was a strict liability offence.[13] He went on to add that the charge could be amended, without suggesting it was necessary to do so in the circumstances. He pointed out that the issue arose as a result of evidence led by the appellant in his own defence, and the appellant would not be prejudiced if the Committee simply amended the charge to indicate that "failure to supervise" or administrative inefficiency, rather than volitional conduct, was the substantive feature of the offence.[14]

[12] *Ibid*. at p. 71.
[13] *Ibid*. at p. 220.
[14] *Ibid.* at pp. 222-23.

[42] The Hearing Committee did not address these arguments in its decision. To sustain its conclusion, however, it placed particular emphasis on the fact the appellant had offered them no evidence regarding procedures or safeguards put in place to prevent errors of the kind in question from occurring. The Hearing Committee's evident view of the matter was that the appellant should have possessed a heightened sensitivity to an error of this kind, given his prior disciplinary experience with the residential school matter. For example, it questioned why the obsolete agreement had been retained by the appellant in his computer databank. In fairness, it must be said that nothing in the retainer agreement itself is inherently objectionable. As a stand-alone document, it is perfectly acceptable. It is only objectionable when read in combination with confusing or contradictory correspondence.

[43] In the case relied upon by the Hearing Committee (*Law Society of Upper Canada*), there are a number of distinguishing features. The substance of the charge was framed discretely, in the sense that it alleged the member *ought to have known the potential for mistakes to occur in the circumstances*. It was abundantly clear that carelessness and administrative inefficiency was the tenor and substance of the offence — hence, the focus in that hearing on issues such as the member's appreciation of the risks, and the objectively foreseeable consequences of his conduct, rather than on the fact of the mistake itself. Further, the *Member* case was not focused on an isolated error. Instead, it addressed a wholesale abdication of professional responsibility by a lawyer who left his employees to run a busy real estate practice without supervision.

[44] For ease of reference I reproduce the Estevan complaint, which was framed in this manner:

> That Evatt Francis Anthony Merchant, Q.C., of the City of Regina, in the Province of Saskatchewan:
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> is guilty of conduct unbecoming a lawyer in that he did correspond to various residents of Estevan, Saskatchewan, by letter dated August 10, 2004, with attached Retainer Agreement, which letter and Retainer Agreement, were reasonably capable of misleading the recipient or intended recipients. (reference: Chapter XIV of the Law Society of Saskatchewan Code of Professional Conduct, Rule 1601(2)(c) of the Rules of the Law Society of Saskatchewan)[15]

[45] The fundamental source of disagreement between the parties relates to the mental ingredient that must be established in order to support a finding of professional misconduct by "corresponding in a manner reasonably capable of misleading intended recipients". The requisite mental ingredient dictates the nature of the defence(s) available to the appellant.

[46] The issue is the degree of fault that will support a finding of conduct unbecoming where a marketing activity constitutes the prohibited act, and the lawyer is unaware he has violated the rules. A useful starting point — one that can serve as a functional basis for comparison — is the *Sault Ste. Marie*[16] decision, the landmark case that established three classifications for offences and the accompanying "fault lines" for each. The three categories were: (1) full *mens rea* offences; (2) strict liability offences; and (3) absolute liability offences.

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[15] *Supra* note 1.
[16] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

[47] Prior to the *Sault Ste. Marie* case, there were only two recognized categories of offences: (1) the traditional criminal offence which required proof of a certain state of mind in relation to the commission of the prohibited act (knowledge combined with a volitional choice, or intent, or at minimum a reckless disregard for the consequences); and (2) the absolute liability offence, where the performance of the act alone was sufficient to establish guilt, regardless of state of mind. The *Sault Ste. Marie* case gave recognition for the first time to an intermediate category of offences described as "strict liability offences" (also referred to as "regulatory offences" or "public welfare offences") where a defendant could avoid culpability for a prohibited act by demonstrating on a balance of probabilities that: (1) due diligence was exercised and all reasonable steps were taken to avoid its commission; or (2) the defendant held a reasonable belief in a set of facts which, if true, would render the act or omission innocent.

[48] Thus, offences which are considered "criminal" in the true sense of the word populate the first category. In such cases, a conscious choice to perform a prohibited act, combined with knowledge that all or some of the relevant circumstances exist, is a well-recognized form of criminal culpability.

[49] Offences of absolute liability are those where the Legislature has said that if the prohibited act alone is proved, then guilt is established and punishment will follow — for example, a case of driving while suspended or prohibited, as in *Re B.C. Motor Vehicle Act.*[17]

[17] [1985] 2 S.C.R. 486.

[50] Regulatory offences that affect matters of public interest or concern fall into the intermediate category. These frequently involve controlled, restricted, or regulated spheres of activity rather than conduct prohibited on pain of criminal sanction. In strict liability offences, the onus is on the accused to establish on a balance of probabilities that he took all reasonable steps to avoid committing the offence. Or, as more recently articulated by Goudge J.A., speaking for the Ontario Court of Appeal, what must be established is that the "… accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system".[18]

[51] The rationale behind the creation of a third category of offences is that in regulatory situations, it is the defendant who has the relevant knowledge regarding the measures taken to avoid the particular breach in question. It was deemed proper to expect that the defendant would come forward with the evidence of due diligence. Thus, while the prosecution was required to prove beyond a reasonable doubt that the prohibited act has been committed, the defendant had to establish, on a balance of probabilities, that he or she had been duly diligent, taking all reasonable care to avoid offending. Alternatively, the defendant had only to establish the requisite reasonable belief in a state of facts that, if true, would render the act an innocent one.

[18] *R. v. Petro-Canada* (2003), 222 D.L.R. (4th) 601 at para. 15 (O.C.A.).

[52] Therefore, a strict liability offence requires, at minimum, a fault element amounting to negligence before misconduct will be found. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent in taking steps which a reasonable person would take.[19]

[53] Accordingly, while lack of the requisite knowledge or intent constitutes a defence to a full *mens rea* offence, it is not a defence in law to a strict liability offence. Required instead is evidence that establishes on a balance of probabilities that all reasonable steps were taken by the defendant to prevent the commission of the prohibited act.

[54] If the *Sault Ste. Marie* classifications properly guide the analysis, the misconduct complained of would logically fall into a category in the nature of a full *mens rea* offence or a strict liability offence. By applying a fault standard amounting to negligence, the Hearing Committee, in effect, reasoned that the misconduct more closely resembled a strict liability offence, and that the defence of due diligence had not been made out by the appellant.

[55] The wording of the charge reads as if the alleged misconduct involved deliberate action on the appellant's part. It says he did "correspond to various residents of Estevan" with a letter and retainer agreement reasonably capable of misleading those residents and makes no reference to negligence, a failure to adequately supervise staff or other such matters. Significantly, counsel for

[19] As articulated by Gonthier J. in *R. v. Pontes*, [1995] 3 S.C.R. 44 (in dissent) at para. 79.

the Law Society confirmed that was the import of the charge when, in direct response to a question from the Chairman, he acknowledged the Committee was not dealing with a "strict liability offence". Accordingly, in the result, the charge had to be read as alleging deliberate or conscious action on the part of the appellant, and evidence of negligence or carelessness was insufficient to warrant the Committee's finding of conduct unbecoming.

[56] In consequence, the decision on the Estevan count cannot be sustained as reasonable. I conclude the appellant's conviction must be quashed, and the sentence set aside.

[57] Having resolved the matter on that basis, and in the interest of completeness, I merely add these observations. The appellant argued before us that a solicitor's negligence has *never* been an acceptable ground for a finding of professional misconduct. He cited a number of cases and academic opinions suggesting the offence requires a finding of moral turpitude.

[58] For example, in *Lawyers and Ethics Professional Responsibility and Discipline*,[20] MacKenzie comments as follows:

> Traditionally, professional misconduct has been defined as "conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency". Moral turpitude was an essential component. Mere negligence was not sufficient. [Footnote omitted]

[20] Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility And Discipline*, 3rd ed. (Toronto: Thomson Carswell, 2007) at p. 26-22.

[59] The proposition is derived from *Myers v. Elman*,[21] in which the House of Lords adopted the definition of professional misconduct enunciated by Mr. Justice Darling *In re A Solicitor*,[22] and said:

> … a solicitor may be struck off the rolls or suspended on the ground of "professional misconduct," words which have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency …. Mere negligence, even of a serious character, will not suffice. …

[60] The historical definitions are informative, but must be considered in their proper chronological context and in light of legislative encroachments into an area once dominated by the common law. They cannot be taken to supersede or displace the existing statutory definition of "conduct unbecoming" found in *The Legal Profession Act, 1990*.

[61] The definition of "conduct unbecoming" in s. 2(1)(d) of *The Legal Profession Act, 1990*, is reproduced for ease of reference:

> (d) **"conduct unbecoming"** means any act or conduct, whether or not disgraceful or dishonourable, that:
>
> (i) is inimical to the best interests of the public or the members; or
>
> (ii) tends to harm the standing of the legal profession generally;
>
> and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);

[62] The definition in the *Act* is expansive, and conduct unbecoming may be established through intentional conduct, negligent conduct or total insensibility to the requirements of acceptable practice (as in professional

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[21] [1940] A.C. 282 at 288-89.
[22] [1912] 1 K.B. 302.

incompetence). In the last two instances, where practitioners have been careless or merely incapable in some aspect, moral turpitude is not, typically speaking, a feature of the unacceptable behaviour. The section provides that the conduct in question need not be disgraceful or dishonourable to constitute conduct unbecoming. It is abundantly clear that moral turpitude is no longer an active requirement.

[63] As a final footnote on the topic, I fully recognize that s. 51(3) of *The Legal Profession Act, 1990* permits a hearing committee to make amendments, additions or substitutions where warranted by the evidence taken in the course of a hearing. The Committee could have amended or substituted the charge against the appellant to accommodate allegations of negligence, failure to supervise, and lack of administrative oversight. However, s. 51(4) of the *Act* makes it clear that where the power is exercised, the hearing committee must adjourn the matter for a sufficient period to allow the member to prepare a defence to the amended, added or substituted charge. The *Act* states:

> **Powers during hearing**
>
> **51 …**
>
> (3) Where, during the course of a hearing, the evidence shows that the conduct of the member who is the subject of the hearing may warrant a charge that is different from or in addition to a charge specified in the formal complaint, the hearing committee:
>
> (a) shall notify the member of that fact: and
>
> (b) may amend, add to or substitute the charge in the formal complaint.
>
> (4) Where a hearing committee acts pursuant to clause (3)(b), it shall adjourn the hearing for any period that the committee considers sufficient to give the member an opportunity to prepare a defence to the amended, added or substituted charge in the formal complaint, unless the member otherwise consents.

[64] As this disposes of the Estevan matter, I turn to the Hearing Committee's finding of conduct unbecoming in the matter of the trust fund withdrawal.

VII. The "Court Order" Complaint

[65] The appellant's law firm represented the wife in a matrimonial dispute. The family home was sold. A judge in chambers directed the appellant to hold the net sale proceeds in trust pending settlement, trial or further court order. The matter proceeded to trial on a variety of matrimonial issues. In connection with the family property division, the trial judge ordered an apportionment of the net sale proceeds between the husband and wife, with the wife receiving the larger share. The trial judge gave this direction:[23]

> (4) The sum of $48,733.94 presently held in trust from the proceeds of the sale of the family home is to be paid to the parties upon the expiry of the appeal period or if an appeal is taken upon the disposition of the appeal or as otherwise ordered by the Court of Appeal, in the following amounts with accrued interest apportioned:
>
> - to the Petitioner $29,915.32
> - to the Respondent $18,818.62

[66] The trial judge's decision also awarded certain costs to the wife, with the costs to be assessed. Although the husband appealed the trial judge's decision in respect of custody and support, he did not appeal the decision regarding division of family property.

[67] The husband repeatedly demanded payment of his share of the family home proceeds from the appellant, to no avail. The appellant took the step of

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[23] 2002 SKQB 17, 214 Sask. R. 181 at para. 68.

initiating an application for the purpose of obtaining an order to retain the husband's share of the funds as security for the wife's costs. At the time of that application, the wife's costs had not yet been assessed. Once those costs were assessed, and while the application for security was pending, but adjourned, the appellant took most of the husband's trust funds to apply against the wife's court costs. The appellant did make a point of concurrently advising counsel for the husband that he was taking the money for that purpose.

[68] Shortly afterward, the Court ordered the appellant to return the husband's funds to the trust account, pending full argument of the matter. The appellant returned the funds to trust. The matter was ultimately resolved several months later by the Court's order that a portion of the husband's funds could be used to satisfy the wife's cost award, but in an amount of roughly two thousand dollars less than the appellant had originally taken.

[69] After fully reviewing the facts, the Hearing Committee concluded, at pp. 33-34 of its decision, that the monies should not have been removed without either court direction or consent of the beneficiary, and that the allegation of conduct unbecoming was therefore well-founded.

[70] In *Witten, Vogel, Binder & Lyons v. Leung et al*,[24] McDonald J. made the following comments regarding the sanctity of trust conditions, comments that

[24] (1983), 148 D.L.R. (3d) 418 at 420 (Alta. Q.B.).

resound with equal force in the context of a lawyer's dealings with trust accounts:

> It is of overarching importance to the practice of law as an honourable profession that solicitors comply, without reservation or question, with the trust conditions upon which documents have been entrusted to them by other solicitors. Unless the solicitors who have sent documents to other solicitors on trust conditions can rely with absolute confidence upon those trust conditions being observed, the edifice of trust between solicitors, upon which so much of the efficient service to the public depends, will crumble. It is in the public interest that this confidence be maintained. This concern merits paramountcy over any effect that judicial measures taken to ensure maintenance of that confidence may have upon the legal or equitable rights and obligations of the solicitors' clients or those of other persons.

[71] As counsel for the Law Society compellingly argued, the legal profession must be held to rigorous account in these matters, for the consequences of non-compliance are grave. Institutions and individuals would have no confidence in the ability of the profession to act as an impartial stakeholder if the lawyer/trustee could become the self-appointed arbiter of competing trust claims and prefer the interests of one beneficiary over another.

[72] Where a solicitor has control of funds that belong to another, the essence of the trust obligation is to hold and distribute the funds for the beneficiary in strict compliance with the terms of the trust. The "even hand" of the trustee is irreconcilable with the helping hand of the advocate. Stringent adherence to principle is essential to the integrity of trust relationships and the credibility of the legal profession. I address the appellant's individual issues with these considerations in mind.

(1) Was there a viable "court order" in relation to payment of the funds?

[73] The appellant argues there are distinct forensic attributes that characterize a fiat, an order, a judgment, and a judgment roll. The appellant submits the trial judge's direction to distribute the funds between the husband and wife was none of the above. It amounted to nothing more than reasons for judgment. The direction was not part of the formal judgment roll drawn up and entered in the proceedings. Further, he says, the charge of conduct unbecoming was overly vague and failed to specify which "court order" the appellant was accused of breaching, whether it be the initial one directing him to hold the funds in trust, or the trial judge's direction for payment to the parties. Accordingly, the appellant argues he could not be found to have acted in breach of a court order and the complaint, as framed, could not be sustained.

[74] The respondent says the question is largely academic, given the framing of the charge in the alternative. It is made out simply upon proof that B.P. did not consent to the withdrawal. While that may be so, I note that the Hearing Committee did find both aspects of the charge made out on the record, and the contravention of the court order was specifically referred to in the course of sentencing. The issue therefore warrants consideration.

[75] It cannot be forcefully asserted that the appellant was under any misapprehension as to the nature of the charge or the particular court decision the citation was referring to. The main thrust of the defence was that the Court's direction to pay funds to B.P. had no legal force or efficacy unless reduced to formal judgment. The defence theory demonstrates full awareness

that it was the trial judge's direction for payment that lay at the root of the complaint.

[76] In *The Law of Civil Procedure*,[25] the distinction between a judgment and an order is described as follows:

> … Decisions which finally determine the question or questions at issue in the action *inter partes* are judgments; decisions which only determine preliminary or subsidiary questions relating to the procedure for the obtaining or enforcing of a judgment are orders. …

[77] Counsel for the Respondent submits that the direction to pay B.P. was properly referred to as an order. It may have been dependent on certain formalities for its enforceability, but not for its existence. I agree. The trial judge's order was a subsidiary matter integral to the judgment on the family property division. I note that in terms of enforcement, it is largely irrelevant whether the court's directions are classified as orders or judgments, since Rule 363 of the *Queen's Bench Rules* recognizes no distinction between the two.

[78] The appellant's argument is greatly inconvenienced by the fact that his firm prepared the formal judgment roll after trial. It did so on the petitioner's behalf, but without reference to the family property division, or the apportionment of the sale proceeds in trust. The *Rules* in family law proceedings prescribe that one judgment will issue with respect to all relief,

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[25] W.B. Williston, Q.C. and R.J. Rolls, *The Law of Civil Procedure*, vol. 2 (Toronto: Butterworths, 1970) at 1020.

excepting child support only, which requires a separate formal order. Rules 607 and 626 state:

> **Judgments and orders**
>
> **607**(1) Subject to rule 626, where a petitioner claims relief under more than one statute, one judgment shall issue with respect to all relief.
>
> (2) Where relief is granted on a claim made under a Saskatchewan statute, that statute shall be referred to in the judgment.
>
> …
>
> **Judgment of divorce**
>
> **626**(1) A judgment in a divorce proceeding shall be in Form 626.
>
> (2) Where the court makes an order granting child support, a separate formal order embodying the child support shall be issued.

[79] The petitioner claimed relief under *The Family Property Act*,[26] a Saskatchewan statute. As requested, the trial judge granted relief under that *Act*. The appellant cannot seek to gain advantage from his own firm's drafting omissions in terms of the judgment roll.

[80] Stripped down to essentials, the efficacy of court orders and judgments are founded on jurisdictional considerations. The generic distinctions between fiats, orders, judgments, and judgment rolls may be relevant in other contexts, or for appeal purposes, or where enforcement measures are concerned. However, in a context where unseemly behavior of an officer of the court is concerned, the relevant considerations are simply that the order was properly made, that it was directed to a lawyer of record and that it required the lawyer to divide trust funds in his possession that were the subject

[26] S.S. 1997, c. F-6.3.

matter of the litigation. To suggest the order was of negligible consequence unless incorporated in the formal judgment roll, one incompletely prepared by the lawyer's own firm, is an argument that simply cannot be countenanced.

(2) Honest belief in a right of equitable set-off

[81] The appellant elected not to testify on the Court Order complaint because his defence rested on the narrow ground that the charge asserted breach of a court order when no such court order was extant. The record is accordingly sparse on the issue of intent.

[82] The appellant argued that he honestly believed, at the time the funds were withdrawn, that he possessed an equitable right set-off in line with *Holt v. Telford*.[27] The evidence, such as it is, suggests this argument was purely afterthought. It was raised for the first time before the Hearing Committee. The appellant recognized full well that he needed the Court's permission to deal with the funds in his trust account in any manner other than the trial judge directed. Otherwise, why launch an application for approval to hold the funds as security for costs, and continue to adjourn the application rather than abandoning it?

[83] The assertion of an honest belief in a right of equitable set-off was not mentioned to B.P. in response to any of the demands B.P. made for payment, nor was it raised as justification in any dealings with B.P.'s counsel.

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[27] [1987] 2 S.C.R. 193.

[84] In any event, and more to point, if the appellant honestly believed he possessed a right of equitable set-off, he could not, at the same time, have honestly believed that he possessed the inherent jurisdiction of a court of equity to make the necessary determination.

[85] The appellant says he was concerned only with the best interests of his client and fears that the husband might file in bankruptcy, thereby defeating her claim for costs. However, there was nothing to prevent him from pressing the matter before the Court.

[86] The comments in *Witten*, above, clearly illustrate that where the "edifice of trust" is concerned, a concern for the legal or equitable rights of one's client cannot justify or excuse trust violations of this nature.

[87] Several months after the monies were ordered returned to the appellant's trust account, the Court eventually approved payment of a portion of the husband's share toward the wife's court costs. This does not relieve the appellant of the consequences of his actions. The amount the Court approved was ultimately something less than the amount the appellant took it upon himself to withdraw initially. The Court simply determined the equities between the spouses as it, alone, has the power to do. This does not absolve the appellant of liability for his precipitous and unauthorized action. In this case, the end cannot justify the means.

(3) Reliance on contempt of court cases

[88] The appellant relies on a line of well-known authority holding that in contempt of court cases the doctrine of *strictissimi juris* must be applied in terms of the procedure followed, since civil contempt is a quasi-criminal action. The general rule in that context is that an order does not operate until it is formally drawn up, signed and served. As the argument goes, the appellant could not have been held in contempt of court in circumstances where he had not been served with a formal, issued order, therefore he should not be found guilty of conduct unbecoming in the same circumstances.

[89] He also seeks the advantage of the same standard of proof imposed in civil or criminal contempt applications, namely proof beyond a reasonable doubt. See: *Saskatchewan Government Insurance v. Collis*.[28] He argues the same standard should apply in disciplinary proceedings where it is alleged a court order has been disobeyed.

[90] While there are obvious comparisons that can be drawn, there are also singular differences between the contempt process and a disciplinary proceeding founded on disregard of a court order. The most striking difference is that in disciplinary proceedings the appellant's liberty is not at stake, despite the fact other severe penalties may ensue.

[91] As to standard of proof, the Court of Appeal rejected a similar argument in *Pierce v. Law Society of British Columbia*,[29] where the allegations involved conduct akin to blackmail. A separated lawyer threatened he would only provide favorable evidence in his spouse's personal injury action if he

[28] 2002 SKCA 64, [2002] 8 W.W.R. 30.
[29] 2002 BCCA 251.

received a satisfactory result in their disputed matrimonial matter. The Court endorsed the principle that in disciplinary proceedings the standard of proof the Law Society must meet is something less than a reasonable doubt but higher than the civil test of a balance of probabilities. The fundamental consideration was whether there was cogent evidence that made it safe to uphold the findings, given the attendant consequences for the lawyer's career and status in the community.

[92] In considering the evidentiary burden in this matter, the Hearing Committee cited *Shumiatcher v. Law Society of Saskatchewan*[30] for the principle that the complaint must be established by convincing evidence, and when a complaint involves a criminal act, by evidence establishing the grounds beyond a reasonable doubt. As there were no allegations of criminal conduct, it applied the recognized standard of clear and convincing proof based on cogent evidence. The Hearing Committee noted that even if the higher burden was required, it would have been persuaded beyond a reasonable doubt of the appellant's guilt. No issue can be taken with these conclusions.

(4) Is a second discrete analysis required, linking rule violation to conduct unbecoming?

[93] I turn to the last ground of appeal. The appellant argued a second discrete analysis is required for the purpose of explaining how a breach of the Rule constitutes "conduct unbecoming" within the meaning of *The Legal*

[30] (1966), 58 W.W.R. 465 at 476 (Sask. C.A.).

Profession Act, 1990. This concern was a particular focus of the dissenting judgment in *Merchant.* There, the Hearing Committee did not undertake the second-stage analysis the appellant calls for here. On this aspect of the matter, however, the majority judgment stated:

> [88] While the written reasons do not engage in an analysis as to whether the letter which the hearing committee found to be misleading constituted conduct unbecoming, that was the charge before them and they found the charge made out. … Having found that he had committed one of the acts complained of, they said "the allegation contained in Count 2 of the complaint is well founded and accordingly the member is guilty of conduct unbecoming a lawyer, in that the correspondence directed to H. and the correspondence directed to B. were reasonably capable of misleading the intended recipient." *There is nothing to indicate that the committee decided that every breach of Rule 1601(2)(c) would be considered "conduct unbecoming," but they did decide that this breach was to be so characterized*. [Emphasis added]

[94] The italicized portion is, I suggest, the majority's recognition that there may be instances where a Hearing Committee must articulate and defend its thesis that a certain rule violation amounts to conduct unbecoming. However, taking trust monies the Court has ordered paid to a beneficiary and using them to a different end is a category of unprofessional behaviour that requires little elucidation. The prohibition against misuse of trust funds is deeply embedded in every lawyer's psyche. This ground of appeal is without merit.

(5) Was the penalty imposed unreasonable?

[95] The appellant received a two-week suspension and an order to pay specified costs. Each party was able to cite innumerable examples where the penalty, costs aside, were greater than, similar, or lesser than the penalty in this case. Not unexpectedly, the reasonable range of sentences in disciplinary matters is elastic. It will be impacted by considerations of age, experience,

discipline history, the unique circumstances of the member, and the nature of the conduct complained of.

[96] The appellant complained the Sentencing Committee did not take a principled approach to sentencing, but was unable to suggest what form that principled approach should take. Do we adopt the sentencing principles established in criminal courts and look to these as a guide, particularly the concept of parity in sentencing, and whether the penalty is a marked departure from the range for similar offences committed by similar offenders?

[97] From the parity perspective alone, the penalty of suspension for a short period is certainly not extraordinary. For example, the respondent cited the decision in *Law Society of British Columbia v. Fred Collins Marion Lowther*.[31] There, the solicitor in a matrimonial matter was found in breach of a consent order by failing to release trust funds as required, and attempting to apply them upon arrears of support owed to his client. That conduct deprived a member of the public of the benefit of funds to which they were entitled. The solicitor was reprimanded, suspended for two weeks and directed to make a contribution to the Law Society's costs.

[98] However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*,[32] the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel

[31] [2002] LSBC 5, [2002] L.S.D.D. No. 13 (Q.L.).
[32] 2008 ONLSAP 7, [2008] L.S.D.D. No. 46 (Q.L.).

quoted extensively from *Bolton v. Law Society.*[33] The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:

> [74] A criminal court judge … is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group -- the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

[99] Senior counsel bear a particularly heavy burden. They have the name recognition that attracts interest, and simultaneously draws the harsh glare of publicity. As their reputations ebb or fall in the public domain, so may the profession's, and the tainted product is not subject to recall. In light of the fundamental objective of sentencing in disciplinary matters, and the Committee's concern that the collective reputation of the profession has been tarnished by the appellant's conduct, its decision to impose a two-week suspension from practice was an entirely reasonable one.

[100] The issue of costs is more problematic. The provisions of s. 55(2)(a)(v)(A),(B) and (C) of *The Legal Profession Act, 1990*, confer upon the discipline committee the express authority to make an order requiring the member to pay all the costs of the inquiry, including costs of investigation and hearing. In particular, the *Act* permits the discipline committee to order

[33] [1994] 1 W.L.R. 512 (C.A.).

payment of the Law Society's costs for counsel during the inquiry. What is normative in terms of legal representation in disciplinary hearings, and whether in-house counsel are utilized or private counsel is hired, is somewhat beside the point in the face of this express statutory authorization.

[101] The respondent asks us to note that the costs charged to the appellant do not constitute a full and complete indemnity to the Law Society. It says the member was not charged with any administrative costs or overhead, nor with any of the Committee's costs with respect to the hearing and sentencing. A summary of costs presented to the Sentencing Committee is the only evidence available to us, and with respect to the costs related to the Court Order complaint, it provides limited information. The summary is reproduced below, and it should be noted that the amounts described as "[B.P]" and "additional costs" are, in the main, the solicitor-client costs charged by the Law Society's counsel:[34]

[B.P.]	$29,742.63
Court reporter	387.88
Hearing fees	755.00
	$30,855.51
Additional costs (awaiting approval)	5,320.45

[34] Appeal Book, Vol. 1 at p. 213a.

[102] To the extent that the costs assessed against the appellant are comprised of fees calculated on a solicitor-client basis, they should not be immune from the same assessment that other solicitor and client bills are subject to. It seems that the accounts were submitted to the Benchers for approval prior to the sentencing hearing, and had been approved except for the portion noted as "additional costs". The appellant complains the summary of costs was simply accepted by the Sentencing Committee with no questions asked. It does not appear he was provided with an itemized account of the costs, although this is not entirely clear from the materials.

[103] It is not in any way suggested the amounts charged by counsel for the respondent are unreasonable. Nor am I suggesting that cursory attention was given to the matter simply because the costs were to be passed on to the member. It is necessary to recognize, however, that the truly interested party, the member charged with liability for the bill, has a vested and legitimate interest in requesting that the costs be objectively scrutinized and assessed as reasonable by someone other than the respondent or its counsel.

[104] Counsel for the respondent proposes that in the exercise of the broad discretion conferred on this Court by s. 56(5) of the *Act*, namely the power to make any order it considers appropriate on appeal, it would be fitting to order that the costs be assessed for reasonableness and that the appropriateness of the award of costs be determined by an assessment officer. The proposal is fair and just in the circumstances.

[105] Accordingly, the assessment of the costs shall be conducted by the Local Registrar in Saskatoon, being the judicial centre where the member who performed the services carries on practice. The Local Registrar may order any further particulars or details of the services rendered by the member, as is deemed appropriate. The Local Registrar is requested to assess the reasonableness of the bill and certify the amount so determined.

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

[107] Except for this direction as to assessment, the appellant's appeal of conviction and sentence in the matter of the Court Order complaint is dismissed. In light of the mixed success, each party will bear its own costs in relation to this appeal.

DATED at the City of Regina, in the Province of Saskatchewan, this 11th day of March, A.D. 2009.

"Wilkinson J.A."

WILKINSON J.A.

I concur "Richards J.A."

RICHARDS J.A.

I concur "Hunter J.A."

HUNTER J.A.