THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2009 SKCA 81 Date: 20090610

Between: Docket: 1632

Susan Rault

Appellant

- and -

The Law Society of Saskatchewan

Respondent

Coram:
Jackson, Smith and Hunter JJ.A.

Counsel:
Michael D. Tochor, Q.C. for the Appellant
Timothy F. Huber for the Respondent

Appeal:

From:	Discipline Committee of the Law Society of Saskatchewan
Heard:	June 10, 2009
Disposition:	Allowed (Orally)
Written Reasons:	July 15, 2009
By:	The Honourable Madam Justice Hunter
In Concurrence:	The Honourable Madam Justice Jackson The Honourable Madam Justice Smith

HUNTER J.A.

[1] On April 18, 2008, the Discipline Committee of the Law Society of Saskatchewan imposed the penalty of disbarment without eligibility to apply for readmission for five years on the Appellant, Susan Rault. In doing so, the Discipline Committee rejected a joint submission on sentence which would have permitted Ms. Rault to resign in the face of discipline. She appeals her sentence pursuant to s. 56 of *The Legal Profession Act, 1990* ("the *Act*").[1] On the hearing of the appeal, we concluded the Discipline Committee erred in failing to consider the joint submission. The decision of the Discipline Committee was quashed and the penalty agreed to by the parties in the joint submission was substituted with the condition that Ms. Rault cannot apply for readmission for three years from the date of the decision of the Discipline Committee. Brief oral reasons were given with written reasons to follow. These are those reasons.

Facts

[2] In 2004, the Law Society received a series of complaints involving Ms. Rault, who, after being advised of the complaints, voluntarily discontinued practising law. An Investigation Committee was struck and, in late 2006, the report of the Investigation Committee was completed. On December 20, 2006, a Formal Complaint was prepared, which itemized six counts against Ms. Rault alleging conduct unbecoming a lawyer.

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

[3] Following the investigation stage of the proceedings there were lengthy negotiations between counsel and they agreed on a joint submission for the purpose of sentencing. Therefore, by consent, the matter proceeded in January 2008, before a single member of the Hearing Committee. At that time Ms. Rault pled guilty to four charges and counsel for the Investigation Committee of the Law Society withdrew the other two charges. The Hearing Committee received an Agreed Statement of Facts, and concluded that the four counts were well-founded. No sentencing recommendation was made by the Hearing Committee.

[4] The four charges were referred to the Discipline Committee for sentencing and are summarized as follows:[2]

> **Charge #1 – Is guilty of conduct unbecoming a lawyer in that she did fraudulently alter documents on 16 separate incidents.**
>
> Ms. Rault prepared numerous false and misleading report documents by cutting, pasting, altering, photocopying and thereafter usually reporting in an untimely way, falsely stating registration and discharge of various interests to financial institutions, clients and estates. This conduct involved 16 distinct transactions occurring in 2001, 2002 and 2003.
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> **Charge #2 – Is guilty of conduct unbecoming a lawyer in that she failed to discharge her duty to clients with diligence and honesty.**
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> In this series of 18 transactions, four of them related to the same clients as detailed in Charge #1. For all of these clients, Ms. Rault's conduct was similar in that it involved a failure to perform work in a timely basis or at all. Typically, Ms. Rault failed to register transfers of title, mortgages, discharges or similar documents. In some cases, she uttered forged documents and made false reports to clients and financial institutions. In some cases, Ms. Rault's work was completed by the trustee appointed by the Law Society to wind up her practice.
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> **Charge #3 – Is guilty of conduct unbecoming a lawyer in that she failed to comply with Rules 910, 912 and 920 of the Rules of the Law Society of**

[2] The Law Society of Saskatchewan Discipline Decision 08-02. Decided: April 18, 2008.

Saskatchewan in that she received trust funds from clients but failed to deposit them to either a mixed or separated trust account as required.

Ms. Rault did not establish a trust account at any material time. Her records show she received trust funds from clients and institutions in relation to real estate transactions and from the administration of estates. She deposited these funds into her general account and thereby commingled them with her own assets. But to be clear, there was never any allegation or finding that she misappropriated or otherwise converted her clients' property or funds to her own use.

In many of these transactions, Ms. Rault acted contrary to the instructions of her clients. In more than one case, she was in breach of trust conditions. In one case she made a variety of excuses about why probate did not occur and suggested she had taken various steps including an official judicial complaint about delay. She later fabricated notes to support her position about activities she said she had done but had not.

Charge #4 – Is guilty of conduct unbecoming a lawyer in that she failed to preserve and keep safe the property of clients that was entrusted to her care.

Ms. Rault failed to keep her clients' documents for safe keeping separate from her own property. At the time of her suspension, her clients' Wills, Powers of Attorney, Health Care Directives, Shares Certificates and other original documents were found amongst her personal and office records maintained in the home she also used as her office. She also failed to maintain adequate records of clients' property kept in her possession. At the time of her trusteeship and voluntary undertaking not to practise, a partial list of Wills, Powers of Attorneys and Health Care Directives were retrieved from her computer. No other records could be found and numerous originals of such documents were located in her premises, but not found on the list maintained on her computer.

[5] In accordance with s. 55(1) of the *Act*, April 18, 2008, was the date set for the meeting of the Discipline Committee to determine the penalty to be assessed. On that date, the Discipline Committee was constituted and received sentencing submissions from counsel for the Investigation Committee and the Appellant. Mr. McIntyre, as counsel for the Investigation Committee, advised that he and Mr. Tochor, as counsel for Ms. Rault, agreed on the joint submission for the sentence to be imposed that Ms. Rault be permitted to resign in the face of discipline. The length of time before Ms.

Rault was eligible to apply for reinstatement was left to the Discipline Committee.

[6] In his submissions, Mr. McIntyre noted that it was for the Discipline Committee to determine if the joint submission was an appropriate disposition. However, he contended that the joint submission was well within the range of sentences for the charges and advocated that it was appropriate in the circumstances of this case. Both counsel made submissions on the mitigating and aggravating circumstances. Mr. Tochor noted the Discipline Committee's primary concern would be protection of the public and deterrence. However, given Ms. Rault's four years of voluntary exile from the practice of law, he contended the Discipline Committee ought to accept the joint submission of resignation in the face of discipline.

[7] After hearing counsel submissions, individual members of the Discipline Committee asked questions of counsel and Ms. Rault made a statement expressing remorse for her actions. The Discipline Committee retired to consider the sentence to be imposed. After 75 minutes, the Discipline Committee returned and advised it would give its decision orally with written reasons to follow. Ms. Rault was advised:

> The decision of this hearing committee is that you be disbarred, that you may not be eligible to reapply for five years from today's date, and that you pay costs in the amount of $15,537.01.[3]

[8] Written reasons followed and it is from this decision that Ms. Rault appeals to this Court. The right to appeal is stated in s. 56 of the *Act*, which

[3] Transcript of the April 18, 2008, Sentencing Hearing, Appeal Book at pp. 100a and 101a.

provides that a member may appeal the penalty assessed or requirement imposed by the Discipline Committee within 30 days after the decision is made and s. 56(5) provides that this Court, on an appeal, may "make any order that it considers appropriate". In accordance with the process described in *Dunsmuir v. New Brunswick*,[4] the appropriate standard of review to be applied to decisions of the Discipline Committee has previously been determined to be the reasonableness standard.[5]

[9] The Appellant contends three questions are raised by this appeal. First, was the Discipline Committee required to consider the joint submission and accord a measure of deference to it in determining penalty? Secondly, was the Discipline Committee required to grant counsel an opportunity to make further submissions when it determined that it would not accept the joint submission on penalty? Thirdly, is the sentence imposed in accordance with the principle of parity? In our view, the issue raised by the first question answers this appeal and it is unnecessary to answer the other two questions posed by counsel for the Appellant.

Analysis

[10] The procedure for Law Society discipline matters set out in Part IV of the *Act* was followed in the instant case. When the Law Society receives a complaint(s) with respect to the conduct of a member, which may constitute

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[4] 2008 SCC 9, [2008] 1 S.C.R. 190.

[5] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Merchant v. Law Society of Saskatchewan*, 2002 SKCA 60, 213 D.L.R. (4th) 457; *Merchant v. Law Society*, 2009 SKCA 33, 324 Sask. R. 108.

conduct unbecoming, the benchers may designate a person to review the conduct of the member,[6] who may refer the matter to the chairperson of the discipline committee,[7] who may appoint an investigation committee.[8] The investigation committee prepares a written report,[9] following which a hearing committee may be appointed which may conduct a hearing.[10] When a hearing committee finds the complaint well founded, the matter is referred to a discipline committee to determine the penalty to be assessed.[11]

[11] The powers of the Discipline Committee are set forth in ss. 55(1) and (2) of the *Act*:

> 55(1) On receipt of a decision from a hearing committee with a finding that a complaint is well founded and with respect to which no penalty has been assessed or requirement imposed, the chairperson of the discipline committee shall:
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> (a) set a day for a meeting of the discipline committee to determine the penalty to be assessed or requirement to be imposed; and
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> (b) give notice to the member concerned of the day and place of the meeting in accordance with the rules.
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> (2) At a meeting called pursuant to subsection (1), the discipline committee may make any one or more of the following orders:
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> (a) assessing any penalties or imposing 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;
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> (i.1) permitting a member to resign from the society;

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[6] Section 40(1).
[7] Section 40(2)(b).
[8] Section 42(2)(b) and s. 44.
[9] Section 46.
[10] Sections 47 to 53.
[11] Section 55.

(ii) suspending the member from practice for a specified period or until specified requirements are met, including requirements that the member:

(A) successfully complete specified classes;

(B) obtain medical treatment or treatment for addiction to drugs or alcohol;

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

(A) not do specified types of work;

(B) successfully complete specified classes;

(C) not have exclusive control of the member's trust account;

(D) obtain medical treatment or treatment for addiction to drugs or alcohol;

(E) practise only as a partner with, or as an associate or employee of, one or more members that the committee may specify;

(iv) imposing a fine in any amount that the committee may specify;

(v) requiring the member to pay:

(A) the costs of the inquiry, including the costs of the investigation committee, hearing committee and discipline committee;

(B) the costs of the society for counsel during the inquiry; and

(C) all other costs related to the inquiry;

(vi) reprimanding the member;

…

(c) any other order that the committee considers appropriate.

[12] Therefore, the Discipline Committee has the statutory authority to impose a penalty which may range from disbarment with a maximum period of five years during which the person is not eligible to apply for reinstatement;

resignation; suspension for a period of time; impose conditions under which a member may continue to practise; a fine; or a reprimand. In addition, the person can be ordered to pay all costs related to the inquiry, including the costs of the Law Society.

[13] The Appellant contends that the principles applied in the public law field of criminal law, with respect to joint submissions on sentencing, should be applied in the matter of sentences imposed pursuant to statutory powers accorded to the Law Society. In Saskatchewan, the principle related to joint submissions for criminal law purposes is set out in *R. v. Webster*,[12] wherein Cameron J.A. adopted the principles described by the Alberta Court of Appeal in *R. v. G.W.C.*[13] In summary, those principles establish that there is an obligation on a trial judge to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so.

[14] In Ontario, the Discipline Committee of the Law Society of Upper Canada has formally adopted a policy on the approach to be used in considering joint submissions. In *Law Society of Upper Canada v. Paskar*,[14] it stated:

> … Convocation encourages Benchers sitting on Discipline Committees to accept a joint submission except where the Committee concludes that a joint submission is outside a range of penalties as reasonable in the circumstances. …

[12] 2001 SKCA 72, 207 Sask. R. 257.
[13] 2000 ABCA 333, 150 C.C.C. (3d) 513, at paras. 17-18.
[14] [1996] L.S.D.D. No. 189, at para. 81 (Q.L.).

[15] This was affirmed in *Law Society of Upper Canada v. Orzech*,[15] where the Discipline Committee accepted the joint submission although it was of the view that disbarment was the more appropriate penalty and stated at p. 6:

> … joint submissions concerning penalty should not lightly be disregarded by the Committee, particularly when they are the outcome of an extended period of discussions and negotiations through the pre-hearing conference process. Where joint submissions concerning penalty are wholly inappropriate having regard to the nature of the conduct involved then such joint submissions can and should be disregarded; however, when the joint submissions are not inappropriate and when they are responsive both to the type of conduct established and the particular circumstances of the Solicitor, it is the Committee's view that only in rare circumstances and with considerable caution should the Committee disregard such joint submissions concerning penalty.

[16] Similar views as those expressed above, in respect of law society discipline matters and the deference accorded to joint submissions on sentencing, are applied in other provinces such as British Columbia,[16] Alberta,[17] and Manitoba.[18] In addition, a similar policy is apparent in the self-governing professions such as physicians.[19]

[17] There are good policy reasons for this principle of deference to joint submissions on sentences. As stated in *G.W.C.* and adopted in this Court in *Webster*:

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[15] [1996] L.S.D.D. No. 56 (Q.L.).
[16] *Law Society of British Columbia v. O'Sullivan*, 2007 LSBC 44, [2007] L.S.D.D. No. 80 (Q.L.).
[17] *Law Society of Alberta v. Moreau*, [2007] L.S.D.D. No. 37 (Q.L.).
[18] *Law Society of Manitoba v. Ward*, [1998] L.S.D.D. No. 4 (Q.L.) and *Law Society of Manitoba v. Ament*, [1999] L.S.D.D. No. 24 (Q.L.).
[19] *Gaye (Re)*, [2005] O.C.P.S.D. No. 2 (Q.L.); *Koren (Re)*, [2003] O.C.P.S.D. No. 14 (Q.L.), at paras. 14 and 18; and *Pontarini (Re)*, [2006] O.C.P.S.D. No. 8 (Q.L.), at para. 22.

> [17] The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for the given offence. "The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge" *R. v. Pashe* (1995), 100 Man. R. (2d) 61, at para. 11.

[18] While other jurisdictions, notably Ontario, have adopted a written policy with respect to joint submissions, in our opinion, they have simply adopted a principle that would be understood to apply. The discipline process in the *Act* has many similarities to the criminal process and as such the bargaining process is undermined if a joint submission, the product of compromise, is readily rejected by the Discipline Committee. There is a formal process for the handling of complaints, including the appointment of an Investigation Committee, which may set out a Formal Complaint outlining the allegations which may constitute a finding of guilt as to conduct unbecoming a lawyer. This can lead to the appointment of a Hearing Committee which determines if the allegations in the Formal Complaint are well-founded and, if so, the matter is referred to the Discipline Committee for sentencing on the charges.

[19] This process can be time-consuming for Benchers involved in the various stages leading to the final penalty imposed by the Discipline Committee and can involve significant costs for both the member and the Law Society. Therefore, all members and the Law Society have a vested interest in ensuring that matters proceed expeditiously. If the member co-operates with the investigation and hearing process and, as happened in the instant case,

pleads guilty, and puts an Agreed Statement of Facts before the Hearing Committee, the Law Society is relieved of the burden of proving the allegations in what could, in some instances, be a complicated and protracted hearing with the usual risks and vagaries that may occur in the course of such hearings. If the parties negotiating compromise agreements cannot expect their efforts will be respected, there is little incentive to attempt to negotiate a resolution. For this reason, joint submissions on sentence should be considered by the Discipline Committee in a principled way similar to the jurisprudence in criminal matters and as applied by discipline committees in the provinces noted above.

[20] While the Discipline Committee has the authority to impose sentence on a member who is guilty of conduct unbecoming and exercises its discretion in determining the appropriate sentence, this does not permit the Discipline Committee to ignore, without proper consideration, a joint submission. In reviewing the written decision of the Discipline Committee dated April 18, 2008, we were unable to conclude that the Discipline Committee considered the joint submission nor do we find that the reasons for imposing a sentence greater than the recommendation in the joint submission disclose a good reason to reject the joint submission.

[21] While, at first blush, it appears there is little difference between the joint submission of “resignation in the face of discipline” and the penalty imposed of “disbarment without eligibility to apply for readmission for five years”, both counsel before us agreed that in the minds of the public, the

members and the Law Society, the penalty of disbarment is more severe than resignation. The *Act* was amended[20] to add the penalty[21] of "permitting a member to resign from the society" as an option. In the Law Society Rules, the following definition appears:

> "**resignation in the face of discipline**" means a resignation accepted by the Benchers pursuant to Rule 402(3) or by the Discipline Committee pursuant to section 55(2)(a)(i.1) of *The Legal Profession Act, 1990* and is deemed to be equivalent to disbarment;

Rule 402 applies to an Investigation Committee and Rule 402(3) referred to in the definition of "resignation in the face of discipline" states:

> Notwithstanding subrule (2):
>
> (a) if, during the course of a discipline investigation, a member requests permission to resign pursuant to section 27 of *The Legal Profession Act, 1990*, the Investigation Committee may, prior to completing its investigation, recommend that the Benchers accept the member's resignation as a resignation in the face of discipline or as a simple resignation;
>
> …
>
> (d) the Benchers may accept an application for resignation as a simple resignation or as a resignation in the face of discipline or reject the application pending the completion of the discipline process;

[22] In the decision of the Discipline Committee, after a review and summary of the statutory authority of the Benchers, it appears the Discipline Committee concluded that it has an absolute discretion, unfettered by any requirement to consider a joint submission, when it stated:

> Thus, the public interest informs the standard of conduct unbecoming. A self-governing association does not enjoy the independence of a judiciary. Its power to govern itself is a privilege conferred by statute. The legitimacy of an association's self-governance is rooted in its credibility and ability to therefore

[20] S.S. 1996, c. 7, s. 18.
[21] Section 55(2)(a)(i.1).

> sustain the public's trust. Where a self-governing association delegates its discipline authority to its own members, the adjudicative and discretionary aspect of that function must be seen as vigilantly exercised in the public interest.
>
> The Benchers are burdened with complete and absolute discretion to determine what constitutes conduct unbecoming, and must do so in a changing legal, political and social context. Where there has been a finding of conduct unbecoming, the Benchers alone determine the appropriate sanction. Both determinations are discretionary and are informed by, but not strictly bound to, earlier precedent. Each case is decided on its own merits, according to the discretion of the Benchers.[22]
>
> [Emphasis added]

[23] In the lengthy reasons of the Discipline Committee, the only reference to the joint submission was the following:

> The Discipline Committee received and considered the joint submission and sentencing recommendation. The Discipline Committee did not consider itself bound by the joint submissions of counsel and independently exercised its responsibility and judgment.[23] [Emphasis added]

By its very terms, this is a rejection of the joint submission without due consideration.

[24] The Discipline Committee then referred to sentencing principles generally, with some emphasis on the concepts of protection of the public and the integrity of the profession, and then stated:

> Thus, the Discipline Committee is guided by the requisite sentencing principles and their import and application in the facts of this case. The overriding and paramount sentencing objective is to maintain the public's confidence, the integrity of the profession and the ability of the profession to effectively govern its own members. …[24]

[25] Again, there is no mention of the joint submission and the role it should have played in the reasoning process. General comments are made with

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[22] *Supra* note 2 at p. 3.
[23] *Ibid*. at p. 6.
[24] *Ibid.* at p. 12.

respect to the issue of resignation in the face of discipline, but again, there is no suggestion the Discipline Committee was of the view it was constrained to consider the joint submission or to elaborate as to why it was inappropriate, if indeed it was of that view. The only reference to this penalty is found in this paragraph:

> Where a lawyer's conduct is unbecoming and deserving of serious sanction, it is open to that lawyer to offer his or her resignation in the face of discipline. According to Rule 402 of the Law Society Rules, the Benchers are not obliged to accept a resignation offered in the face of discipline. But where a resignation in the face of discipline is accepted, it is equivalent to disbarment, because the lawyer then loses his or her status as a member and must reapply for admission. During the effective term of the lawyer's resignation or disbarment, the public is equally protected during the effective term of the resignation or disbarment.[25]

[26] From this paragraph, it seems the Discipline Committee was of the view that resignation in the face of discipline is a serious sanction and the equivalent of disbarment. Therefore, it must be taken to say that this sentence was in the appropriate range of sentences for these charges. It is therefore difficult to see how the Discipline Committee concluded that the penalty of resignation in the face of discipline was unfit, or unreasonable, or contrary to the public interest.

[27] Further, one might infer from the above quoted paragraph that the Discipline Committee relied on Rule 402(3)(d) as the authority to reject the joint submission of "resignation in the face of discipline" without the necessity of considering it or stating why it rejected it and believing that it had an unfettered discretion with respect to rejecting the same. This is an

[25] *Ibid*. at p. 12.

interpretation of Rule 402(3)(d) that cannot be sustained. Rule 402(3)(d) applies in the context of the Investigation Committee only and the effect of the Rule is to end the discipline proceeding prior to completion of all the stages provided for in the *Act*. In the instant case, the full discipline proceeding occurred through all the stages, and the only issue remaining to be determined by the Discipline Committee was the matter of penalty in accordance with s. 55(2) of the *Act*.

Conclusion

[28] In summary, the Discipline Committee had a duty to consider the joint submission. The reasons for decision do not reflect that the Discipline Committee understood it was constrained to consider the joint submission, and give reasons as to why it was inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest. If the Discipline Committee was of the view the joint submission penalty was not an appropriate disposition in the case before them, then it was required to give good or cogent reasons as to why it is inappropriate. Failure to do so leads to the inevitable conclusion that the decision of the Discipline Committee is unreasonable.

[29] At the conclusion of the hearing, we proposed to quash the penalty and remit the matter to the Discipline Committee to reconsider and impose the appropriate sentence. Counsel for Ms. Rault requested an order that the penalty recommended in the joint submission be imposed with the Court undertaking to fix the appropriate length of time before Ms. Rault may apply for admission to the Law Society at two years. Counsel for the Law Society

also suggested there were logistical problems with remitting the matter and urged the Court to exercise the broad powers granted in s. 56 of the *Act*. The Law Society also submitted that if we were to quash the decision and accept the joint submission, we should impose the maximum sentence of five years ineligibility.

[30] In the view of the Court, there was no basis to reject the joint submission. That leaves for determination the length of time before Ms. Rault would be eligible to apply for reinstatement. Having regard for the submissions of counsel and the length of time Ms. Rault voluntarily withdrew from practice, the Court fixes the period at three years from the date of the Discipline Committee decision.

[31] In the result, the decision of the Discipline Committee on penalty is quashed. The Appellant shall resign in the face of discipline with the condition that she is prohibited from applying for readmission for three years from the date of the decision of the Discipline Committee of April 18, 2008. The order as to costs made by the Discipline Committee shall remain in effect. The Appellant shall have her costs of this appeal under Column 2 of the Tariff of Costs.