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PROVINCE OF SASKATCHEWAN)
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**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF
Sterling McLean of Regina, Saskatchewan A LAWYER**

**The Law Society of Saskatchewan
Discipline Decision 09-03
Sterling McLean of Regina, Saskatchewan**

DECIDED: June 12, 2009

Timothy F. Huber on behalf of The Law Society of Saskatchewan
David G. MacKay on behalf of Sterling McLean

Jurisdiction and Responsibility

1. The jurisdiction and authority of the Law Society of Saskatchewan to govern itself through the regulation and discipline of its members is reviewed extensively in the Benchers' decisions to disbar Susan Rault made the 18th of April, 2008 #08-02 and Michael Nolin made the 3rd of October, 2008 #08-04. As the Benchers stated in Nolin, the Law Society's responsibility for discipline is a serious one which must be exercised with great care in each case and with full regard for its public policy importance.

2. It is well established that public confidence in the profession's ability to govern itself is a matter of public interest. In *Merchant v. Law Society of Saskatchewan*,¹ the Saskatchewan Court of Appeal quoted with approval from McDonald J. in *Witten, Vogel Binder & Lyons v. Leung et al*,² in part:

[...] 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.**
[emphasis added]

3. The Alberta Court of Appeal stated in *Adams v. Law Society (Alberta)*:³

6 [...] A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

4. As the Benchers stated in *Nolin* at paragraph 24:

Thus, the public interest, and the need to protect the public, directs the discretion to be exercised by the Law Society in its self-governance role, particularly in the area of discipline, where professional misconduct brings the member into direct conflict with the public's paramount right and expectation that a member may be trusted in all respects and that the public will be protected in all events [...]

¹ 2009 SKCA 33, [2009] 5 W.W.P., 478 at para. 70 (hereinafter "*Merchant*")

² (1983), 148 D.L.R. (3d), 418 (Alta. Q.B.) at 420

³ 2000 AB C.A. 240, [2000] 11 W.W.R. 280 at para. 6

5. The exercise of the Benchers' discretionary powers is rooted in the public interest and is informed by the *Code of Professional Conduct* and the decisions of other Benchers. The responsibility of discipline demands a principled and judicious approach.

Procedural History

6. This matter initially proceeded before the Hearing Committee consisting of George W. Patterson (the "Hearing Committee"). The Hearing Committee convened on April 28, 2009 by teleconference.

7. At that hearing, Mr. McLean represented himself. Counsel for the Law Society and Mr. McLean acknowledged that the Hearing Committee was properly constituted and had jurisdiction. There were no preliminary objections or other issues.

8. At the hearing, the formal complaint was amended by consent. A plea of guilty was entered to all charges, as amended, such that the Hearing Committee did find that Mr. McLean:

1. Is guilty of conduct unbecoming a lawyer in that he did fail to comply with a trust condition imposed by letter dated June 19, 2007, which he accepted, upon the use of documents in connection with the transfer of land from DDC to his client BN;

Reference Chapters XVI of the *Code of Professional Conduct*.

2. Is guilty of conduct unbecoming a lawyer in that, during the course of his representation of a vendor in a real estate transaction, he did breach an undertaking provided to W.J., a fellow member, wherein he undertook that he would not release purchase funds provided to him in trust without first having secured a discharge in relation to a Federal Writ on the title to the property being sold;

Reference Chapters XVI of the *code of Professional Conduct*.

3. Is guilty of conduct unbecoming a lawyer in that he failed to act in a conscientious, diligent and efficient manner on behalf of the Estate of D.D. in that he failed to complete estate business in a timely fashion;

Reference Chapters II of the *Code of Professional Conduct*.

4. Is guilty of conduct unbecoming a lawyer, in that he did attempt to mislead a member of the public, K.D., by misrepresenting the status of an estate manner;

Reference Chapter I of the *Code of Professional Conduct*.

5. Is guilty of conduct unbecoming a lawyer in that he failed to serve his client, J.L., in a conscientious, diligent and efficient manner in the course of a real estate transaction.

Reference Chapters II of the *Code of Professional Conduct*.

9. The parties introduced an Agreed Statement of Facts endorsed by Mr. McLean and counsel for the Law Society dated March 26, 2009. No further evidence was adduced.

10. Pursuant to s. 51 of *The Legal Profession Act, 1990* the Hearing Committee made no sentencing recommendation and referred the matter to the Benchers and this Discipline Committee of the Benchers sitting as a whole (the "Discipline Committee") in Regina on June 12, 2009. The entire record of evidence before the Hearing Committee was put into evidence before the Discipline Committee. The Law Society was represented at the hearing by Mr. Tim Huber. Mr. McLean was represented by Mr. David MacKay.

11. A quorum of Benchers was established at the hearing. There was no objection to the jurisdiction or composition of the Discipline Committee. There were no preliminary motions or other objections. Convictions were entered by the Discipline Committee on all charges as amended. The Discipline Committee received written and oral submissions as to sentencing from both counsel. Mr. McLean did not directly address the Discipline Committee.

12. The Discipline Committee deliberated and rendered an oral decision on June 12, 2009. The Chair indicated written reasons would follow. The Discipline Committee has since reviewed this document and confirms it reflects the analysis and reasoning employed by the Benchers in reaching their oral decision on June 12, 2009. Consistent with the Benchers' responsibility to be transparent and accountable about the decision making process, this document also embodies the jurisprudence and other authorities relevant to the principled approach used in forming this decision.

Charges and Facts

Charge #1 - Is guilty of conduct unbecoming a lawyer in that he did fail to comply with a trust condition imposed by letter dated June 19, 2007, which he accepted, upon the use of documents in connection with the transfer of land from DDC to his client BN.

Charge #1 - Facts

13. In relation to this count, Mr. McLean accepted trust conditions imposed on his office by letter dated June 19, 2007 from DDC to his client, BN. According to the Agreed Statement of Facts and Admissions, Mr. McLean made use of the documents upon which the trust conditions were imposed. When Mr. McLean later failed to comply with the trust conditions at the request of DDC, counsel for DDC wrote to Mr. McLean, demanding that he comply with the trust condition to pay funds to the credit of DDC. When Mr. McLean failed to comply with that demand, counsel for DDC complained to the Law Society. In Mr. McLean's response to the Law Society, Mr. McLean initially claimed a contractual right on behalf of his client to retain the funds to secure his client's position.

14. Mr. McLean ultimately paid the funds in question, but not until after the complaint to the Law Society and some four months after he was required to do so. He ultimately acknowledged he was not entitled to retain the funds.

15. In the Agreed Statement of Facts and Admissions, Mr. McLean admitted he:

[...] chose to ignore the trust condition that he had previously accepted in order to benefit the interests of his own client. The member attempted to use the seasonal holdback amount as leverage in relation to his client's warranty claim and in so doing, breached trust condition number three as set out in the letter...

His counsel attempted to suggest Mr. McLean waited and then responded to a ruling by the Law Society. But the Agreed Statement of Facts shows he only paid the funds after the Law Society became involved and in the face of a complaint. DDC retained legal counsel to demand payment of the trust funds improperly withheld by Mr. McLean. While there is no evidence legal costs were incurred by DDC it is reasonable to infer as much. At the least, DDC was inconvenienced and was without its funds while they were withheld by Mr. McLean.

Charge #2 - Is guilty of conduct unbecoming a lawyer in that, during the course of his representation of a vendor in a real estate transaction, he did breach an undertaking provided to W.J., a fellow member, wherein he undertook that he would not release purchase funds provided to him in trust without first having secured a discharge in relation to a Federal Writ on the title to the property being sold.

Charge #2 - Facts

16. This complaint involved a complaint of delay by Mr. J., a lawyer for the buyer in the transaction in question. The investigation determined that Mr. McLean was the root cause of a complaint involving delay in discharging a Federal Writ. Mr. McLean failed to comply with his formal undertaking to discharge the writ. As a consequence, Mr. J.'s client could not complete a subsequent transaction in relation to the property. The Law Society investigated Mr. McLean's actions as a result of a complaint from Mr. J.

17. The Agreed Statement of Facts established that Mr. McLean released to the former spouse and joint owner of the property an amount equal to one half of the funds paid to him in trust by Mr. J. Mr. McLean did not discharge the Federal Writ prior to releasing these funds. The amounts then held by Mr. McLean were known by him to be insufficient to discharge the Federal Writ against the properties. He had not made any other arrangements to discharge the writ and was therefore unable to obtain a discharge.

18. Mr. McLean admitted he had followed his client's instructions to not pay the remaining funds due to the writ holder, contrary to his undertaking to do so upon receipt of funds from Mr. J. As of the date of the hearing before the Hearing Committee, Mr. McLean had still not resolved the issue. The writ was still outstanding and registered against the title. Trust funds were still held in Mr. McLean's account and Mr. McLean had applied to the Court of Queen's Bench to pay the money held in trust into court in exchange for a partial discharge of the writ. At the time of the hearing before the Discipline Committee, the writ had been discharged after proof the balance of the funds in trust were paid to Canada Revenue Agency.

Charge #3 - Is guilty of conduct unbecoming a lawyer in that he failed to act in a conscientious, diligent and efficient manner on behalf of the Estate of D.D. in that he failed to complete estate business in a timely fashion.

Charge #4 - Is guilty of conduct unbecoming a lawyer, in that he did attempt to mislead a member of the public, K.D., by misrepresenting the status of an estate manner.

Charge #3 and Charge #4 - Facts

19. Charges #3 and #4 relate to the same estate and the relevant facts will be summarized together.

20. These complaints arose from a complaint by L.P., a beneficiary of the Estate of D.D. Mr. McLean was the executor and solicitor for the estate. The complaints involve delay generally in the administration of the Estate. The complaints also involved delay in completing tasks as promised by Mr. McLean and a failure to communicate accurately, or at all.

21. At the date of the complaint, nine months had passed since the date of D.D.'s death on August 25, 2007. In the complainant's letter of May 27, 2008, the complainant stated Mr. McLean told her on March 24, 2008 that "documentation" would be forwarded to the court the following Tuesday. He also promised to provide a list of D.D.'s assets to the complainant. Follow up phone calls and emails dated March 26th, May 11th and May 20th, 2008 were not returned by Mr. McLean.

22. When Mr. McLean did respond to the complainant on June 9, 2008 he alleged there was a "family feud" that prevented some beneficiaries from talking to other beneficiaries. The beneficiaries denied any feud.

23. Mr. McLean had also met with another beneficiary, K.D., on February 22, 2008. He told K.D., and another beneficiary on more than one occasion that "things would be wrapped up by Friday". These results were never forthcoming. The probate of the estate had yet to be completed in the spring of 2008. Indeed, in Mr. McLean's letter responding to the letter to the Law Society of June 9, 2008, he confirms that an application for Letters Probate had not yet been filed, but that he would attend to the same "in the very near future". [emphasis in original]

24. An application for probate was ultimately filed after Mr. McLean's response to the complaint on Friday, June 11, 2008. Letters Probate were granted on July 18, 2008.

25. The delay of approximately one year since the date of death was not the only issue of concern to the beneficiaries. Mr. McLean, in his capacity as executor, failed to pay the funeral expenses of D.D. until March 6, 2009, some 19 months after the expenses were due in the amount of \$5,431.71. By then, interest had also accrued in the amount of \$2,326.11. The payment made by Mr. McLean on March 6, 2009 did not settle the entire account. According to the demand letter from the funeral home dated March 6, 2009, a balance of \$2,707.82, including interest, was still outstanding. In that letter, the funeral home referenced unreturned phone calls to Mr. McLean on November 12, 2007 and February 13, 2008. The letter also referenced a telephone conversation with Mr. McLean on May 28, 2008, the same date a written reminder

notice was sent to Mr. McLean from the funeral home. In this letter, the funeral home threatened to bring legal proceedings against the estate for the unpaid balance of the account.

26. Notwithstanding this history, Mr. McLean informed the beneficiary, K.D., in a letter dated March 3, 2009 that “it was the writer’s mistaken understanding, that this funeral costs (sic) had been paid” in his letter, he referenced a phone call from the funeral home concerning the outstanding account. He requested the return of a \$10,000.00 payment made to K.D., such that he might then arrange to pay the funeral home costs before making any further distribution.

27. In his next letter to K.D. he indicated a payment in the amount of \$5,431.71 had been made to the funeral home. He enclosed the funeral home’s letter of March 6, 2009 and suggested interest was still outstanding in the amount of \$2,326.11. But as the funeral home’s letter of March 6, 2009 indicates, the balance then outstanding was the higher amount of \$2,707.82. Mr. McLean offered no explanation for the discrepancy and admitted he should have been in “closer contact” with K.D. in relation to the payment of this account. At no time did Mr. McLean provide any explanation for his failure to respond to the account reminders and phone calls from the funeral home.

28. As of the date of the hearing, the estate had still not been distributed and finalized. The estate was still at risk of being sued by the funeral home for unpaid interest accrued at the rate of 24% per annum in the aggregate amount of \$2,326.11. Mr. McLean had not made any offer or attempt to compensate the estate for these costs. At the hearing before the Discipline Committee his counsel suggested the beneficiaries exercise their remedies in the Court of Queen’s Bench in the context of an application for approval of accounts.

Charge #5 - Is guilty of conduct unbecoming a lawyer in that he failed to serve his client, J.L., in a conscientious, diligent and efficient manner in the course of a real estate transaction.

Charge #5 - Facts

29. This complaint also involved a delay in the conclusion of a real estate transaction. Mr. McLean represented the purchaser of a home, J.L., and the vendor of the same property, Mr. G. At the time of the complaint, the complainant had been in possession of his home for approximately seven months but had still not received a final Statement of Adjustments including a reconciliation of trust funds. No final report had been provided by Mr. McLean. Mr. McLean had made more than one promise to deliver the adjustments "on Friday", but these promises were not fulfilled.

30. It appears the buyer, J.L., was entitled to possession of the property on June 29, 2007 and did pay funds into trust with Mr. McLean's office on August 8, 2007. But the mortgage proceeds expected from the mortgage registered against the property in favor of the CIBC were not forthcoming because the approval of that mortgage had been cancelled. A new mortgage was sought and obtained by the client and was registered by Mr. McLean on October 15, 2007, behind the CIBC mortgage that had been registered on August 17, 2007. At that time, the CIBC mortgage had not been discharged.

31. Mr. McLean did not provide a full and timely accounting to J.L. In what may be described as his first report, he wrote to the Law Society of Saskatchewan on May 23, 2008 to provide a chronology of events and undertook to provide a report to his client by May 30, 2008. On May 30, 2008 he then provided what he described as a "preliminary report" to J.L. regarding her purchase of the property. In his letters of May 23, 2008 and May 30, 2008 he acknowledged the existence of the CIBC mortgage against the title. In his letter of the 23rd he stated that CIBC had "not provided us with a discharge of their mortgage interest". But Mr. McLean could produce no evidence he made any formal request for a discharge of the mortgage between his

search result and copy of the title of October 15, 2007 and his reports to the Law Society and to J.L. of May 23, 2008 and May 30, 2008, respectively.

32. In his letter to the Law Society of May 23, 2008 he acknowledged that an accounting should have been provided to J.L. but it had not. In his letter to J.L. of May 30, 2008 he apologized for the delay in reporting. He stated: "The writer apologizes directly to you for the delay in providing you with this report. There is no good reason why it has taken so long."

33. Mr. McLean made no effort to request a discharge of the CIBC mortgage until September 17, 2008, almost two months after an inquiry to this effect from the Law Society's complaint counsel by letter to Mr. McLean dated July 24, 2008. While Mr. McLean did take steps to obtain a discharge, he did not respond to the Law Society until contacted again by letter dated November 25, 2008. The actual discharge of the mortgage was registered on the 19th of December, 2008. The CIBC mortgage was registered against the title for 16 months in total. The real estate file then came to a close, some 17 months after Mr. McLean's client took possession.

34. The complainant did not suffer any monetary loss as a result of the delay.

The Duty of the Lawyer

35. Mr. McLean's misconduct in the context of the lawyer's requisite duty involves three themes. Charges #1 and #2 involve a breach of a trust condition and undertaking, respectively. Charges #3 and #5 involve delay and dilatory practice. Charge #4 involves an attempt to mislead in an attempt to excuse or put off a complaint of delay. In the Agreed Statement of Facts there is reference to another attempt to mislead, but this did not form the basis of a formal charge. Each of these themes will be reviewed separately.

Charges #1 and #2 – Breach of Trust Conditions and Breach of an Undertaking

The Duty of the Lawyer

36. Chapter XVI of the *Code of Professional Conduct* expresses the following rule:

The lawyers conduct toward other lawyers should be characterized by courtesy and good faith.

37. In the commentary of guiding principles, paragraph 10 provides:

10. The lawyer shall give no undertaking that cannot be fulfilled, shall fulfill every undertaking given, and shall scrupulously honour any trust condition once accepted. Undertakings and trust conditions shall be written or confirmed in writing and shall be absolutely unambiguous in their terms. If the lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally.⁸ **If the lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition shall be immediately returned to the person imposing the trust condition unless its terms can be forthwith amended, preferably in writing, on a mutually agreeable basis.** [emphasis added]

Where a lawyer accepts a trust condition or gives an undertaking, the lawyer is held out as a trustee who can be trusted to strictly carry out the terms of the trust and to keep his or her undertaking. In *Merchant*, the court characterized the use of trust conditions as an essential tool of commerce:

[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 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. [emphasis added]

[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. [emphasis added]

38. In *Law Society of British Columbia v. Hordal*,⁴ the Benchers recognized the critical importance of undertakings between lawyers. They considered a breach of an undertaking as a serious event requiring a harsh sanction. At paragraph 60, they stated:

[60] The breach of undertaking by itself, particularly in light of the recent conduct review history, is a serious event. It demonstrates a regrettable disregard for the sanctity with which lawyers must regard undertakings. It has been variously observed that undertakings among solicitors form the basis upon which the commercial ventures of our clients are accomplished. They are at the heart of the value added to commercial transactions by the legal profession. Undertakings facilitate the efficient exchange of documents and funds. Any breach of undertaking, particularly one undertaken intentionally, must be responded to in the harshest possible terms. It is probable that the specific facts of this case, with the intentional breach of undertaking demonstrated would, by itself, have justified the suspension period suggested by the Hearing Panel.

39. In the *Law Society of British Columbia v. Kruse*,⁵ the Benchers said this at paragraph 13 of the "penalty" section of its decision:

13. Undertakings are a vital part of the interaction among lawyers in their service of their clients. Breach of undertaking is serious; so serious that breach of undertaking is specifically referred to in our Professional Conduct Handbook as a type of misconduct that a lawyer must report to the Law Society.

⁴ [2004] L.S.D.D. No. 93, 2004 LSBC 36

⁵ [2002] L.S.D.D. No. 24, 2001 LSBC 32

In its analysis in *Kruse*, and at paragraph 18 of the “penalty” section of the decision, the Benchers regarded the member’s breach of an undertaking as a “particularly egregious instance of professional misconduct”.

40. Where a lawyer has deliberately breached an undertaking, it amounts to a broken promise, reflecting negatively on the integrity of the lawyer. The public’s confidence in and reliance on the legal profession as a necessary aid to commerce is compromised. Lawyers who rely on the promises and undertakings of other lawyers lose confidence in their ability to protect their own clients. When lawyers cannot be trusted generally, commercial systems fail.

41. At its essence, the responsibility to fulfill a trust condition or an undertaking invokes the lawyer’s fundamental duty of integrity. As the Benchers have observed before, the Code begins in Chapter I with the singular rule of integrity as a “key element” of each rule of the code:

The lawyer shall discharge with integrity all duties owed to the clients, the court, other members of the profession and the public.

[...]

1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt about the lawyer’s trustworthiness the essential element in the lawyer-client relationship will be missing. If personal 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

2. **The principle of integrity is a key element of each rule of the Code.**
[emphasis added]

Analysis

Charges #1 and #2 – Breach of Trust Conditions and Breach of an Undertaking

42. In weighing the seriousness of the member’s misconduct in relation to all charges and the need for appropriate sanction we have considered the factors articulated in the *Law Society v.*

Ogilvie,⁶ and the Alberta Hearing Guide as summarized at Tab 2 of Mr. Huber's brief. As the Benchers did in *Rault* and *Nolin*, we have also considered the approach outlined in Richard Steinecke's newsletter entitled "Formulating Sanctions", April 2006 - No. 98 referenced by the Benchers in *Nolin*. We have also considered the jurisprudence involving similar cases referred to us by counsel.

43. As the Benchers stated in *Nolin*, we are not bound or limited by earlier decisions where the principled basis for those decisions has not been articulated or well understood. But in the interest of legitimate consistency and parity, we are guided by decisions formed on the basis of principle and its application in similar cases in Saskatchewan and in other jurisdictions in Canada. The authorities relevant for this purpose are not confined to the decisions of the Benchers of the Law Society of Saskatchewan.

44. The provincial law societies are committed to achieving national standards in their core areas of regulatory responsibility through their membership and participation in the Federation of Law Societies (of Canada). Mobility and other arrangements between provincially constituted societies are made through the Federation to ensure they meet a principled national standard.

45. In the realm of ethics and discipline, the Federation has developed and adopted a uniform Federation of Law Societies *Code of Professional Conduct*. The Federation's member societies are in the process of adopting all or part of this Code as their own with the intent of moving to a national standard encompassing competency as an aspect of discipline.

46. The importance of a national standard of discipline being in step with current societal values was endorsed by the Alberta Court of Appeal in *Adams*,⁷ at paragraph 27:

[...] We acknowledge that considering the dispositions in disciplinary matters in other cases and in other jurisdictions can be helpful. **But this assessment must be undertaken with due respect to contemporary values in Canadian society.** [...] [emphasis added]

⁶ [1999] LSBC 17

⁷ *Supra*, note 3

To this end, the collective decisions of all societies constitute a comprehensive jurisprudential footing for guiding future decisions of the Benchers in all provinces. Where these decisions meet the requirement of being sufficiently transparent and principled, they are a valuable reference in the discipline decisions of all societies.

47. In relation to Charge #1, Mr. McLean accepted the trust conditions imposed upon his office. He used the documents provided to him on that basis. He chose to ignore the trust conditions and ultimately refused to comply with those conditions as “leverage...” to advance the interests of his client. He ultimately fulfilled the condition, but not until a complaint had been filed by the lawyer representing the complainant and the Law Society of Saskatchewan intervened.

48. In Charge #2, Mr. McLean paid money from trust without discharging the writ according to the undertaking he gave as a condition of receiving funds into trust. He put himself in a position where he was then unable to fulfill his undertaking to discharge the writ. He made no attempt to discharge the writ in fulfillment of his undertaking until a complaint was made to the Law Society by another member. Even then, considerable time passed before he applied to the court for an Order discharging the writ. While this was accomplished before the sentencing hearing before the Discipline Committee it was nonetheless completed in the face of discipline.

49. Each case is a straightforward example of a lawyer knowingly and deliberately breaching a trust condition and failing to fulfill an undertaking. In each case, the complainants’ interests were prejudiced. In relation to Charge #1 the breach was deliberately committed for that purpose and to pressure the complainants to the advantage of Mr. McLean’s client.

50. In this case, and as the authorities indicate, a deliberate breach of an undertaking involves serious consequences to the individual entrusting their property or other interests to the control of a lawyer in his or her capacity as an express trustee. The use of trust conditions and undertakings between lawyers is an integral part of the systems necessary to complete commercial and other transactions.

51. Indeed, protocols have emerged in differing areas of practice where specialized sectors of the bar have agreed to use uniform trust conditions to bring a level of rigor, consistency and predictability to routine transactions.

52. The essential premise underlying these systems is that the lawyer will dutifully, and without discretion, fulfill his or her undertaking or trust condition. Where there is a broken promise or breach of trust by a lawyer, conveyancing systems fail and the public loses confidence in the legal profession's ability to serve its interests. To the extent a party's property is compromised by a breach of trust or promise, it amounts to prejudice or deprivation, or both. This brings serious discredit to the profession.

53. As the facts indicate, the breach of trust by Mr. McLean in relation to Charge #1 involved a deliberate breach of trust and a broken promise reflecting adversely on his integrity and trustworthiness. While there is no evidence Mr. McLean deliberately intended to compromise the complainant's interest in relation to Charge #2, it is clear from the evidence he knowingly put himself in a position where he could not comply with and fulfill the undertaking he gave as a condition of receiving and disbursing the funds from trust.

54. As his record indicates, Mr. McLean was previously disciplined for a breach of undertaking by the decision of the Benchers made June 14, 2006 (#06-08). He was ordered to practice under the supervision of a Practice Advisor until June 13, 2007. On June 17, 2007 he received the letter imposing the trust conditions he admitted to breaching in relation to Charge #1. By letter dated the 15th of October, 2007, he was asked by D.D. to release the holdback pursuant to those trust conditions after messages were left with his receptionist in the previous two months, but not returned by Mr. McLean.

55. By virtue of that experience he should have known a breach of a trust condition was serious and deserving of formal sanction. Some four months thereafter, after the end of the practice conditions imposed as a result of his previous conviction, he breached the trust condition in relation to Charge #1 and then later in relation to Charge #2. In relation to Charge #2, Mr. McLean gave the undertaking in question on June 16, 2006, only two days after being sentenced

on June 14, 2006. He then released funds from trust and breached that undertaking on September 13, 2007, some three months after the oversight of his practice ended. In each case he knew, or certainly ought to have known, the complainant's interests were compromised by his breach.

56. In relation to Charge #1 we find it troubling that he admitted to breaching his undertaking to gain "leverage" within months after the Law Society's Practice Advisor ended his supervision of Mr. McLean's practice. In the face of the new complaint and the letter from the Law Society, he initially refused or failed to recognize his misconduct. Rather than immediately remedying the problem, he attempted to justify his breach of undertaking by rationalizing it against other circumstances he was not entitled to take into account according to the terms of the trust imposed upon and accepted by him. He ultimately admitted he breached a trust condition, as alleged by the complaint.

57. In his counsel's oral submissions before the Discipline Committee, Mr. McLean attempted to again excuse his breach of the trust conditions by suggesting in oral argument there was no "specific time limit on compliance". In his brief at page 5 in relation to Charge #2 he stated:

Immediate release of the Federal Writ was never part of the trust condition.
[emphasis in original]

As the Agreed Statement of Facts indicate, Mr. McLean committed and did plead guilty to the breach of trust which had put the complainant in Charge #1 to the burden of retaining counsel to remedy. In Charge #2, Mr. McLean put himself in a position where he could not fulfill the trust condition and where a court application was needed to discharge the writ some 24 months after funds were released in breach of the trust conditions. He admitted and entered a plea of guilty to a breach of an undertaking.

58. In his submissions before the Hearing Committee, Mr. McLean's counsel attempted to suggest the breach was an innocent one and one that was quickly addressed when it was submitted to the Law Society by the complainant's counsel for a "ruling". But in his

submissions at the hearing his counsel admitted Mr. McLean “knew all along that he had to comply with the trust conditions and he did eventually comply with it.”⁸ This indicates a clear consciousness and deliberateness inconsistent with any good faith claim of innocence.

59. Further, we find nothing objectively ambiguous about Mr. McLean’s responsibilities in relation to the trust conditions at issue with respect to Charge #1. We are troubled by Mr. McLean’s attempts to minimize his state of mind in the face of his admissions in evidence. This either suggests a lack of understanding his actions were wrong or a deliberate and conscious breach of his duty.

60. With respect to Charge #2, Mr. McLean’s counsel again attempted to equivocate or qualify the scope of the undertaking given by Mr. McLean stating this undertaking was given “with the expectation of a reasonable response from the Crown”. With respect, this submission again fails to appreciate the requisite duty of the lawyer as trustee, where the lawyer must become the impartial stakeholder, acting without discretion or any expectation a complainant such as this may be obliged to accept anything less than full compliance with a trust condition.

61. As has been held in numerous rulings of the Ethics Committee of the Law Society, it is always open for a lawyer to reject trust conditions, or to refuse to give an undertaking if, in so doing, he or she is acceding to an untenable or otherwise unreasonable position. But having accepted the trust conditions or having given an undertaking, the lawyer loses his or her ability to advocate the individual interests of the client and must then act according to the strictures of the trust.

62. As the Court of Appeal at paragraph 71 in *Merchant* stated:

[...] the legal profession must be held to rigorous account in these matters, for the consequences of noncompliance 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.

63. As Mr. Huber suggested in oral and written argument, Mr. McLean's submissions to the Discipline Committee suggest he continued to misunderstand his role as trustee in construing the trust conditions as ambiguous and allowing him license to do what he considered "reasonable". While he suggested he was not required to immediately comply with the trust condition and undertaking his counsel admitted at the hearing that Mr. McLean knew he was required to comply and that D.D. rightfully expected him to do so as a member of the legal profession.

64. Counsel thus reflected an awareness that a lawyer's trusted position in society is a privilege that is only sustained because the Law Society may hold individual lawyers to account for their promises.

65. While his counsel also suggested there was no breach, it was clear from the evidence he was in breach when he chose to ignore the trust condition and deliberately withheld funds from the complainant in relation to Charge #1. He put himself in a position where, on instructions from his client, he could not pay funds to the complainant in Charge #2. In pleading to both charges he admitted to a breach in any event.

66. Had there been some genuine confusion on his part as to his obligation he had the opportunity to seek other counsel or to seek the assistance of Law Society counsel on an informal basis or a request for a ruling of its Ethics Committee. He did not do so, and instead put the Plaintiff to the burden of retaining counsel and making a formal complaint to the Law Society. Altogether, we find his conduct to represent a serious disregard for his professional obligations in relation to both Charges #1 and #2. The seriousness of his misconduct is aggravated by his previous record which includes one recent conviction and sanction for a breach of an undertaking. Given these concerns, the Discipline Committee was left with an unresolved concern about recurrence. This militates in favour of a serious sanction with the object of individual deterrence in addition to the general deterrence of denunciation.

67. We have considered the impact on the complainants and others. We reject his counsel's suggestion that there was no prejudice to the complainants. The misconduct in each case did cause prejudice to both complainants. The complainant in Charge #1 was deprived of its funds

for a period of time. This complainant may have also incurred the cost of retaining legal counsel to remedy the breach of the trust condition. In relation to Charge #2, the writ holders' interests were prejudiced. It was denied the payment of funds required by the undertaking given by Mr. McLean. The title holder was unable to immediately obtain clear title and to complete a subsequent transaction in relation to the property. In each case the complainants lost confidence in the promise and commitment of a member of the trusted legal profession sufficient to file a formal complaint.

68. In oral argument Mr. McLean's counsel suggested that the undertaking given by Mr. McLean in relation to Charge #2 was a "self imposed undertaking" that was an "empty promise" of no value to the writ holder, presumably because the tax payer's interest in the property was insufficient to pay the amount owed to the writ holder.

69. We have difficulty accepting this submission as a mitigating factor. The evidence showed that the writ remained on the title until sometime after March 24th of 2009 when Mr. McLean's application to the court was ultimately made and granted. But both properties were previously sold again and in the course of those transactions new counsel, relying upon the undertaking of Mr. McLean made a similar undertaking to remove the writ and were then unable to fulfill this undertaking.

70. More importantly, we have difficulty in principle with the proposition that a voluntary undertaking is of any different import than one that is imposed upon a lawyer. We have serious difficulty with the proposition that a lawyer, having given an undertaking, reserves any discretion to then determine whether such undertaking should later be fulfilled. As indicated in the Code and the authorities, the lawyer's integrity is at the heart of any promise and the public is rightfully entitled to every assurance such integrity is not subject to compromise.

71. In the end, there was no offer of restitution or apology to any of these individuals. Indeed, much of Mr. McLean's submissions at the sentencing hearing were premised on an attempt by him to cast the complainants or others in each case as being unreasonable or dilatory themselves.

72. Notwithstanding these aggravating factors, the Discipline Committee has also considered the many years Mr. McLean has been in practice and the considerable volume of work he has handled over the years without much incident until the latter part of his career where, as his counsel suggested, he has become increasingly burdened with the responsibilities of his practice and caring for his family and its farm. Apart from his own counsel's submissions before the Discipline Committee, little was said about his general character. Mr. McLean did not address the Discipline Committee.

73. Even then, it must be noted that there was nothing patently false or misleading about his behaviour. He did not misappropriate or otherwise profit from his misconduct. But the Discipline Committee was left with the concern that Mr. McLean's initial response to the law Society in relation to Charges #1 and #2, the timing of those matters, and his submissions to the Discipline Committee suggest a lack of remorse and failure to accept responsibility for these serious acts of misconduct.

74. While his conduct is therefore not deserving of the most serious sanction in the range established for misconduct of this nature, the sanction must recognize the importance of specific deterrence for his refusal to understand or acknowledge his wrongdoing. In the end, his misconduct reflects negatively on his integrity. He has knowingly broken a promise given to and relied upon by others in circumstances where such promises must be kept in all events. A pattern of serious misconduct, including a previous record, also invokes the need for general deterrence to control such behaviour generally and to maintain the public's legitimate expectation of censure. The circumstances of this case invoke the imperatives of specific and general deterrence.

75. In the jurisprudence referred to us by counsel, the range of sanction for breach of trust conditions and breaches of undertakings ranges from a fine or reprimand at the low end to a suspension in the vicinity of six months.

76. In the decision of the Benchers in *Law Society of British Columbia v. Hordal*,¹¹ the Benchers there imposed a six month suspension, a reprimand and an order to pay costs. In discussing the appropriate penalty, the Sentencing Committee considered the sentencing criteria in *Law Society of British Columbia v. Ogilvie*¹² and the other considerations noted in the Alberta Law Society Hearing Guide referenced above. The decision in *Hordal* characterizes a breach of an undertaking as a breach of the core duty of integrity. At paragraph 49, the Benchers stated:

Honesty, integrity and trustworthiness are fundamental values of the legal profession. They form the underpinning and *raison d'être* of the profession. If a lawyer's word cannot be trusted, what is the point of hiring him or her? Therefore the Panel finds that the violation of the duty of honesty and a breach of undertaking amount to grave misconduct.

77. In relation to the importance of general and specific deterrents, the Hearing Committee stated at paragraph 50:

[...] cases involving breaches of undertaking and misleading are grave, as they damage and undermine the very structure of our society of which the legal profession is one of the pillars.

78. The Sentencing Committee went on to state at paragraph 60:

It has been variously observed that undertakings among solicitors form the basis upon which the commercial ventures of our clients are accomplished. They are at the heart of the value added to commercial transactions by the legal profession. Undertakings facilitate the efficient exchange of documents and funds.

79. In *Hordal*, the member faced a charge that he breached an undertaking that he gave for the purpose of inducing a release to be provided when he knew then he could not fulfill such an undertaking. He went further to provide a draft transfer to opposing counsel and told him it would be signed the following day, when this was patently untrue. Altogether, he knowingly deceived opposing counsel in three different and successive ways.

80. The Discipline Committee in *Hordal* imposed a six month suspension because of the element of deceit and because he had a very recent and related history involving similar misconduct.

¹¹ *Supra*, note 5

¹² *Supra*, note 7

81. In *Law Society of British Columbia v. Kruse*,¹³ the lawyer gave his undertaking to pay money to third parties from the sale proceeds. He represented that he had completed his undertakings when in fact he had left it to his client to do so. When his client's cheque was returned for insufficient funds, the monies due to third parties were outstanding. When matters were brought to his attention by opposing counsel and to the Law Society, he failed to respond, resulting in a further charge of failure to respond to the Law Society. By the time the matter proceeded to a hearing, the lawyer ceased to be a member of the Law Society for reasons unrelated to the proceeding. The Sentencing Committee imposed a fine of \$12,000.00 in relation to the breach of undertaking and a \$3,000.00 fine in relation to the failure to respond to the Law Society. Costs were also awarded. The Panel, at paragraph 18 of the "penalty" section of its decision, concluded that the lawyer had:¹⁴

chosen almost completely to ignore the accusations made against him. [...] Such responses he has made are unworthy of a professional in whom the public should be able to put trust.

The Panel observed that, if the member had still been engaged in active practice, the penalty would have included a suspension with conditions imposed on the lawyer's return to practice.

82. In *Law Society of Saskatchewan v. Stinson*,¹⁵ the member was found guilty of conduct unbecoming a lawyer for providing two undertakings to the public when he had no control over whether they would be fulfilled. Neither undertaking was ultimately fulfilled. His breach of an undertaking was described by counsel for the Law Society as "at the very least reckless". The Agreed Statement of Facts in *Stinson* suggests Mr. Stinson's misconduct "appeared rooted" in his failure to recognize the importance of the relevant rule in the Code of Professional Conduct. While the complainants were induced to rely on the undertakings, the Law Society's counsel suggested there was no intentional deception by Mr. Stinson.

¹³ *Supra*, Note 6

¹⁴ *Supra*, Note 6

¹⁵ [2009] L.S.D.D. No. 5

83. Mr. Stinson had no prior discipline record. He demonstrated remorse and full acceptance his actions were wrong. He received a suspension for two months and was required to practice under the supervision of a Practice Advisor upon reinstatement. He was also ordered to pay \$4,164.50 in costs.

84. In *Law Society of Saskatchewan v. William Zion Brown*,¹⁴ Mr. Brown was found guilty of conduct unbecoming for breach of an undertaking by releasing funds without first satisfying his undertaking and to provide a report as promised. There was no evidence of any improper motive or sharp practice. The complaint arose from a practice review by the Law Society and not because a client was impacted. Mr. Brown had no prior record, was remorseful, and acknowledged his conduct was inappropriate. He was reprimanded and ordered to pay \$7,947.53 in costs.

85. In *Merchant*, Mr. Merchant was found guilty of conduct unbecoming because he caused trust funds to be paid from trust contrary to a court Order or without the consent of a party claiming an interest. He was suspended for two weeks and ordered to pay costs.

86. In the reasons for the decision in *Merchant*, there is no definitive statement showing whether the Benchers gave full consideration to the public interest objective in sentencing or the range of sentencing options suggested by the jurisprudence. It is therefore difficult to rationalize the decision in *Merchant* with the relevant sentencing objectives and the applicable jurisprudence. As the Benchers concluded in *Nolin*:

58. For all these reasons, the Benchers should be cautious about simply referencing and following outcomes in earlier decisions. Consistency and fairness is best achieved in the application of similarly reasoned principled decisions reflecting the legitimate objectives of the sentencing power and responsibility. Likewise, where an earlier precedent seems incorrect in approach or result, this should not be compounded by a similar approach or outcome in other cases.

¹⁴ [2008] L.S.D.D. No. 6

59. Thus, the Benchers are not bound by mere outcomes in earlier decisions. While each case must be decided on its own facts and merits, each decision must also withstand the scrutiny of others, including the Benchers. Where a previous decision does not appear to support the Law Society's paramount mandate to protect the public, such decisions cannot bind Discipline Committees to a similar outcome.

As indicated above, decisions of the Benchers in this and other jurisdictions are of useful reference where they are sufficient in their reasons and consistent with the sentencing responsibility. In the context of all the jurisprudence before us and in the circumstances of this case, we find the decision itself in *Merchant* to be of limited value. With this exception, we find the cases referenced above to reflect the prevailing range of sentencing options in cases involving a breach of trust or an undertaking.

87. A breach of an undertaking is equal to a breach of a trust condition. In both events, an express trust is formed, and is then broken when the lawyer, in his or her capacity as a trustee, breaks a promise. We regard either form of misconduct as equally significant and deserving of serious sanction.

88. In the case of Mr. McLean, there is no obvious element of deceit, but Mr. McLean's behaviour does involve a willful and strategic disregard for trust conditions. As in *Hordal*, Mr. McLean has a recent discipline record involving a previous conviction for a breach of an undertaking. The conduct of Mr. McLean itself is similar in objective terms to the conduct of Mr. Kruse as Mr. McLean did knowingly breach trust conditions in two separate matters.

89. Unlike the Kruse matter, Mr. McLean did cooperate fully with the Law Society during the investigation and prosecution. While cooperation with the Law Society is a mitigating factor, the Discipline Committee was still left with the concern at the hearing that Mr. McLean believed his breach of trust and breach of an undertaking were justified. He expressed little or no remorse or regret, thus indicating he does not appreciate the impact of his misconduct on the complainants and others.

90. Unlike Mr. Stinson, Mr. McLean does have a prior record for a similar offence. Unlike the conduct in *Stinson*, Mr. McLean's conduct has recurred in three discrete matters and in each case is serious in its implication for harm to the complainants and mischief to the reputation of the profession. But the absence of deliberate deceit on his part supports a sanction less than the upper end of the six month range suggested by the authorities. The ultimate sanction must also be considered in the totality of all the circumstances, including the remaining Charges #3, #4 and #5, one of which includes an act of attempted deceit.

The Duty of the Lawyer

Charges #3, #4 and #5

91. Chapter II of the Code requires a requisite level of competency from all lawyers as an ethical duty. The rule states:

- (a) A competent lawyer meets the needs of clients, other lawyers, the legal system and the public by:
 - i) acquiring and maintaining an appropriate level of qualifications, skills, and knowledge;
 - ii) **acting with diligence and honesty;**
 - iii) maintaining a satisfactory level of practice management; and
 - iv) fostering professional relationships in which reasonable expectations are met, appropriate strategies are adopted, strong communication links are maintained, and the interest of the public is the prime consideration. (See attached Appendix A "Competency Profile") (clause (a) added September, 2003)
- (b) The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf.¹
- (c) **The lawyer should serve the client in a conscientious, diligent and efficient manner** so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.² [emphasis added]

92. In the commentary to this rule, the Code suggests:

* * *

3. The lawyer should not undertake a matter without honestly feeling either competent to handle it, or able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is to be

distinguished from the standard of care that a court would apply for purposes of determining negligence. [emphasis added]

* * *

Quality of Service

7. Numerous examples could be given of conduct that does not meet the quality of service required by the second branch of the Rule. The list that follows is illustrative, but not by any means exhaustive:

- (a) **failure to keep the client reasonably informed;**
- (b) failure to answer reasonable requests from the client for information;
- (c) **unexplained failure to respond to the client's telephone calls;**
- (d) failure to keep appointments with clients without explanation or apology;
- (e) **informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;**
- (f) failure to answer within a reasonable time a communication that requires a reply;
- (g) doing the work in hand but doing it so belatedly that its value to the client is diminished or lost;
- (h) slipshod work, such as mistakes or omissions in statements or documents prepared on behalf of the client;
- (i) failure to maintain office staff and facilities adequate to the lawyer's practice;
- (j) failure to inform the client of proposals of settlement, or to explain them properly;
- (k) **withholding information from the client or misleading the client about the position of a matter in order to cover up the fact of neglect or mistakes;**
- (l) **failure to make a prompt and complete report** when the work is finished or, if a final report cannot be made, failure to make an interim report where one might reasonably be expected;
- (m) self-induced disability, for example from the use of intoxicants or drugs, which interferes with or prejudices the lawyer's services to the client.⁵
- (n) failure to maintain an adequate limitation reminder or tickler system to ensure an effective follow-up procedure with respect to the lawyer's files.

[Chapter II Commentary 7(n) added February 4 & 5, 1993]

Promptness

8. The requirement of conscientious, diligent and efficient service means that the lawyer must make every effort to provide prompt service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.⁶ [emphasis added]

In the notes to the rule at Paragraph 5, it is suggested:

5. Cf. Orkin, pp. 123-25, and para. 9, post.

"A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers...concluded that the solicitor had not given an honest explanation for the delay, but on the contrary had deceived his client as to the reason for such delay...", per Farris, C.J.S.C. in Re Legal Professions Act; Sandverg v. "F" (1945), 4 d.l.r. 446 at 447 (B.C. Visitorial Tribunal). Cf. IBA-D1. The Legal Profession Act, 1990 provides that "conduct unbecoming"

includes the practice of law in an incompetent manner (Section 2(1)(d)) and further allows the Law Society to apply to the court for the appointment of a trustee to manage the practice of a member who, inter alia, is unable for any reason to practice as a lawyer (Section 61).

93. The Saskatchewan Court of Appeal has suggested that the statutory construct of “conduct unbecoming” created by *The Legal Profession Act, 1990* has expanded the common-law categorization of dilatory or incompetent practice where moral turpitude was an essential component. In *Merchant, supra*, the court stated at paragraphs 57 to 62:

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* [sic] 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*, 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]

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

94. Thus, a breach of the lawyer's duty of competency may constitute "conduct unbecoming" without a negative moral element and, where it otherwise meets the definition. While a disgraceful or dishonest moral component contributes to the seriousness of conduct unbecoming a charge can be sustained in its absence.

Analysis

Charges #3, #4 and #5

95. In this case, Mr. McLean has admitted by his guilty plea to Charges #3 and #5 that his incompetence qualifies as "conduct unbecoming". An element of moral culpability is admitted by his plea of guilty to Charge #4, where he admitted to attempting to mislead a member of the public by misrepresenting the status of work he had promised to complete but did not. His counsel's submission that this involved a misunderstanding by Mr. D. is an attempt to minimize or avoid responsibility.

96. In relation to Charges #3 and #4, there was an unreasonable and unexplained delay by Mr. McLean in performing the work expected of him as a lawyer and in his capacity as an executor of the estate. By his own admission there was "no good reason" for the delay. He was negligent in not paying the legitimate debts of the estate, thus resulting in a financial loss to the estate for which he has still not accepted responsibility.

97. In the context of his dilatory approach to his duties he misled his client and others by making false promises about the work that was being done, and when it would be done. In so doing he failed to meet his ethical duty of competency and honesty. He failed to respond,

without explanation, to calls and emails from a beneficiary of an estate for which he acted as executor and solicitor. In this matter, the decedent passed away on August 25, 2007. Mr. McLean informed the complainant an application for probate was to be made in the last week of March, 2008. This application was not made until July of 2008 after the complaint to the Law Society and only then in the face of potential discipline.

98. In relation to Charge #5, there was a considerable delay in completing a real estate transaction. A final report was not provided until eight months after the complaint was made and the Law Society intervened. As in Charge #3, Mr. McLean admitted there was “no good reason” for the delay. In the end, a final report and accounting was not delivered to Mr. McLean’s client until 14 months after the client had possession.

99. A lawyer has an absolute duty at all times to be honest and forthright and to make no attempt to mislead. As indicated in the discussion above, the lawyer’s duty of integrity informs every other duty in the Code. In this case, Mr. McLean attempted to mislead K.D. on more than one occasion by promising but not completing work by a certain date. He made similar promises to one of the beneficiaries in the same estate from which Charge #3 arises. While it appears these promises were made to put off the client’s inquiries because work had not been done, it was a clear breach of Mr. McLean’s duty of integrity to report that work was being done, and was to be done when it had not.

100. In Mr. McLean’s counsel’s written submission before the Discipline Committee he characterized Mr. McLean’s conduct in relation to all charges and its impact this way:

While the member has a prior disciplinary history, given the facts in this case, none of the complaints involved incompetence, dishonesty or lack of integrity nor was anyone misled by the circumstances. In all cases trust conditions were complied with and clients served with integrity. Delay is the only complaint. Where circumstances justified some delay where a final resolution was not immediately available. NO actual harm has resulted from any of the action here and to penalize a member for anticipated harm (i.e. where the estate pays or should have paid interest on the funeral account) is premature.
[emphasis in original]

101. With respect, this submission inaccurately minimizes Mr. McLean's misconduct and represents an inappropriate attempt to avoid responsibility for such conduct, including conduct reflecting adversely on the integrity of Mr. McLean and the profession at large.

102. Dilatory practise in itself generally does not warrant a sanction beyond a fine, reprimand or practice conditions unless there is a well entrenched pattern or other aggravating factors. In this case, the Discipline Committee is sufficiently concerned about Mr. McLean's poor insight into and understanding of his behaviour, such that there is a risk of recurrence that must be addressed in the totality of the sanction imposed for all five charges, and upon his ultimate return to practice.

Conclusion

103. Altogether, Mr. McLean's misconduct does not warrant a sanction equal to the high end of the range established by the jurisprudence referenced above. But his overall conduct in relation to all charges, his previous record and his failure to accept responsibility at the sentencing hearing supports a suspension closer to the high end than the low end of the range, with practice conditions of an indefinite duration.

104. There is nothing to mitigate against the general rule of ordering costs on a full indemnity basis.

Decision and Penalty

105. It is therefore the decision of this Discipline Committee that:

- (a) Mr. McLean is suspended from the practice of law for a period of four months effective the 15th of June, 2009;

- (b) Mr. McLean's resumption of practice will be conditional upon him practicing under the supervision of a Practice Advisor chosen by the Chair of the Discipline Executive on such terms and for such duration as the Chair may determine over time; and
- (c) Mr. McLean is ordered to pay the costs of the Law Society fixed in the amount of \$3,396.25 not later than June 12, 2010.

DATED at the City of Regina in the Province of Saskatchewan this 12th day of June, 2009.

Per: 
Paul H.A. Korpan, Q.C.
Chair, Discipline Committee



CANADA

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PROVINCE OF SASKATCHEWAN

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TO WIT

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**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF STERLING MCLEAN,
A LAWYER OF REGINA, SASKATCHEWAN**

**AGREED STATEMENT OF FACTS AND ADMISSIONS
BETWEEN STERLING MCLEAN AND
THE LAW SOCIETY OF SASKATCHEWAN**

In relation to the Amended Formal Complaint dated March 26, 2009, attached at Tab 1.

Jurisdiction

1. Sterling McLean (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* (herein after the "Act") as well as the *Rules of the Law Society of Saskatchewan* (the "Rules"). Attached at **Tab 2** is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's status.
2. The Member is currently the subject of an Amended Formal Complaint dated March 26, 2009. The Formal Complaint is comprised of five counts. The Amended Formal Complaint was served upon the Member on March 27, 2009. Proof of service of the Amended Formal Complaint upon the Member is included at Tab 1.

3. The Member acknowledges the jurisdiction of the Hearing Committee appointed in relation to this matter to determine whether the complaints against him are well founded. The Member further acknowledges service of the Formal Complaint and the Notice of Hearing and takes no issue with the constitution of the Hearing Committee.
4. The Member has agreed to enter a guilty plea in relation to all Counts set out in the Amended Formal Complaint.

Particulars of Conduct

5. These proceedings arose as a result of a Law Society investigation in relation to complaints received from two Regina lawyers, two beneficiaries of an Estate on which the Member is the executor and one other client for whom the Member was acting on his real estate purchase. The complaints from fellow lawyers deal with breach of trust conditions. The beneficiary complaints relate to unreasonable delay in administering an estate and misleading one of the beneficiaries in relation to the status of the file. The real estate complaint relates to inaction on the file and delay in relation to the discharge of an incorrectly registered mortgage.

Complaint of RS

6. The complaint of RS was received on December 18, 2007 and is attached at **Tab 3**. R.S.'s correspondence alleges a breach of trust condition by the Member. R.S. referred to a letter from his client HD to the Member dated June 19, 2007, attached at **Tab**
 4. With the June 19, 2007 letter, HD, as vendor of a newly constructed residential home, enclosed various documents required to conclude the purchase and sale including a transfer authorization, power of attorney, partial discharge and a real property report. Those documents were provided to the Member on various trust conditions including the following as trust condition #3:

Respecting the seasonal holdback, prior to disbursement of mortgage funds we will provide your office with an inspection report indicating the amount of this holdback. When the seasonal work is completed, we will also provide you with an inspection report and request release of the holdback. Seasonal holdback money must be completely forwarded to out office once the final inspection is sent to your office.

7. The Member accepted the trust conditions imposed in the June 19, 2007 letter and made use of the documents upon which the trust conditions were imposed.
8. On October 15, 2007, HD provided a letter and final inspection report, attached at **Tab 5** to the Member indicating that the seasonal work, and in fact, all work had been completed in relation to the build and that the property was 100% complete. The letter requested the release by the Member of both the builder's lien holdback of \$18,784.78 and the seasonal holdback in the amount of \$9,547.00 as was contemplated and required in trust condition #3.
9. On November 5 and November 7, 2009 RS wrote to the Member requesting payment of the holdbacks in compliance with the trust conditions. Those letters are attached at **Tab 6**.
10. On November 8, 2007, the Member wrote to RS and paid the builder's lien holdback of \$18,784.54. The letter from the Member to RS dated November 8, 2007 with a copy of the cheque for the builder's lien holdback is attached at **Tab 7**. In that letter, the Member advises that certain deficiencies still existed in relation to the build such as a missing front step stair railing and a malfunctioning jet tub. The Member advises that he had received instructions from his client to retain the \$9,547.00 designated as the seasonal holdback until the deficiencies had been resolved. The deficiencies referenced by the Member in this letter were unrelated to the seasonal work or seasonal holdback. All seasonal work had been completed as was indicated in the inspection report attached at Tab 5.
11. On December 13, 2007 RS wrote to the Member yet again. That letter is attached at **Tab 8**. The letter reiterates that the Member was required, pursuant to trust condition #3, to pay the seasonal holdback upon receipt of a final inspection report. A further demand for release of the seasonal holdback was made. The Member failed to comply with the demand and RS complained to the Law Society on December 18, 2007 by sending the letter attached at Tab 3.
12. The complaint was forwarded to the Member and he provided his response on January 21, 2008. The response is attached at **Tab 9**. In the response the

Member argues that the build was not in fact 100% complete due to the existing deficiencies reference in his letter of November 8, 2007, and that this gave him the right to retain the seasonal holdback, to in effect secure his client's position.

13. On February 1, 2008, RS responded further to the Member's response. In his letter RS confirms that any issues relating to the jet tub and its related deficiencies were peripheral to the issue of the trust condition relating to the seasonal holdback. RS stated that the seasonal holdback could not be converted to some type of security in relation to a separate deficiency. RS confirms that the home was registered in the New Home Warranty Program and that any issues of deficiencies would have to be addressed via that program rather than by refusing to release the seasonal holdback.
14. On February 25, 2008, in excess of 4 months after receiving the final inspection report, after having received repeated demands for payment and after the involvement of the Law Society, the Member paid the seasonal holdback in the amount of \$9,547.00 to RS in compliance with trust condition #3. In the Member's letter, attached at **Tab 10**, he acknowledges that he was not in a position to retain the seasonal holdback pending resolution of claims for deficiencies or warranty work.
15. In this case, the Member chose to ignore the trust condition that he had previously accepted in order to benefit the interests of his own client. The Member attempted to use the seasonal holdback amount as leverage in relation to his client's warranty claim and in so doing, breached trust condition #3 as set out in the letter from HD dated June 19, 2007.

Complaint of the Law Society of Saskatchewan - Breach of Undertaking to WJ

16. During the course of a Law Society investigation of a complaint of delay against WJ, it was determined that the Member in these proceedings was the root cause of that complaint. The Member, representing a vendor, had provided WJ with an undertaking to discharge a federal writ against certain property civically known as Angus Street and Quebec Street. As of May 11, 2005, the subject writ amount was \$25,416.01. The Member had failed

to comply with this undertaking and as such WJ could not complete a subsequent transaction in relation to the property. The Law Society, having identified the apparent breach of undertaking investigated the Member's actions.

17. The Law Society determined that, on June 16, 2006, the Member wrote to WJ and enclosed transfers for Angus Street and Quebec Street. The letter dated June 26, 2006 is attached at **Tab 11**. In that letter the Member undertook as follows:

From Angus Street, we undertake to discharge Bank of Montreal caveat Interest #10733789 and Federal Writ IR# 110271417.

From Quebec Street, we undertake to discharge Federal Writ IR# 110271417.

We undertake not to release the funds provided to us in your letter dated March 8, 2006 until the above interests have been discharged.

18. WJ's letter of March 8, 2006 as referenced above by the Member is attached at **Tab 12**. Under cover of that letter WJ provided the Member with a trust cheque in the amount of \$40,906.01.
19. On September 13, 2007, the Member released \$20,453.00 of the funds provided to him by WJ to the former spouse of the vendor who had been joint owner of the property. The Member had not discharged the federal writ prior to releasing these funds in accordance with his written undertaking of June 26, 2006. The balance remaining in the Member's trust account totaled \$20,670.96. The amount held by the Member was no longer sufficient to discharge the federal writ against the properties.
20. The Member has advised that his client has refused to allow him to pay any amount to the writ holder, Canada Revenue Agency. The Member has followed his client's instructions not to pay the remaining funds to the writ holder despite his undertaking. Attached at **Tab 13** is a chronology of events provided by the Member dated July 11, 2008.
21. Unfortunately, even if the Member did pay the amount to the writ holder, the amount he holds in trust would be insufficient to discharge the writ, due to the

fact that he had already released roughly half of the funds contrary to his undertaking.

22. To date, the Member has failed to resolve the writ issue. No meaningful steps had been taken until February 2009 to have the writs removed from the titles since the original undertaking was provided by the Member. The writ remains on title for both properties. Attached at **Tab 14** are copies of recent land title certificates for Quebec Street and Angus Street, both showing that the writ is still present as of March 24, 2009. The amount of \$20,670.96 remains in the Member's trust account.
23. Both properties have been sold by WJ's client. In the course of those transactions WJ relied upon the undertaking of the Member and provided a similar undertaking relating to the removal of the writ to counsel for the subsequent purchasers. To date, WJ has not been able to fulfill his undertaking as a result of the Member's original breach of undertaking and subsequent inaction.
24. The Member has applied to the Court of Queen's Bench to pay the money held in his trust account into court in exchange for a partial discharge of the writ with respect to both properties. The application was originally returnable March 26 and was adjourned to April 23. If the Member is successful, the writ would be removed from the titles in question and WJ would be in a position to satisfy his trust condition to the subsequent purchasers.

Complaint of JL

25. The complaint of JL arrived at the Law Society on May 8, 2008. The letter received from the complainant is attached at **Tab 15**. The complaint related to a delay of approximately 7 months between the complainant taking possession of his home and receiving a final statement of adjustments. As of the date of the complaint, no final report had been provided by the Member. The complainant also raised issues of failure to communicate. When the complainant did get in touch with the Member, the Member would tell him that the adjustments would be ready "on Friday", and these promises were not fulfilled.



26. The Member provided his response to the JL complaint to the Law Society on May 23, 2008. The response is attached at **Tab 16**. The response outlines a real estate transaction in which the Member represented JL and purchaser as well as the vendor. A mortgage was required to pay a portion of the purchase price. JL applied and was approved for a CIBC mortgage of \$87,851.25. On August 17, 2007 title transferred to JL and the Member registered the CIBC mortgage on title pending advancement of the funds. Unfortunately, when the Member made the request for advancement of the mortgage funds, the Member was advised that the mortgage had been cancelled and that no funds would be forthcoming from the CIBC.
27. A new mortgage was sought out and obtained by JL that new mortgage was registered on the title in priority behind the CIBC mortgage that had been registered on August 17, 2007. On October 15, 2007 the Member obtained a copy of the title showing that the new mortgage from MCAP had registered. That title also showed that the CIBC mortgage remained in the title.
28. The Member highlights in his letter of May 23, 2008 that the CIBC mortgage had yet to be discharged from the mortgage. The Member can produce no evidence that he made any formal request for a discharge of the mortgage from CIBC between October 15, 2007 when he would have certainly known that it was still on title and the date of his May 23, 2008 letter.
29. The Member also admits in his May 23, 2008 letter that an accounting in relation to the transaction should have been provided to JL but that it had not been. In a letter dated May 30, 2008, attached at **Tab 17**, the Member provides a preliminary report to JL and apologized to him for the delay in reporting and stated that there was no good reason for the delay. The Member stated again that the CIBC mortgage remained on the title.
30. The Member however did not tend to obtaining a discharge in relation to the CIBC mortgage. Donna Sigmeth of the Law Society had asked the Member what efforts he had made to secure a discharge in relation to the CIBC mortgage. Donna Sigmeth's made this request by way of letter dated July 24, 2008, attached at **Tab 18**. No response was forthcoming. Further requests were made of the Member to provide this information on November 25, 2008.

31. The Member provided the requested documents to the Law Society on February 5, 2009. Those documents showed that no request was forwarded to CIBC seeking a discharge of the CIBC mortgage until September 17, 2008. A subsequent letter was sent to the CIBC on November 10, 2007. Both letters sent by the Member to the CIBC are attached at **Tab 19**. Confirmation of discharge of the mortgage was received by the Member from the CIBC on January 14, 2009. The actual discharge of the mortgage occurred on December 19, 2008. Attached at **Tab 20** is a copy of the letter written to JL confirming the discharge. With that, the real estate file came to a close approximately 17 months after the Member's client took possession of the property.
32. The Complainant did not suffer any monetary loss as a result of the delay. After the failed CIBC mortgage he was successful in obtaining the MCAP mortgage. Just after the CIBC mortgage was discharged in December 2008 the Complainant refinanced yet again with a new mortgage being registered on December 30, 2008.

Complaint of the Beneficiaries of the Estate of DD

33. On May 27, 2008 the Law Society received a complaint from LP, a beneficiary of the Estate of DD. The Member was acting as Executor for the Estate and also as the solicitor representing the Estate. The complaint letter of LP is attached at **Tab 21**.
34. As of the date of the complaint, nine months had passed since the date of DD's death. LP advised in her letter that she had spoken to the Member on March 24, 2008 at which time he told her that "documentation" would be forwarded to the court the following Tuesday. At that time he also promised to provide a list of DD's assets to LP. Follow up phone calls and emails dated March 26, May 11 and May 20, 2008 were not returned by the Member.
35. The Member provided a response to the LP complaint on June 9, 2008. The Response is attached at **Tab 22**. In his response the Member raises the allegation that the beneficiaries had had a family feud. The beneficiaries have denied this.

36. On or about February 22 2008 the Member met with KD, another beneficiary to the DD Estate to discuss land values. The Member told KD that "things would be wrapped up by Friday" on more than one occasion. No results were ever forthcoming. The probate of the estate had yet to be completed in the spring of 2008.

37. Probate was ultimately applied for on Friday July 11, 2009. Probate was granted thereafter on July 18, 2009. 2009  2009 

38. The business of the estate has not been completed in a timely fashion. The delay of approximately one year before letters probate was obtained is not the only issue concerning the beneficiaries. The Member also failed to pay the funeral expenses of DD until March 6, 2009. The account for funeral services in the original amount of \$5,431.71 remained unpaid for approximately 19 months. Interest accrued at a rate of 24% per annum in relation to this account and totaled \$2,326.11. The March 6, 2009 payment only did not cover the entire account. Attached at **Tab 23** is a letter from Paragon Funeral Services dated March 6, 2009 outlining the issues with the account. In that letter Paragon Funeral Services refers to occasions where they had phone communications with the Member which included numerous phone calls including on November 12, 2007, February 13, 2008 and May 28, 2008. An account reminder was also sent to the Member on May 28, 2008 and is attached at **Tab 24**.

39. Despite these frequent reminders, the Member advised KD in a letter dated March 3, 2009, attached at **Tab 25**, that he had understood that the account had been paid. In that letter the Member also seeks the return of a \$10,000.00 distribution that he has previously made to KD. The Member wrote another letter to KD on March 16, 2009, attached at **Tab 26**, indicating that he was not aware of the outstanding account. He confirms in this letter that Paragon was prepared to sue unless the outstanding interest was not paid within 15 days. The Member concedes in this letter that he should have been in closer contact with KD in relation to the payment of this account. No explanation is provided in relation to the Member's disregard for the frequent account reminders that the Member from the funeral service provider.

40. As of the date of this proceeding, the Estate of DD has not yet been finalized.

Discipline History

41. This is not the Member's first discipline proceeding before the Law Society. On June 14, 2006 the benchers of the Law Society found the Member guilty of conduct unbecoming in that he failed to provide an acceptable level of service to clients and that he failed to respond to a fellow member. That finding of conduct unbecoming related to 3 different files. The subject matter of the June 14, 2006 proceeding included problems similar to those set out in the current proceeding with this Member failing honor commitments to discharge interests from property and failure to provide adequate levels of service in estate matters. A digest of the decision is attached at **Tab 27**.
42. During the June 14, 2006 proceeding the Member was also found guilty of conduct unbecoming for breaching an undertaking provided to another member by failing to comply within a reasonable time.

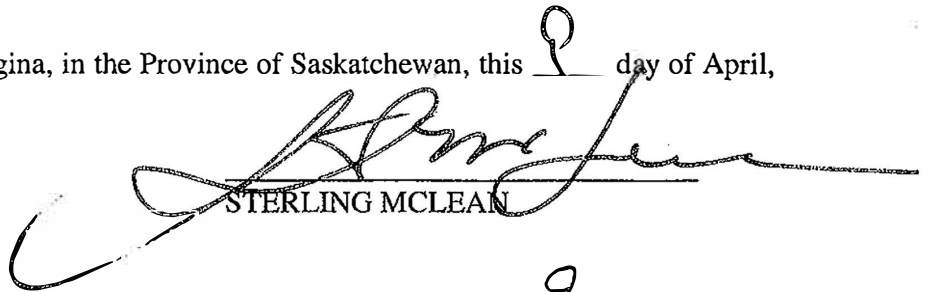
Summary

43. To summarize, the foundations for the charges of conduct unbecoming set out in the Amended Formal Complaint are as follows:
- a. In relation to the RS complaint, the Member accepted trust conditions imposed by a builder in a letter dated June 19, 2007 and made use of the documents upon which the trust conditions were imposed;
 - b. The Member later failed to comply with trust condition #3 set out in the letter dated June 19, 2007, by refusing to release seasonal holdback money to the builder upon receipt of a final inspection report;
 - c. The Member breached the trust condition and held the seasonal holdback funds as security for unrelated warranty work relating to the build;
 - d. The Member paid the seasonal holdback money to the builder only after repeated demands by the builder's counsel and only after the Law Society became involved;

- e. In relation to the complaint of WJ, the Member failed to fulfill a written undertaking provided on June 16, 2006 to secure a discharge of writ from titles to two properties being sold by his client to WJ's client as purchaser;
- f. The Member had undertaken to not release the purchase funds until the writ had been discharged in relation to the properties in question;
- g. Contrary to his undertaking the Member released \$20,453.00 of the funds to the vendor's former spouse on September 13, 2006 without having first discharged the writ;
- h. The writ remained on both titles and the Member's client refused to have the remaining funds applied to the writ;
- i. Even if the Member had been able to get instructions from his client he would not have been able to fulfill the writ as the amount of money remaining from the proceeds of the sale was less than the amount of the writ;
- j. The writ remains on both titles to this date, however the Member has an application pending on the Court of Queen's Bench in an effort to have the writs discharged;
- k. In relation to the complaint of JL, the Member failed to rectify an anomaly arising out of a failed mortgage transaction;
- l. On August 17, 2007 JL received possession of property. He intended to fund the purchase with a CIBC mortgage and the mortgage was in fact registered on title prior to his taking possession of the property;
- m. The mortgage company later cancelled the mortgage deal and no money was advanced in relation to the deal. A new mortgage was obtained and the registered on the title;
- n. The member failed to make any efforts to have the CIBC mortgage removed from the title until September 2008, over a year after the mortgage transaction collapsed;

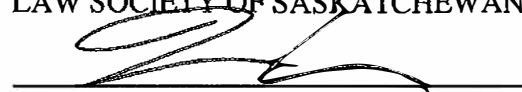
- o. No reporting was provided to the purchaser until May 30, 2008 when a preliminary report was made, and even then this report was incomplete due to the presence of the CIBC mortgage on title;
- p. In December 2008, roughly 3 months after the Member sent his first request for discharge letter to the CIBC, the mortgage was removed from the title;
- q. In January 2009, the Member concluded the real estate file, approximately 17 months after it began;
- r. The complaint of the beneficiaries of the Estate of DD relates primarily to the delay in the Member dealing with estate business;
- s. The Member, in his role as both executor and estate solicitor did not apply for probate on the uncontested estate for approximately 1 year after the date of death;
- t. The Member failed to deal with major estate expenses. The bill for the funeral service remained unpaid for approximately 19 months and during that time \$2,326.11 in interest accrued in relation to the original funeral cost of \$5,431.71;
- u. The Member received various account reminders by way of letter and telephone call from the funeral service provider and has no explanation for his failure to pay the account;
- v. To this date, the estate remains unresolved
- w. In relation to the allegation of misleading KD in relation to the status of the estate file, the Member on a number of occasions left KD with the impression that the matter would be concluded in short order, and on more than one occasion assured KD to the effect that "the matter would be wrapped up by next Friday";
- x. The Member did not live up to his promises; and
- y. The Member was found guilty of conduct unbecoming a lawyer on facts similar to those in the current case in 2006 in relation to 4 separate files.

DATED at the City of Regina, in the Province of Saskatchewan, this 9 day of April, 2009.


STERLING MCLEAN

DATED at the City of Regina, in the Province of Saskatchewan, this 9 day of April, 2009.

LAW SOCIETY OF SASKATCHEWAN


TIMOTHY F. HUBER, Counsel
on behalf of the Investigation Committee