IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF EVATT FRANCIS ANTHONY MERCHANT

RULING BY THE DISCIPLINE HEARING COMMITTEE
ON COUNTS ONE AND TWO

PUBLICATION NOTE

The Law Society of Saskatchewan has the responsibility for investigating complaints of lawyer conduct. These investigations often require clients to provide confidential information about communications with their lawyer. Communications between a lawyer and client must be in the utmost confidence and such communications are protected by solicitor-client privilege. The Supreme Court of Canada has commented that solicitor-client privilege is a right that must be as close to absolute as possible. The governing legislation for the Law Society of Saskatchewan (*The Legal Profession Act*) provides a limited exception to solicitor-client privilege for the purposes of investigating and disciplining lawyers. *The Legal Profession Act* also provides protection for clients to ensure that communications with lawyers that are subject to solicitor-client privilege remain confidential to the greatest extent possible. The entitlement to solicitor-client privilege belongs to the client rather than the lawyer and the maintenance of privilege is done solely in the interests of protecting the client's rights.

In the current matter, much of the evidence called at the hearing was subject to solicitor-client privilege. As such the hearing in this matter was closed to the public at the request of the client. In order to maintain the solicitor-client privilege that exists in relation to the evidence called at the hearing, the client has requested that the full decision in this matter not be published in its original form. The Law Society of Saskatchewan, in keeping with the requirements of *The Legal Profession Act*, is therefore publishing only a brief a summary of the findings of the Hearing Committee to prevent, to the greatest extent possible, any disclosure of information that is subject to solicitor-client privilege.

CASE SUMMARY

Evatt Francis Anthony Merchant Q.C. (the Member) faced a Complaint alleging two Counts of conduct unbecoming a lawyer ("the Complaint") in that he did:

1. Breach an Order of the Court of Queen's Bench that required his firm to pay certain settlement proceeds due to his client, "Client X", into court pending determination of a related family property issue;

   Reference Chapter XIII of the *Code of Professional Conduct*

2. Counsel and/or assist his client, "Client X", to act in defiance of an Order of the Court of Queen's Bench;

   Reference Chapter XIII of the *Code of Professional Conduct*

The allegations against the Member arose as a result of his actions in connection with a Court Order that he, his firm, Merchant Law Group, and his client, Client X, became bound by in the context of a family law litigation matter. The relevant portions of the Court Order are as follows:

> **IT IS HEREBY ORDERED that in the event the Respondent, [Client X], receives a settlement in his law suit […] the first $50,000.00, after payment of reasonable solicitor fees and disbursements, shall be paid into Court so that the parties might speak to the distribution of same.**
>
> **IT IS HEREBY FURTHER ORDERED that the Respondent's counsel, the Merchant Law Group, or any new counsel shall pay the settlement proceeds into Court, in accordance with the foregoing.**

The Court Order was appealed by the Member on behalf of his firm and client but the automatic stay from enforcement had been lifted by opposing counsel and the Court Order was therefore in full force and effect at all relevant times.

The Hearing Committee found the Member guilty on Counts one and two of the Complaint.

The Hearing Committee found the Member "wilfully breached" the Court Order. Some of the findings made by the Hearing Committee are as follows:

"…[T]he Member proceeded purposely with full knowledge of what he was doing. He was the directing mind and will of the events that transpired…"

…

"In this case we find that the Member formulated and eventually executed a plan that was intended to thwart the [Court] Order. The Member's actions were carried out without regard to the requirements of acceptable practice. The Member acted in a surreptitious manner without regard for the [Court] Order."

…

"Clearly the Member abandoned his duty as an officer of the court and the Member breached Chapter XIII of the Code of Professional Conduct…"

…

"In his evidence and in his argument the Member repeatedly attempted to justify his actions by citing his duty of loyalty to his client as a justification for his actions and omissions. When the Member felt it necessary to breach the [Court] Order in order to fulfill his obligations to his client he made a patently bad decision."

…

"None of the Member's actions have done anything to inspire the public's confidence in the administration of justice or the legal profession. The Member's desire to "be right" on the appeal of the [Court] Order and his desire to circumvent it drove him to act as he did and in the final analysis he acted to protect his own financial and other interests to the detriment of many."

…

"For the reasons set forth above we are of the view that the Member is guilty on Counts 1 and 2."

CANADA)
PROVINCE OF SASKATCHEWAN)
TO WIT)

IN THE MATTER OF *THE LEGAL PROFESSION ACT*, 1990

AND IN THE MATTER OF EVATT FRANCIS ANTHONY MERCHANT Q.C.,

A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE DISCIPLINE COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. On August 2nd and 3rd, 2011, the Hearing Committee of the Law Society of Saskatchewan held a hearing with respect to two counts of conduct unbecoming a lawyer against Evatt Francis Anthony Merchant (the "Member"). The Committee was comprised of Evert van Olst, Reg Watson, Q.C. and Lorne Mysko. The Hearing Committee delivered written reasons for its decision on December 12, 2011 and found that the Member was guilty of conduct unbecoming a lawyer in relation to both of these counts.

2. The Discipline Committee (the "Committee") convened a hearing on sentence on April 10, 2012 in Regina. At the conclusion of the hearing, the Committee indicated its intention to reserve its decision on sentence and render written reasons for the disposition crafted.

BACKGROUND

3. The formal complaints, the evidence, and the findings with respect to the complaints are set out in the written reasons of the Hearing Committee, which are attached as an appendix to this sentencing decision.

4. Count 1, in relation to which the Member was found guilty, alleged that he engaged in conduct unbecoming a lawyer by breaching a court order of Mr. Justice Smith dated June 4, 2003, that required his firm to pay certain settlement proceeds due to his client, M.H., into court pending determination of a related family property issue.

5. Count 2, in relation to which the Member was found guilty, alleged that he engaged in conduct unbecoming a lawyer by counselling or assisting his client, M.H., to act in defiance of a court order of Mr. Justice Smith dated June 4, 2003.

SUBMISSIONS ON SENTENCE

6. Counsel for the Investigation Committee formulated the lower end of the range of penalty for the Member's conduct by using the limited number of publicly available cases involving similar conduct by lawyers. Utilizing these cases, counsel for the Investigation Committee submitted that an appropriate range of penalty for the Member's conduct starts with a four month suspension. Although he cited a number of cases to the Discipline Committee involving a lawyer breaching a court order or counselling a client's breach of a court order, the penalty imposed in these cases ranged from a fine and reprimand to a suspension of two months (see *Law Society of Alberta v. Nielson* [1994] L.S.D.D. No. 215, *Law Society of British Columbia v. Saini* [2006] L.S.D.D. No. 160, *Law Society of British Columbia v. Scholz* [2008] L.S.D.D. No. 26, *Law Society of Upper Canada v. Sussman* [1995] L.S.D.D. No. 17, *Law Society of Alberta v. MacSween* [2004] L.S.D.D. No. 61, *Law Society of British Columbia v. Barron* [1997] L.S.D.D. No. 141, and *Law Society of Saskatchewan v. Merchant* #06-06). Counsel for the

Investigation Committee noted that in all of the above cited cases, with the exception of *Merchant*, the members in question had no prior disciplinary record. Moreover, the only cited case involving calculated conduct was *Sussman* and the panel in that case explicitly stated that had it not been for Sussman's advanced age and his lengthy career the penalty meted out of a suspension for 1 month would have been "far more severe". In justifying the lower end of the range at four months, counsel for the Investigation Committee, in his oral submissions, stated as follows: "So the presence of an additional breach of court order [engaged in by the Member], the presence of various aggravating factors, in that it [the Member's conduct] was calculated and surreptitious, my rationale is that at least doubled the maximum presented in the cases available, hence the four-month start to the range." (Transcript, p.93.)

7. In support of this doubling of suspension time in cases involving calculated and surreptitious behaviour, counsel for the Investigation Committee cited *Law Society of Saskatchewan v. Miller* #00-1. In this case, the member was found in breach of the *Code of Professional Conduct*, which prohibited a member from drafting a will in which he or she was a beneficiary unless the testator was a family member. The member was suspended for three months for this conduct. However, upon the client's death, the member applied for probate at a judicial centre other than the one in which he and the client had resided and he did not include any indication in the application for probate that he was a lawyer or that he had prepared the will. This surreptitious and calculated plan resulted in a further six month consecutive suspension for the member.

8. Counsel for the Investigation Committee noted a number of other specific aggravating factors at play that, in his view, were sufficient to place the appropriate sanction in this case above the range established by the cited cases. Chief among these additional aggravating factors was the fact that the Member chose to let his client remain in harm's way on two contempt applications where his client could have faced jail time as a result of the Member's conduct. In addition, counsel submitted that the Member's conduct defeated the rights of the

complainant V.W. who would have had the right to fight for arrears of child support but for the Member's actions.

9. Counsel for the Investigation Committee utilized a 'first principles' approach in support of his submission that the upper end of the range for the Member's conduct was disbarment. In paragraph 9 of counsel's written submissions, he stated as follows:

> Disbarment is an appropriate sanction option if a lawyer's conduct is such that they can no longer be trusted. In this case, the Member has been found guilty of breaching a court order, not once, but twice (prior conviction). The manner of breach in the current case was found to be wilful and intentional and part of a scheme orchestrated by the Member. The interests of both his client and the opposing party were placed at risk. In these circumstances, the Member's trustworthiness, and his ability to continue on as a member of the law society must come under scrutiny.

In his oral submissions, counsel for the Investigation Committee argued that disbarment should be considered an appropriate sanction where the risk to the public is too great should a lawyer be allowed to continue to practice law.

10. Counsel for the Member also articulated a range for the Member's conduct but his range differed greatly from that articulated by counsel for the Investigation Committee. Counsel for the Member submitted that the appropriate range in this case was a fine or reprimand at the low end to a suspension of less than fourteen days at the high end. Counsel for the Member buttressed this submission not by pointing to many new cases dealing with lawyers who breached or counselled their clients to breach court orders but by directing the Committee to what he characterized as a "confluence of unique circumstances" surrounding this case.

11. Chief among these stated unique circumstances was the 81-month period from the time V.W. formally complained to the Law Society about the Member's conduct on November 1, 2004 to the time the Member's hearing was conducted on August 2 and 3, 2011. Counsel for the Member noted that the impugned conduct occurred over a short period of time,

culminating on July 13, 2004. His submission was that "this inordinate delay serves to mitigate the penalty."

12. Other factors counsel for the Member relied upon as significant in the determination of his range of sentence included the following: the Member's cooperation with the Law Society investigation into this matter, [REDACTED], the staleness and lack of relevance of three of the Member's previous four findings of guilt for conduct unbecoming a lawyer, the Member's fourth finding of guilt for conduct unbecoming a lawyer occurring after his impugned conduct in this case, the manner in which the Law Society chose to publish the findings of the Hearing Committee, and the Member's record of great accomplishment.

DECISION

13. It has been noted that, in its previous decisions, the Discipline Committee has been guided by the decisions of Benchers in other provinces (see *McLean v. Law Society of Saskatchewan* 2012 SKCA 7 at para 49). Increased mobility of members between the various Law Societies has reinforced the need to develop national standards of discipline. As stated at para 46 of the Discipline Committee's decision in *Law Society of Saskatchewan v. McLean* #09-03, "To this end, the collective decisions of all societies constitute a comprehensive jurisprudential footing for guiding future decisions of the Benchers in all provinces." Indeed, it should be noted that, during their oral submissions, both counsel for the Investigation Committee and counsel for the Member agreed with this approach and exhorted the Discipline Committee to look at sentences meted out in Saskatchewan as well as other Canadian provinces.

14. It appears that reported instances of lawyers breaching court orders or counselling their clients to breach court orders are, fortunately, quite rare in this country. Counsel agreed that, because of this paucity of cases, the factual scenarios to compare to this current case are somewhat limited. Nevertheless, the dispositions handed down in the cases range from

reprimands and fines to a suspension of two months. The Committee was somewhat surprised that the range of penalty for breach of a court order by an officer of the court was so low given the damage that such misconduct inflicts on the profession and the legal system. The only Saskatchewan case that deals with a member breaching a court order is *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 [hereinafter known as the *B.P.* matter], in which the Court of Appeal affirmed a decision of the Discipline Committee to impose a two-week suspension order.

15. The Member's impugned conduct, which gave rise to this two-week suspension order, occurred in July and August of 2003 and the resulting complaint was lodged in or about September of 2003. A Hearing Committee found the complaint to be well founded on January 30, 2006. The conduct of the Member that forms the subject matter of the within sentencing occurred between April 30, 2003 and July 14, 2004. As a result, the Member's conviction in relation to the matter giving rise to the two-week suspension order occurred after he engaged in the conduct that forms the subject matter of the within sentencing of the Member.

16. Counsel for the Member contended that the *B.P.* matter should not be considered a prior offence in the context of the within sentencing of the Member. Counsel relied upon *R. v. Skolnick*, [1982] 2 S.C.R. 47, a criminal law case, for the proposition that before a more severe penalty can be imposed for a second offence, the second offence must have been committed after the first conviction. In *Lambert v. College of Physicians and Surgeons of Saskatchewan* [1991] S.J. No. 108, the Saskatchewan Court of Queen's Bench held that, in the context of disciplinary proceedings, it may also be inappropriate to impose a higher penalty for a second offence committed before the conviction for a first offence has been entered.

17. However counsel for the Investigation Committee correctly observed that post-offence convictions, especially for similar offences, can be treated as an indicator of the offender's character and thus can be employed to negate any mitigating circumstances and displace any presumption that the offender might be a good candidate for a rehabilitative sentence. Indeed,

this use of post-offence convictions has been approved by appellate courts, notwithstanding the rule that such convictions are not to be treated as a prior record or as an aggravating factor on sentence (see, for example, *R. v. Johnson*, [1989] B.C.J. No. 1542 (B.C.C.A.)).

18. The Member has been found guilty of conduct unbecoming a lawyer on three other occasions and all of these convictions predate the conduct giving rise to the within sentencing. On December 12, 1986, the Member was found to have wilfully interfered in the lawful use of property and he was fined $1,000.00. He was found to have failed to reply to correspondence from the Law Society on September 6, 1989 and he was fined $500.00. Finally, on November 12, 2000, the Member sent correspondence reasonably capable of misleading the recipient. As a result, the Member was reprimanded and fined $5,000.00.

19. The use that should be made of this disciplinary history was hotly contested by the parties. Counsel for the Investigation Committee submitted that this record demonstrates that the Member is a recidivist as the Member has been found guilty of conduct unbecoming a lawyer on five separate occasions. It was further contended that this record does not inspire confidence that the Member is worthy of the level of trust required of a lawyer and hence the sanction of disbarment is a credible option in relation to this matter. Counsel for the Member asserted that the significant gap between offences demonstrates that the Member poses little, if any, risk to the public and therefore disbarment should not be considered in this case. Moreover, counsel for the Member contended that the 1986, 1989, and 2000 convictions are too distant in time from the events giving rise to the within sentencing to be given any weight in the sentencing process.

20. The gap between the Member's last offences, which are offences that are the subject matter of the within sentencing, and the present day is significant. This gap constitutes probative evidence suggesting that the Member does not so lack in trustworthiness or otherwise pose a risk to the public as to make disbarment an option.

21. Certain convictions in the Member's discipline history have more relevance to the within sentencing than other convictions. Counsel for the Member is correct that the 1986 and 1989 convictions are too stale to be given any significant weight in the sentencing process. However, the 2000 conviction for conduct unbecoming a lawyer is only 3-4 years before the conduct that gives rise to the within sentencing of the Member. Consequently, the 2000 conviction should be given some weight in the sentencing process, albeit it should be noted that the conduct that gave rise to this conviction was significantly different and less serious than the conduct that gives rise to the within sentencing.

22. Counsel for the Member submits that the lengthy delay from the time the formal complaint concerning the Member's conduct was received by the Law Society to the time the Member's hearing was conducted should serve to mitigate the penalty imposed. In support of this submission, counsel for the Member relies upon *Wachtler v. College of Physicians & Surgeons (Alberta)*, 2009 ABCA 130. In this case, the Alberta Court of Appeal significantly reduced what would otherwise be a fit sentence for a family physician found guilty of unbecoming conduct based on an unexplained lengthy delay from the time the complaint was lodged to the time the hearing was conducted.

23. In the case of the matter giving rise to the within sentencing, there is no lengthy period of unexplained delay. Most of the delay in this case is attributable to the legal battle that ensued when the Law Society sought the Member's complete file for review and the Member and his client opposed the application based on concerns pertaining to solicitor and client privilege. Although the Member and his client were successful in opposing the application at the Court of Queen's Bench, the Law Society successfully appealed to the Saskatchewan Court of Appeal and obtained access to the complete file. A subsequent application for leave to appeal to the Supreme Court of Canada by the Member and his client was ultimately denied. In the end, the Law Society obtained compelling and important evidence of the Member's misconduct as a result of this litigation process. It is important to note that in *Blencoe v. British*

Columbia (Human Rights Commission) [2000] 2 S.C.R. 307 at para 121-122, the Supreme Court of Canada stated that,

> To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate . . . the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings[.]

In terms of the case giving rise to the within sentencing, a determination of the various rights at stake required that a lengthy legal process ensue.

24. Interestingly, counsel for the Member did not attribute any delay to the Law Society but simply suggested that the very fact of the delay should significantly mitigate the penalty imposed in this case. In *Christie v. Law Society of British Columbia* [2010] B.C.J. No. 687, the B.C.C.A. confirmed that *Wachtler* supports the proposition that unreasonable delay on behalf of the regulator may be considered in mitigation of penalty but, as in *Christie*, there is no evidence of unreasonable delay in the case giving rise to the within sentencing. Nevertheless there is a lengthy delay here and the Saskatchewan Court of Appeal in *McLean* adverted to the possibility of taking into account such delays where the lapse of time has, among other things, resulted in the member suffering significant emotional consequences. Here it can be inferred that the Member suffered some emotional angst due to the uncertainty of whether or not he would be disciplined by his professional body and this angst was heightened as a result of the length of time it took for the matter to finally be resolved. Consequently it is appropriate to take into account the lengthy delay in mitigation of penalty. However the appropriate weight to give this mitigating factor is substantially less than would be the case if there was unexplained or otherwise unreasonable delay on behalf of the regulator.

25. There are a number of other mitigating factors raised by counsel for the Member that must be taken into account in this sentencing. For example, the Member was cooperative with the Law Society investigation, at least up to the point where he felt his duty of confidentiality to his client prevented him from providing the information sought. [REDACTED]. Finally, it should be acknowledged that the Member is a lawyer of some acknowledgement and stature and he

has engaged in considerable service to both the legal and broader community especially through his philanthropic efforts.

26. Nevertheless, counsel for the Member asked the Committee to take into account a number of mitigating factors that would be inappropriate to consider in this sentencing process. For instance, counsel for the Member submitted that the Member's conduct in this matter was not deliberate and dishonest, nor intended to deceive. Rather, it was asserted that the Member held a sincere belief that his actions were proper. Yet the Hearing Committee determined that the Member

> [F]ormulated and eventually executed a plan that was intended to thwart the Smith order. The Member's actions were carried out without regard to the requirements of acceptable practice. The Member acted in a surreptitious manner without regard for the Smith Order. (Hearing Committee decision para 90).

The Hearing Committee found that the Member "executed a plan that was intended to breach the Smith Order." (Hearing Committee decision paras 74 and 65). The Hearing Committee also held that the Member "proceeded purposely with full knowledge of what he was doing." (Hearing Committee decision para 73.) Finally, the Hearing Committee determined that the Member "wilfully breached the Smith Order." (Hearing Committee decision para 84). Quite simply, the submission of counsel for the Member cannot stand together with the above noted findings of fact of the Hearing Committee.

27. Counsel for the Member also pointed out that if the matter giving rise to the within sentencing had proceeded in a timely fashion, it would have been considered by a Hearing Committee and the Discipline Committee at the same time as the *B.P.* matter. Counsel for the Member further contended that the fact that these charges were not adjudicated at the same time prejudiced the Member as it deprived him from arguing that concurrent sentencing was warranted. However, concurrent sentences are generally warranted only where the complaints could be said to be part of the same transaction or endeavor or they could be characterized as having a reasonably close nexus. The *B.P.* matter and the matter giving rise to the within sentencing could not be characterized in this fashion.

28. It is also asserted by counsel for the Member that the Member has been treated unfairly because of the manner in which the Law Society chose to publish the findings of the Hearing Committee. However it is readily apparent that the Law Society chose to publish the findings of the Hearing Committee in a fashion that protected the solicitor-client privilege while simultaneously ensuring that the public received factually accurate information about this case. Consequently, this submission by counsel for the Member is rejected.

29. Counsel for the Member submitted that it is important to note that the Member did not act alone and that he consulted with others in his firm as to the course of action to be taken in this matter. Nevertheless it is difficult to give effect to this submission because the Hearing Committee also found as a fact that the Member was the "directing mind and will of the events" (Hearing Committee decision para 73) that form the subject matter of the within sentencing.

30. A number of key aggravating factors in the present case serve to increase the range of sanction from what might typically be appropriate. First, the Member in the current matter acted to breach the court order in a calculated manner (Hearing Committee decision para 90). Second, the breach of the court order in this case had the potential to irreversibly and unfairly dispose of money held pursuant to the order for the benefit of an individual who was claiming arrears of child support (Hearing Committee decision para 95). Third, the Member chose to let his client remain in harm's way on two contempt applications instead of revealing the true nature of the transactions that had occurred. Had the Member made this disclosure, contempt applications would likely only have been brought against the Member (Hearing Committee decision para 95).

31. A number of mitigating circumstances present in many of the publicly available cases involving similar conduct by lawyers are absent in this case. For example, the Member cannot claim that he lacks a discipline history and that therefore his misconduct is out of character and

deserving of less of a sanction than would normally be the case. The Member also cannot claim that he has acknowledged his misconduct in terms of the events giving rise to the within sentencing and that his demonstrated remorse makes him an ideal candidate for a rehabilitative "discount" in sentencing.

32. The primary consideration in all Law Society discipline proceedings is the protection of the public. Closely related to this consideration is the need to maintain the public's confidence in the integrity of the profession and the ability of the profession to govern its own members. In order to restore public confidence the penalty imposed must reflect the unique constellation of aggravating and mitigating circumstances presented by this case.

ORDER

33. Given the range of penalty articulated in the publicly available cases involving lawyers breaching court orders or counselling clients to breach court orders and appropriately weighing the aggravating and mitigating factors in this case, the Committee orders that the Member be suspended for a period of three months in relation to count 1 and three months in relation to count 2. Because both counts are properly characterized as being part of the same transaction, the sentences are ordered to run concurrently to one another. In addition, it is ordered that the Member pay the costs of this proceeding in the amount of $28,869.30 to the Law Society of Saskatchewan by September 30, 2012 or such further period as may be allowed by the Chair of Discipline. Finally, it is ordered that the Member's suspension shall commence on a date determined by the Chair of Discipline after hearing from counsel for the Member and counsel for the Investigation Committee.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 1st day of June, 2012.

Sanjeev Anand, Q.C.
Chair, Discipline Committee