



The Law Society of Saskatchewan

JOHN BILLESBERGER

HEARING DATE: November 18, 2016

DECISION DATE: January 17, 2017

Law Society of Saskatchewan v. Billesberger, 2017 SKLSS 1

**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF JOHN BILLESBERGER,
A LAWYER OF ESTEVAN, SASKATCHEWAN**

**DECISION OF THE HEARING COMMITTEE FOR THE
LAW SOCIETY OF SASKATCHEWAN**

1. The Hearing in this matter proceeded on November 18, 2016, by conference call with Hearing Committee members Judy McCuskee, W.J. Davern, and Perry Erhardt, Q.C. (Chair) present on the call. At the Hearing, John Billesberger, the Member, represented himself and Timothy Huber represented the Law Society of Saskatchewan (LSS).
2. The Hearing was convened to consider a Formal Complaint set out by the Conduct Investigation Committee of the LSS against Mr. Billesberger, which comprised a single count. The LSS complaint alleged that Mr. Billesberger is guilty of conduct unbecoming a lawyer in that he did, through his associate, Billesberger Law Professional Corporation, enter into a debtor/creditor relationship with his client, D.G., without ensuring that the client received independent legal advice.
3. At the outset of the Hearing, both Mr. Billesberger and Mr. Huber indicated that there were neither any objections to the composition of the Hearing Committee nor preliminary motions to be presented. The Hearing proceeded and Mr. Huber filed two documents, which were accepted by the Hearing Committee: namely, Notice of Hearing with Proof of Service - Exhibit P-1; and, Agreed Statement of Facts and Admissions – Exhibit P-2.
4. Although the matter proceeded on the basis of the Agreed Statement of Facts and Admissions, Mr. Billesberger did not enter a plea of guilty to the single count set out in the Formal Complaint.
5. The salient facts from the Agreed Statement of Facts and Admissions are the following:

- a) The Member was retained by his client, D. G., with respect to a contested foreclosure proceeding against a financial institution. According to the Member, his client was unable to secure refinancing with another bank, credit union, or family member. D.G.'s options were limited and he was in reasonably dire circumstances.
- b) D.G. got behind in making mortgage payments owing to the financial institution. He suffered a heart attack on September 24, 2010. He was unable to work. He filed an affidavit with the Court sworn February 20, 2015. The affidavit also stated he was still not fully recovered. He was 56 years of age at the time and a self-employed carpenter.
- c) The mortgage D.G. had with the financial institution had an interest rate of 11% calculated semi-annually. The monthly payments of principal and interest were \$422.92.
- d) In a letter from the Member to the Law Society dated March 2, 2016 the Member stated:
 - a. "I encouraged him to refinance with another bank or credit union. He told me he went to the Affinity Credit Union in Lampman to get financing, but was not accepted. I recall speaking to Colleen Leslie, the loans officer, and she confirmed he had applied for the loan."
- e) The foreclosure action court file shows that the Member filed a Statement of Defence for D.G. A Chambers application was heard before Madame Justice Gunn on March 2, 2015. A further application was heard before Mr. Justice Brown on May 25, 2015. The Member represented D.G. on both Chamber applications and prepared and filed a Brief of Law on behalf of D.G.
- f) The appraisal filed in the foreclosure action valued D.G.'s house at \$91,250.00. A payout statement was provided by the financial institution's lawyer on April 12, 2015.
- g) The Member has not charged D.G. any legal fees in this matter and has not charged D.G. any legal fees preparing and registering the mortgage in favour of the member. The Member has undertaken that he will not be charging legal fees to D.G.
- h) The member decided to lend his client the sum of \$11,500.00 to facilitate the payment of the outstanding principal, interest, discharge fee, and taxes. The Member prepared a mortgage as security for the loan. The interest rate charge pursuant to the Mortgage term was 2.5%, with payments of \$150.00 per month, commencing October 1, 2015 up to and including September 1, 2020. The mortgage was entered between D.G. and Billesberger Law Professional Corporation, the Member's professional corporation.
- i) The mortgage was signed before the Member on September 18, 2015.

- j) No independent legal advice was obtained for D.G. nor did the Member recommend that the client receive independent legal advice. No waiver of independent legal advice, written or otherwise, was obtained from D.G. by the Member.
- k) The mortgage remains outstanding.
- l) D.G. has not complained about the matter. Rather, the complaint against the Member was initiated by the Law Society.

6. The Hearing Committee entertained submissions from each of Mr. Huber and Mr. Billesberger.

7. Mr. Huber directed the Hearing Committee's attention to the admission of the Member that, through his professional corporation, he loaned money to a client, a mortgage was given to the corporation as security for the loan, and the client neither received independent legal advice or representation nor waived independent legal advice on the transaction. In short, Mr. Huber submitted that the Member had acted contrary to the Code of Professional Conduct (the "Code") and that the charge was in the nature of a strict liability offence, which did not require that moral turpitude be proven.

8. Mr. Huber submitted that despite the apparent reasonable, even perhaps favourable, mortgage terms for the client and the good intentions of Mr. Billesberger to assist a client in need, such good intentions did not constitute a defence to the charge. Despite no appearance of impropriety in this particular transaction, the Member's client was entirely vulnerable in the circumstances and in a position that he might have accepted any mortgage terms to avoid losing his property at the time in question. The relevant Code provisions and rules are designed to prevent any appearance of impropriety and require that transactions of a creditor and debtor nature between a lawyer and client be vetted by independent counsel. While the Member did not appear to have taken advantage of his client, he ignored the safeguards that are established to protect clients and ensure that they go outside of the lawyer's firm in such circumstances.

9. Mr. Billesberger did not dispute the events set out in the Agreed Statement of Facts and Admissions. He indicated that he was not aware of the requirement that a client must be referred for independent legal advice on the lending transaction when it was entered into between his client and his professional corporation. Mr. Billesberger referred the Committee to the borrowing terms that were provided to his client in the face of imminent loss of his property through foreclosure proceedings. The Member also indicated that he informed his client of the conflict of interest arising by his lending of money to his client, and his client consented to the borrowing transaction being fully aware, but despite the conflict.

10. The balance of the Member's submissions were focused on distinguishing the facts of the instant case from those in other disciplinary cases on the same or similar charges.

11. In short, the Member did not dispute any of the facts, but believed that his conduct in the circumstances was not of a nature to constitute conduct unbecoming.

12. Following submissions, the Hearing Committee reserved its decision in this matter.

13. The Committee observes that the formal complaint against the Member is brought under the provisions of the Code pertaining to Conflicts. The commentary provided under this section of the Code is instructive and provides, in part, as follows:

The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. **To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty.** Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the **duty to avoid conflicting interests.** [emphasis added]

14. In short, upon entering into a creditor/debtor relationship with his client, the Member was in a conflict of interest. The facts of this case are specifically addressed by the Code.

15. Section 2.04(33) of the Code for the LSS states the following:

2.04(33) A lawyer must not lend money to a client unless, before making the loan, the lawyer:

(a) discloses to the client the nature of the conflicting interest;

(b) requires that the client:

(i) receives independent legal representation; or

(ii) if the client is a related person as defined by the *Income Tax Act* (Canada), receives independent legal advice; and

(c) obtains the client's consent.

16. This section prohibits the lending of money by a member of the LSS unless all of the protective measures or steps set out in subsections (a) through (c) are followed by the lawyer. By his admission, the Member failed to follow through on the step set out in subsection (b) above. In short, he acted contrary to and breached section 2.04(33).

17. The Hearing Committee considers the purpose of section 2.04(33) to be twofold. First, it provides direct protection for a client from being taken advantage of by her or his lawyer when the client is in a potentially vulnerable state. Secondly, it provides a measure of assurance to the public that lawyers will be guided by and required to follow specific safeguards before becoming a creditor to a client. Although there is no outright prohibition on lawyers lending money to clients, strict adherence to established safeguards is assured in every instance of such lending.

18. The Hearing Committee is of the view that the Member did not appear to take advantage of his client while the client was in a vulnerable state; however, the Member's actions fell outside of what the public is given to know is a requirement that must be followed by lawyers in every instance of lending money to a client. As such, his actions fell short of what is expected and appropriate behaviour of a lawyer.

19. In other situations, such as where a Member has entered into creditor/debtor arrangements with clients and subsequently taken steps to recover against a client's property, additional potential conflicts can arise and create further difficulties between a Member and his or her client. (see *LSS v Braun*, Discipline Decision #09-01).

20. Where a Member of the LSS acts contrary to the Code or the Law Society Rules ("Rules"), it is left to be determined whether the conduct of the Member is conduct unbecoming. Such conduct is defined in clause 2(1)(d) of *The Legal Profession Act* as follows:

"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);

21. As mentioned previously, the Member submits that his actions in the situation giving rise to the charge should not be considered conduct unbecoming.

22. In *Merchant v. Law Society of Saskatchewan*, the Saskatchewan Court of Appeal addressed the definition of conduct unbecoming, in contrast to "professional misconduct", and the following passage is instructive in the instant case:

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. [emphasis added]

23. The Hearing Committee finds that the Member's breach of the Code constitutes conduct unbecoming. His conduct did not comply with the applicable rules, which the public understands and is assured are the rules that must, in every instance, be followed by a lawyer

entering into a creditor relationship with a client. Failure to adhere to the clear rules in this instance is inimical to the best interests of the public and tends to harm the standing of the legal profession.

24. Despite its finding, the Hearing Committee also acknowledges the Member's dealings with his client should not be construed as dishonourable and, in fact, appear charitable and even meritorious. Regardless, the failure to adhere to the Code, which imposes a high standard for lawyers, underpins the protection of the public interest and steers the result in this case.

25. It is worthy to note within this decision that the Member's offending conduct was only identified after the filing of the Member's TA-3 trust form in which he disclosed the loan agreement with his client. The Member did not attempt to hide the transaction, and the Formal Complaint did not originate with the client, but rather, from the LSS.

26. It is not without considerable sympathy for the Member that this Hearing Committee finds him guilty of the charge. It finds that his conduct was improper in the circumstances and an appropriate penalty must be assessed. In this matter, the Hearing Committee hereby orders that the following penalty be imposed:

- a) Mr. Billesberger shall, within one year of this decision, attend three (3) hours of Continuing Professional Development, in addition to the mandatory CPD hours he is required to complete, all of which must be primarily focused on the Code of Professional Conduct and approved by the Chair of Discipline Executive of the LSS;
- b) In the event that Mr. Billesberger does not complete the requirements within the timeframes set out in a), he shall be reprimanded and the reprimand shall be maintained on the records of the LSS; and
- c) There shall be no order as to costs.

Agreed upon by the Hearing Committee this 17th day of January, 2017.

``Perry D. Erhardt, Q.C.``
Chair

``Judy McCuskee``

``W.J. Davern``

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated June 3, 2016, alleging the following:

THAT JOHN BILLESBERGER, of the City of Estevan, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

1. did, through his associate, Billesberger Law Professional Corporation, enter into a debtor/creditor relationship with his client, D.G., without ensuring that the client received independent legal advice.

JURISDICTION

27. John Billesberger (hereinafter “the Member”) is, and was at all times material to this proceeding, a practicing Member of the Law Society of Saskatchewan (hereinafter the “Law Society”), and accordingly is subject to the provisions of The Legal Profession Act, 1990 (hereinafter the “Act”) as well as the Rules of the Law Society of Saskatchewan (the “Rules”). Attached at Tab 1 is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to Section 83 of the Act confirming the Member’s practicing status.

28. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated June 3, 2016. Attached at Tab 2 is a copy of the Formal Complaint along with proof of service.

ORIGIN OF COMPLAINT

29. The Law Society began an investigation into the Member after Pamela Harmon, Senior Auditor, for the Law Society, identified a concern arising out of her review of the Member’s TA-3 trust form filings. Ms. Harmon’s particular concern centered around the Member’s disclosure on the TA-3 form (Tab 3) that he had entered into a loan agreement with a client. Attached at Tab 4 is a letter Ms. Harmon wrote to the Member dated January 21, 2016.

PARTICULARS

30. The Member was retained by his client, D.G., with respect to a contested foreclosure proceeding against a financial institution. According to the Member, his client was unable to secure refinancing with another bank, credit union, or family member. D.G.’s options were limited and he was in reasonably dire circumstances.

31. D.G. got behind in making mortgage payments owing to the financial institution. He suffered a heart attack on September 24, 2010. He was unable to work. He filed an affidavit with the Court sworn February 20, 2015. The affidavit also stated he was still not fully recovered. He was 56 years of age at the time and a self-employed carpenter.

32. The mortgage D.G. had with the financial institution had an interest rate of 11% calculated semi-annually. The monthly payments of principal and interest were \$422.92.

33. In a letter from the Member to the Law Society dated March 2, 2016 the Member stated:

“I encouraged him to refinance with another bank or credit union. He told me he went to the Affinity Credit Union in Lampman to get financing, but was not

accepted. I recall speaking to Colleen Leslie, the loans officer, and she confirmed he had applied for the loan.”

34. The foreclosure action court file shows that the Member filed a Statement of Defence for D.G. A Chambers application was heard before Madam Justice Gunn on March 2, 2015. A further Chambers application was heard before Mr. Justice Brown on May 25, 2015. The Member represented D.G. on both Chamber applications and prepared and filed a Brief of Law on behalf of D.G.

35. The appraisal filed in the foreclosure action valued D.G.’s house at \$91, 250.00. Attached as Tab 5 is the payout statement from the financial institution’s lawyer of April 12, 2015.

36. Attached and marked as Tab 6 is the decision of Mr. Justice Brown of August 14, 2015 in the foreclosure action.

37. The Member has not charged D.G. any legal fees in this matter and has not charged D.G. any legal fees for preparing and registering the mortgage in favour of the Member. The Member has undertaken that he will not be charging legal fees to D.G.

38. Attached and marked as Tab 7 is an Amortization Schedule prepared by the Member and given to D.G.

39. The Member decided to lend to his client the sum of \$11,500.00 to facilitate the payment of the outstanding principal, interest, discharge fee, and taxes. The Member prepared a mortgage as security for the loan. The interest rate charge pursuant to the mortgage terms was 2.5%, with payments of \$150.00 per month, commencing October 1, 2015 up to and including September 1, 2020. The mortgage was entered between D.G. and Billesberger Law Professional Corporation, the Member's professional corporation. A copy of the mortgage is attached hereto at Tab 8.

40. The mortgage was signed before the Member on September 18, 2015.

41. No independent legal advice was obtained for D.G. nor did the Member recommend that the client receive independent legal advice. No waiver of independent legal advice, written or otherwise, was obtained from D.G. by the Member

42. The mortgage remains outstanding.

43. D.G. has not complained about the matter. Rather, the complaint against the Member was initiated by the Law Society.

PRIOR HISTORY

44. The Member has no prior discipline history.