THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2015 SKCA 2 Date: 2015-01-08

Between: Docket: CACV2507

Joel Arvid Hesje, Q.C.

Appellant

- and -

The Law Society of Saskatchewan

Respondent

Coram:
Ottenbreit, Caldwell and Herauf JJ.A.

Counsel:

Michael W. Milani, Q.C. and Kelly A. Waddell for the appellant
Karen M.T. Prisciak, Q.C. for the respondent

Appeal:

From:	Hearing Committee, Law Society of Saskatchewan
Heard:	October 29, 2014
Disposition:	Dismissed
Written Reasons:	January 8, 2015
By:	The Honourable Mr. Justice Herauf
In Concurrence:	The Honourable Mr. Justice Ottenbreit
	The Honourable Mr. Justice Caldwell

Herauf J.A.

I. Introduction

[1] Joel Hesje was found guilty of conduct unbecoming a lawyer by a Hearing Committee of the Law Society of Saskatchewan. The Hearing Committee found Mr. Hesje had failed to serve his client, G.L., in a conscientious, diligent and efficient manner "by failing to keep him reasonably informed of his litigation."

[2] As a result of the finding of conduct unbecoming, Mr. Hesje received a reprimand and was ordered to pay $12,674.35 toward the costs of the proceedings. However, the Hearing Committee particularly noted at para. 14 of its sentencing decision that:

> … [T]he Member … has practiced law in Saskatoon for 30 years. Prior to the Committee's findings in October 2013, his disciplinary record was unblemished. He is an elected Bencher of the Law Society of Saskatchewan, and received the designation of Queen's Counsel in 2003.

[3] Mr. Hesje only appeals from the finding of conduct unbecoming. He has numerous grounds of appeal, including lack of particulars, failure to articulate a relevant standard of conduct, unreasonableness of the decision and evidentiary issues. I conclude that, for the reasons set out below, Mr. Hesje's appeal must be dismissed. The conclusions of the Hearing Committee are reasonable and I would sustain its decision.

II. Background

[4] There are three primary parties to this matter. Mr. Hesje is a lawyer who has practiced with McKercher LLP since his admission to the Law Society of Saskatchewan in 1984. Timothy Froese was admitted to the Law Society of Saskatchewan on April 26, 2011. He too practised at McKercher LLP. G.L.

was a volunteer working in the Saskatoon campaign headquarters of federal Liberal candidate Chris Axworthy in 2006. Mr. Axworthy was running in the Saskatoon-Wanuskewin riding against Maurice Vellacott, the incumbent Conservative Member of Parliament.

[5] G.L. testified that on January 17, 2006, he was asked by Mr. Axworthy's campaign manager to phone into a live televised program on which Mr. Vellacott was appearing and to ask Mr. Vellacott: "Were you also removed from North Park Church because you were charged with sexual assault on your secretary?" G.L. phoned into the call-in show and asked the question. On March 22, 2006, Mr. Vellacott issued a statement of claim against G.L., alleging that G.L.'s question on the call-in show was defamatory. Mr. Vellacott claimed $50,000 in damages.

[6] McKercher LLP accepted G.L. as a *pro bono* client. A lawyer at McKercher LLP prepared a statement of defence for G.L. against Mr. Vellacott's claim, and Mr. Hesje signed it on G.L.'s behalf. Mr. Hesje read an internal brief of law prepared wherein McKercher LLP concluded that G.L.'s question on the call-in show was defamatory and that damages would likely be between $20,000 and $40,000. The action lay dormant until March 13, 2007, when the parties participated in a mandatory mediation session. The mediation was terminated without resolving the action. Mr. Hesje wrote a memorandum outlining the discussions at the mediation. Mr. Hesje did not, at any point, ask G.L. to identify the campaign manager who had asked G.L. to phone into the call-in show and ask the question.

[7] The proceedings again were inactive until August 10, 2011, when Mr. Vellacott served a Notice of Motion seeking summary judgment against G.L. The motion was returnable on August 18, 2011. Mr. Hesje asked

Mr. Froese to handle the motion for summary judgment, and Mr. Froese agreed. At this point, Mr. Froese attempted to contact G.L. Mr. Froese testified that he called the phone numbers on the file jacket, but that one of the numbers had been disconnected. When Mr. Froese called one of the other phone numbers on the jacket file (this one a landline), a person who said he did not know G.L. answered and said he had had that phone number for the previous five years. Mr. Froese saw that a residential address was listed on the file, but reasoned that, since the landline no longer belonged to G.L., then G.L. must have moved residences. This inference was ultimately incorrect, as G.L. later testified that at all relevant times he resided at the address listed in the file. Mr. Froese also consulted a phone directory and online sources and made phone calls, but was unable to contact or locate G.L. Consequently, Mr. Froese requested and received a one-week adjournment from Mr. Vellacott's lawyers. The motion for summary judgment was now returnable on August 25, 2011.

[8] Mr. Froese informed Mr. Hesje that he had not been able to contact G.L. Both Messrs. Froese and Hesje testified they did not consider sending G.L. a letter in the mail since Mr. Froese had concluded that G.L. no longer lived at the address on their file. Mr. Hesje accepted Mr. Froese's conclusion that G.L. must have moved residences. In their cross-examinations, both Messrs. Froese and Hesje stated they had not considered sending a letter via courier to G.L., using a process server, or engaging a private investigator to locate G.L.

[9] Both Messrs. Froese and Hesje concluded that the original retainer between G.L. and McKercher LLP authorized them to oppose the motion for summary judgment. Mr. Hesje testified that, in his opinion, it was in G.L.'s best interests to oppose the motion for summary judgment. They both noted

that Mr. Vellacott's affidavit in support of the motion for summary judgment was very weak and that an additional adjournment would enable Mr. Vellacott to strengthen his materials in his motion for summary judgment. Moreover, they both determined that it was unlikely that Mr. Vellacott could succeed with his motion for summary judgment based on the material filed, and that an order for trial was the most likely outcome. Lastly, they considered withdrawing as counsel, but decided that withdrawal immediately before a summary judgment hearing would be unduly prejudicial to G.L. Messrs. Froese and Hesje agreed that Mr. Froese would appear to argue the motion for summary judgment.

[10] The motion was argued before Chief Justice Popescul on August 25, 2011. Chief Justice Popescul reserved his decision. After the motion for summary judgment was argued, neither Mr. Hesje nor Mr. Froese attempted to contact G.L. On January 17, 2012, Chief Justice Popescul issued his decision, granting summary judgment against G.L. and ordering G.L. to pay $5,000 in damages plus costs to Mr. Vellacott (see: 2012 SKQB 23). After receiving the judgment, Mr. Froese attempted to find contact information for G.L., again to no avail.

[11] On February 13, 2012, a newspaper reporter contacted G.L. On that same day, Mr. Froese received a voicemail from the reporter who asked for a comment on Chief Justice Popescul's ruling. Mr. Froese then consulted an online phone directory and found a telephone number for G.L. Mr. Froese reached G.L. at that number the same day. It had been roughly five years since anyone from McKercher LLP had been in contact with G.L. Mr. Froese apologized for not contacting G.L. and for not attempting to send a letter to G.L.'s address. G.L. testified that he told Mr. Froese he wanted to pursue the

parties responsible for having him call into the call-in show and ask the defamatory question. G.L. testified that those parties had assured him he would not be liable. Mr. Froese advised G.L. that it was unlikely McKercher LLP could pursue those claims since it had close connections to the Liberal Party.

[12] G.L. then filed complaints with the Law Society of Saskatchewan against Messrs. Froese and Hesje. The Law Society subsequently laid formal charges against Messrs. Froese and Hesje. The charge against Mr. Hesje originally stated:

> THAT JOEL ARVID HESJE, Q.C., of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:
>
> 1. Aided Timothy Froese in failing to serve and failed to serve his client, G.L., in a conscientious, diligent and efficient manner by failing to keep him reasonably informed of his litigation matter contrary to Chapter II of the *Code of Professional Conduct* for the Law Society of Saskatchewan. [emphasis added]

Messrs. Hesje and Froese made applications to the Law Society Hearing Committee for further and better particulars. Since one of Mr. Hesje's grounds of appeal relates to the adequacy of the particulars furnished by the Hearing Committee, the Hearing Committee's August 19, 2013 decision on that application bears some mention.

[13] Ms. Karen Prisciak, Q.C. for the Disciplinary Investigation Committee responded on July 12, 2013, to the applications from Messrs. Hesje and Froese for better particulars. Both Mr. Hesje and Mr. Froese were dissatisfied with the response, so a conference call was held on August 16, 2013 where Messrs. Hesje and Froese were allowed to make submissions to the Hearing Committee.

[14] Messrs. Hesje and Froese both argued that:

> … [T]he charges as they stand do not point with sufficient specificity to the misconduct which is alleged against the Applicants. They acknowledged that they had received significant disclosure from counsel for the Disciplinary Investigation Committee, including the complaints on which the charges were based and material from the files of the law firm whose services were the subject of the complaints.

Mr. Hesje argued that the principles of natural justice needed to be followed; Ms. Prisciak agreed, but further argued "that the documents disclosed to the Applicants would enable them to understand the case they would be required to meet." The Hearing Committee rejected Mr. Hesje's argument that the Disciplinary Investigation Committee must precisely state the actions or omissions that were alleged to have resulted in G.L. not being kept reasonably informed. Specifically, the Hearing Committee held that "[i]t is not possible … to reduce standards of professional conduct to a list of specific 'dos' and 'don't's,'" and natural justice therefore required only "that the charges give a meaningful indication of the issues [Messrs. Hesje and Froese] are expected to address."

[15] Mr. Hesje also argued that given the extended period of time it took for the litigation against G.L. to run its course, the charges as originally framed left ambiguous whether the Hearing Committee's focus was "on the period during which Mr. Froese was involved with the file, or whether the charge might relate to alleged misconduct during earlier stages of the litigation." The Hearing Committee found merit in Mr. Hesje's argument on this point, since the complaint was intended to address only Mr. Hesje's conduct subsequent to Mr. Froese becoming involved with G.L.'s file. The complaint against Mr. Hesje was therefore amended to read as follows:

> THAT JOEL ARVID HESJE, Q.C., of the City of Saskatoon, in the Province of Saskatchewan, is guilty of conduct unbecoming a lawyer in that he:

> … failed to serve his client, G.L., in a conscientious, diligent and efficient manner by failing to keep him reasonably informed of his litigation matter contrary to Chapter II of the *Code of Professional Conduct* for the Law Society of Saskatchewan, from August 10, 2011 to February 1, 2012.

III. The Decision of the Hearing Committee

[16] The Hearing Committee found Mr. Hesje guilty of conduct unbecoming a lawyer for failing to serve his client, G.L., in a conscientious, diligent and efficient manner by failing to keep G.L. reasonably informed of the litigation against him. The Hearing Committee specifically excluded the words "Aided Timothy Froese in failing to serve and" from the complaint. The complaint against Mr. Froese was dismissed.

[17] First, the Hearing Committee held that there are circumstances in litigation where a lawyer should keep his client informed, and other circumstances where a lawyer must keep his client informed. Particularly important to the Hearing Committee in determining when the lawyer must inform his client was the importance of the matter to the client: "It seems to us that the importance of the matter under consideration is critical to a determination of whether a lawyer should be obligated to inform a client about that matter." On that point,

> 61. … there is no more important matter for a client in the defence of an action than at a stage where there is a potential for a final adjudication of the client's case. This may be by way of a trial or, as is the case here, a summary judgment application. It is our view that it is generally imperative that a client be informed when the possibility of final judgment exists, whether or not a lawyer assesses the likely outcome as favorable or unfavorable.

[18] The Hearing Committee recognized its imperative that lawyers must keep the client informed throughout the proceedings, is not absolute. Rather, they noted the duty to inform the client throughout the litigation varies with the sophistication of the client and the importance of the matter. Where,

however, the client is unsophisticated (like G.L.) and lacks "a grasp of his legal options," the client must be kept informed throughout the litigation proceedings. Thus, the Hearing Committee commented on Mr. Hesje's failure to keep in contact with G.L. throughout the duration of Mr. Vellacott's action against G.L. Specifically, the Hearing Committee noted that Mr. Hesje's failure to make contact with G.L. resulted in Mr. Hesje having

> 65. … no way of knowing if in the intervening years G.L. might have made an apology on his own initiative. He was not in a position to examine G.L.'s financial circumstances in the period following the mediation in order to explore the possibility of settlement of the action. He did not have any opportunity to discover if G.L. wanted to oppose the Motion or perhaps consent to a judgment to keep the facts and circumstances from becoming public as they later did in the Judgment. In fact, he did not really know if G.L. was alive or dead.

In any event, the Hearing Committee concluded that the client always has a right to be advised when judgment is rendered against him.

[19] In light of the need to contact G.L., the Hearing Committee then held that "the attempts made to contact G.L. fell short of what was reasonable and necessary in the circumstances." The Hearing Committee's reasons on this point are worth quoting at length:

> 70. … It is clear that it was not a straightforward matter to contact G.L., in circumstances [*sic*], but where the stakes for him were so high, we think that more robust efforts were called for. Froese testified that it was not his "practice" to obtain instructions from clients by mail, but in this instance, more vigorous and varied means of locating G.L. should have been used. The pro bono policy put in evidence before us indicated that the pro bono clients are entitled to the same level of services as other clients, and more thorough or even more costly efforts to track down G.L. would have been more consistent with the level of service expected of lawyers. No further attempt was made to contact G.L. until a newspaper reporter contacted Froese on February 13. Froese, after consulting an online directory, was able to reach G.L. the very same day.

The Hearing Committee therefore held that:

> 74. We find that neither Hesje and [*sic*] Froese can be said to have reasonably informed G.L. between August 10, 2011 to February 1, 2012 that:

a) The Motion had been served and was returnable;

b) They intended to oppose the application, but to file no evidence on his behalf;

c) A summary judgment might be granted at this stage that could finally determine the claim against G.L.;

d) No steps had been taken by them to explore the possibility of making a claim, formally or informally, against the Manager or the political party they represented;

e) The Motion had been argued and judgment was reserved and

f) Judgment had been rendered.

[20] Having determined that Mr. Hesje had not served G.L. in a conscientious, diligent, and efficient manner by failing to keep him reasonably informed, the Hearing Committee then addressed whether Mr. Hesje "failed to 'provide a quality of service equal to that which lawyers generally expect of a competent lawyer in a like situation'" as required by Chapter II(c) of the *Code of Professional Conduct*.

[21] On this issue, the Hearing Committee held that:

> 80. … [T]he senior, experienced lawyer who had all the contact with the client and was in charge of the litigation would be responsible to ensure that the client was reasonably informed of the litigation, and that the strategic decisions made reflected the client's perspective. This would be Hesje's responsibility … we have concluded that the responsibility for ensuring that G.L. was kept reasonably informed lay with Hesje who was overseeing Froese's involvement in G.L.'s litigation. … In our view, however, the primary responsibility always lay on Hesje as the lawyer in charge of the file to ensure that the obligations to the client were carried out. …

The Hearing Committee concluded by holding that "it is inimical to the best interests of the public to permit a lawyer to fail to communicate with his/her client in the circumstances we have described and further, that it tends to harm the standing of the legal profession generally to condone such conduct." Mr. Hesje's conduct was therefore deemed "conduct unbecoming."

IV. The Parties' Positions

(a) Mr. Hesje's Position

[22] Mr. Hesje argues that the Hearing Committee erred in six ways. As a result of any of the errors or in the aggregate, he says the decision does not fall within the range of acceptable outcomes which are defensible on the facts and the law.

[23] First, Mr. Hesje submits that he was not provided with sufficient particulars of the complaint against him. On this point, Mr. Hesje contends that the Hearing Committee's August 19, 2013 decision was unreasonable. In his factum, Mr. Hesje argues that:

> Although a time period was eventually described in the Complaint, no particulars were given as to what Mr. Hesje ought to have done to avoid failing to keep G.L. reasonably informed of the litigation matter between August 10, 2011 and February 1, 2012, or as to the nature of his omissions or commissions.
>
> [See: Factum of the Appellant at para. 37]

In particular, Mr. Hesje submits that the particulars of the allegation left him uncertain whether:

> (a) he failed to serve his client in a conscientious, diligent and efficient manner simply by virtue of his failing to contact his client (notwithstanding his attempts to do so), or (b) he failed to so serve his client by not taking the steps that a typical lawyer ought to have taken to attempt to contact his client or (c) some other circumstance, consideration or component.
>
> [See: Factum of the Appellant at para. 42]

As a result of the generality of the allegations against him, Mr. Hesje argues that the burden of proof was reversed and he bore "the practical onus" of proving the reasonableness of his conduct.

[24] Second, Mr. Hesje argues that an isolated decision made in good faith cannot constitute "conduct unbecoming." Here, Mr. Hesje argues that

"conduct unbecoming" is limited to "blatant cases of wilful and reckless failures to maintain even the most minimal standards of competence and quality of service." (See: Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (2014-Rel 2) (Toronto: Carswell, 1993) at 24-3.) Conduct unbecoming is therefore not typically found where the misconduct amounts to an isolated instance of negligence; Mr. Hesje submits that his failure to keep G.L. apprised of the litigation against him resulted from an isolated decision made in good faith, and so cannot amount to conduct unbecoming.

[25] In the event his failure to keep G.L. reasonably informed was not an isolated incident, Mr. Hesje submits that that failure nevertheless was not conduct unbecoming because it was not a wilful and reckless failure to maintain even the most minimal standards of competence and quality of service. Mr. Hesje had Mr. Froese repeatedly attempted to contact G.L. When those attempts failed, Mr. Hesje determined that G.L. could not be reached. Despite not being able to reach G.L., G.L.'s best interests required Mr. Hesje to continue to represent G.L. Mr. Hesje's ultimate decision to continue to represent G.L. regardless of his inability to contact G.L., Mr. Hesje submits, cannot constitute conduct unbecoming.

[26] Third, Mr. Hesje submits that the Hearing Committee erred by failing to articulate the standard of professional conduct that Mr. Hesje was required to meet and then concluding that Mr. Hesje had failed to meet that undefined standard. While the Hearing Committee failed to clearly articulate the standard by which it was assessing Mr. Hesje's conduct, Mr. Hesje submits that the Hearing Committee applied a standard of perfection in assessing his efforts to contact G.L. The Hearing Committee's implied standard of

perfection—rather than its alleged failure to clearly articulate the applicable standard—appears to be the main thrust of this ground of appeal.

[27] However, Mr. Hesje goes on to argue that the Hearing Committee's failure to clearly articulate a standard of conduct results in several potential interpretations of the Hearing Committee's reasons. This matrix of possible interpretations leaves members of the profession at-large guessing at what they must do to avoid being found guilty of conduct unbecoming when they diligently try but still fail to contact their clients.

[28] Fourth, Mr. Hesje submits that the Hearing Committee lacked the requisite evidentiary basis to conclude that the steps Mr. Hesje took to contact G.L. proved that Mr. Hesje failed to provide a quality of service equal to that which lawyers generally expect of a competent lawyer in a like situation. In particular, Mr. Hesje notes that no evidence was led by the Disciplinary Investigation Committee as to what lawyers generally would expect of a competent lawyer in a like situation, or that the steps that Mr. Hesje and Mr. Froese took were not consistent with such expectation. By not adducing such evidence, Mr. Hesje argues that the Disciplinary Investigation Committee failed to meet its evidentiary burden of proving conduct unbecoming.

[29] Fifth, Mr. Hesje argues that the Hearing Committee failed to take into account several relevant circumstances and considerations in assessing his conduct: (i) Mr. Hesje had existing instructions from G.L. to achieve the best outcome possible; (ii) Mr. Hesje had to weigh the risks of further adjourning the application for summary judgment (which would likely result in Mr. Vellacott assembling a much stronger case) against continuing his attempts to contact G.L. Mr. Hesje also had to weigh the possibility of

withdrawing as counsel against the prejudice of a late-stage withdrawal to G.L; (iii) the Hearing Committee failed to articulate the relevant standard of conduct against which to assess Mr. Hesje's conduct; (iv) "more robust efforts" to contact G.L. would not necessarily have resulted in contacting G.L; (v) the circumstances of the complaint against Mr. Hesje were novel and therefore required a more fulsome analysis; (vi) Mr. Hesje had to protect the confidentiality of his lawyer-client relationship with G.L., which Mr. Hesje argues precluded him from sending a letter to G.L.'s home address; and (vii) the reasoning of the Hearing Committee will result in lawyers withdrawing from representing clients who cannot be contacted, which is not in the public's best interest.

[30] Sixth and finally, Mr. Hesje submits that the Hearing Committee misdirected itself on the evidence in two ways. First, the Hearing Committee considered irrelevant and extraneous evidence. Mr. Hesje submits that the Hearing Committee considered the litigation strategy employed by Mr. Hesje, matters outside the time period described in the complaint against Mr. Hesje, and Mr. Hesje's management of G.L.'s file, all of which is argued to be irrelevant to whether Mr. Hesje's failure to keep G.L. reasonably informed amounts to conduct unbecoming. Second, Mr. Hesje submits that the Hearing Committee either disregarded or gave insufficient weight to relevant evidence, namely, Mr. Hesje's honest belief that G.L. could not be contacted, the efforts of Mr. Hesje and Mr. Froese to contact G.L., conflicting testimony from Mr. Froese and G.L. regarding where G.L. resided during the relevant times, the ultimate result of the litigation against G.L., and G.L.'s own failure to provide Mr. Hesje with up-to-date contact information.

(b) The Law Society's Position

[31] The Law Society argues that the Hearing Committee's decision falls within the range of possible acceptable outcomes which are defensible on the facts and the law, and so should not be disturbed.

[32] First, the Law Society submits that Mr. Hesje was not entitled to particulars detailing with precision the actions that were alleged to constitute conduct unbecoming. Instead, professional discipline proceedings only require that the person charged know the case he has to meet. The Law Society submits that Mr. Hesje knew the charge was that he had not served G.L. in a conscientious, diligent, and efficient manner by failing to keep G.L. reasonably informed of Mr. Vellacott's litigation against G.L. The charges against Mr. Hesje included the client's name, the specific file matter under consideration, the time period of the impugned misconduct (after the Hearing Committee ordered further and better particulars), and the impugned misconduct of failing to keep his client reasonably informed. No more was required, it says.

[33] Second, the Law Society argues that Benchers are in the best position to determine what constitutes conduct unbecoming. Moreover, "conduct unbecoming" encompasses isolated decisions and is not restricted to instances where the lawyer demonstrates moral turpitude; Mr. Hesje's argument that his actions were taken in good faith is therefore not a defence to a charge of conduct unbecoming.

[34] On this same issue, the Law Society also contends that, while reasonable care would be a defence to a charge of conduct unbecoming,

Mr. Hesje is only contending that he acted honestly and a lawyer's honesty is not a defence to a charge of conduct unbecoming.

[35] Third, the Law Society argues that the Hearing Committee was not required to articulate the standard of expected conduct. As stated in its factum,

> [i]t is unnecessary for the Hearing Committee to articulate a standard of conduct in all circumstances involving a failure to keep the client informed. Professional conduct is a changing assessment depending upon the circumstances surrounding each individual case. There are situations where failure to contact a client will lead to no prejudice to the client. In those circumstances, less effort at client contact may be sufficient. [See: Factum of the Respondent at para. 54]

Thus, the Law Society says Hearing Committee's failure to articulate a standard of expected conduct is immaterial.

[36] Fourth, the Law Society submits that there is no obligation on the Disciplinary Investigation Committee to lead evidence to establish what a lawyer would typically do in similar circumstances. The Law Society argues that the "collective wisdom" of the Benchers who constituted the Hearing Committee made it well-positioned to decide whether Mr. Hesje's conduct was unbecoming. In exercising their collective wisdom, the members of the Hearing Committee rendered a decision that was reasonable because it did not misinterpret or misapply the facts.

[37] Fifth, the Law Society submits that the Hearing Committee's weighing of the evidence was reasonable and should not be disturbed. The Law Society argues that G.L.'s instructions to defend the lawsuit were so broad as to not offer Mr. Hesje a defence to a charge of conduct unbecoming. The Law Society also argues that the competing considerations identified by Mr. Hesje were of his own making, and that Mr. Hesje had an obligation to seek fresh instructions once Mr. Vellacott brought a motion for summary judgment. The

Law Society also submits that the "more robust efforts" referred to by the Hearing Committee would include sending a letter to G.L.'s last known address. The Law Society also argues that Mr. Hesje's submissions regarding the novel circumstances of the case and concerns over confidentiality are without merit. Finally, the Law Society submits that nowhere in its decision does the Hearing Committee refer to a standard of perfection against which it was assessing Mr. Hesje's conduct.

[38] Sixth, the Law Society argues that the Hearing Committee did not consider extraneous evidence or improperly weigh relevant evidence. With respect to Mr. Hesje's argument that irrelevant evidence was considered, the Law Society points out that evidence of Mr. Hesje's litigation strategy, the possibility of an apology from G.L. to Mr. Vellacott, and events prior to the time period outlined in the charge against Mr. Hesje were, essentially, pieces of evidence establishing a narrative necessary to understand the alleged misconduct within the period specified in the charge. The Law Society also submits that the inquiry into Mr. Hesje's file management was appropriate, since Mr. Hesje submits that he was acting on G.L.'s original instructions.

[39] The Law Society also addressed the relevant evidence that Mr. Hesje argues was given insufficient weight. First, evidence of Mr. Hesje's good faith was not at issue. Second, Mr. Hesje's attempts to contact the client were negligible—Mr. Froese simply called phone numbers that no longer belonged to G.L. Third, the conflicting testimony as to G.L.'s residence was hearsay. Fourth, the Hearing Committee did not suggest that the result of the litigation would have been different if G.L. had been contacted; the only issue was Mr. Hesje's failure to contact G.L. Fifth and last, the Law Society submits

that G.L. had no obligation to inform McKercher LLP of new contact information because G.L. had never moved residences.

V. Issues

[40] There are six issues on appeal:

> 1. Was the Hearing Committee's decision not to order the Disciplinary Investigation Committee to provide Mr. Hesje with the precise particulars of his misconduct unreasonable?
>
> 2. Did the Hearing Committee err in finding that Mr. Hesje's conduct was "conduct unbecoming," thereby making its decision unreasonable?
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> 3. Did the Hearing Committee err by failing to articulate the relevant standard of conduct, making its decision unreasonable?
>
> 4. Did the Hearing Committee lack the proper evidentiary foundation to find that Mr. Hesje's conduct fell below a quality of service equal to that which lawyers generally expect of a competent lawyer in a like situation?
>
> 5. Did the Hearing Committee fail to take into account relevant surrounding circumstances?
>
> 6. Did the Hearing Committee consider irrelevant evidence or disregard relevant evidence?

VI. Standard of Review

[41] The applicable standard of review is reasonableness. Ottenbreit J.A. for this Court recently discussed and explained the applicable standard of review in *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56, [2014] 6 WWR 643 (*Merchant* 2014):

> 38 The standard of review to be applied to decisions of the HC respecting misconduct and DC respecting penalty is common ground and has been authoritatively established as reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *McLean v. Law Society of Saskatchewan*, 2012 SKCA 7, 347 D.L.R. (4th) 414, leave to appeal to Supreme Court of Canada refused, [2012] S.C.C.A. No. 130; *Oledzki v. Law Society of Saskatchewan*, 2010 SKCA 120, 362 Sask. R. 86; *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33,

[2009] 5 W.W.R. 478; *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81, [2010] 1 W.W.R. 678; *Merchant v. Law Society of Saskatchewan*, 2002 SKCA 60, 213 D.L.R. (4th) 457).

39 The Supreme Court described the standard of reasonableness in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Binnie J., for the majority, wrote (at para. 59):

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

40 As explained by Iacobucci J. at para. 55 in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, the standard of reasonableness calls for "a somewhat probing examination":

> [W]hether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole. (para. 56)

41 In *Merchant* (2009), *supra*, this Court also made the following observation:

> 26 Nothing in recent case law has diminished the force of Justice Iacobucci's observations in *Pearlman v. Manitoba Law Society Judicial Committee*, [[1991] 2 S.C.R. 869 at 880] where he stated:
>
> > I note that courts have recognized that Benchers are in the best position to determine issues of misconduct and incompetence. For example, in *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292-93):
> >
> > > No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

VII. Relevant Statutory Provisions

[42] "Conduct unbecoming" is defined in *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1:

> 2(1) In this Act:
>
> …

> (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);

[43] The lawyer's duty to keep a client reasonably informed is set out in Chapter II, Competence and Quality of Service, in the *Code of Professional Conduct, 1991* that was in force at the time of the alleged offence:

> …
> (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.

The commentary to Chapter II states:

> 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;
> …

VIII. Analysis

(a) Was the Hearing Committee's decision not to provide Mr. Hesje with more detailed particulars of his alleged misconduct unreasonable?

[44] It is long established that where a law society undertakes disciplinary proceedings against a member, that member must be given notice of the case he has to meet. (See: *Palmer (Re)* (1853), 7 NBR 533 at 535 (SC).) The requirement that the member be given notice of the case he has to meet is reflected in the obligation on the law society to provide particulars of a charge of professional misconduct or conduct unbecoming to the member. In *Brendzan v Law Society of Alberta* (1997), 205 AR 278 (QB) at paras 15 and

23 [*Brendzan*] (a case relied on by both parties), the citation from the Law Society of Alberta stated:

> IT IS ALLEGED that you acted and continued to act in a conflict situation in that you failed to take steps to insure that all parties received independent legal advice and that such conduct is conduct deserving of sanction.

[45] Section 56(1)(a) of the relevant statute provided that:

> 56(1) If the Conduct Committee directs that the conduct of a member is to be dealt with by a Hearing Committee,
>
> > (a) the Secretary, on being informed of the direction, shall give the member notice of the hearing and of the acts or matters regarding the member's conduct to be dealt with, with reasonable particulars of each act or matter, ...

[46] At issue in *Brendzan* was that the Secretary provided the notice and the citation to Mr. Brendzan, while counsel for the law society later delivered the particulars of the alleged misconduct to Mr. Brendzan. Section 56(1) of the relevant statute expressly provided that the Secretary was obligated to provide the particulars with the "notice of the hearing and of the acts or matters regarding the member's conduct to be dealt with." Mr. Brendzan argued that the Secretary failed to provide adequate particulars of the alleged misconduct. The law society countered by arguing that the citation, as phrased, constituted adequate particulars. Johnstone J. disagreed with the law society and held that:

> 22. … It is untenable to suggest that the charge set forth in the Citation that the member "acted and continued to act in a conflict situation in that you failed to take steps to insure that all parties received independent legal advice" reasonably particularizes "each act or matter" cited. …

[47] However, that finding was not dispositive of the case. Johnstone J. went on to determine whether the rule that the Secretary give the notice to the member was "mandatory," a breach of which required a remedy, or "merely 'directory' in which case the error is usually disregarded as a technical

irregularity provided no miscarriage of justice has resulted." Johnstone J. held that the error was technical—Mr. Brendzan received from counsel for the law society the same particulars to which he was entitled to receive from the Secretary. Thus, the purpose of s. 56(1)(a) of the *Act*—"that the member has sufficient particulars to be able to know the case he has to meet, and to be able to prepare a defence"—was satisfied. As a consequence of Mr. Brendzan receiving adequate particulars to know the case he had to meet, the requirements of *audi alteram partem* were satisfied. In fact, addressing other challenges to the adequacy of the particulars on the basis of *audi alteram partem*, Johnstone J. continued to assess whether Mr. Brendzan knew the case he had to meet, or whether he was prejudiced in the preparation of his defence by any ambiguity in the charge.

[48] In *Gilliss v Barristers' Society of New Brunswick* (1986), 68 NBR (2d) 165 (WL) (CA), Mr. Gilliss contended that the charge against him was insufficiently particularized. Mr. Gilliss acted for Mr. Gould in Mr. Gould's attempt to obtain a settlement with an insurance company. Mr. Gilliss successfully negotiated a settlement, but unbeknownst to Mr. Gould, Mr. Gilliss withheld several thousand dollars obtained in the settlement. Mr. Gould ultimately became aware of Mr. Gilliss' fraud and filed a complaint with the Barristers' Society of New Brunswick against Mr. Gilliss. In the same transaction, Mr. Gilliss also charged Mr. Gould $2,500, which was $1,500 more than Mr. Gilliss and Mr. Gould had agreed. Mr. Gould's complaint to the Barristers' Society was for overpayment of fees for services and, in particular, the manner in which these fees were obtained. The Barristers' Society gave notice to Mr. Gilliss that a Committee of Inquiry had been formed, and the subject of inquiry would be the:

> [C]onduct of the member in relation to his handling and disposition of trust funds of Aurele Gould, advanced by North American Life Assurance Company for the benefit of the aforesaid Aurele Gould and whether the member is guilty of professional misconduct or conduct unbecoming a barrister or solicitor in relation thereto. [at para. 20]

[49] Before the Committee of Inquiry began its hearings, Mr. Gilliss challenged the adequacy of the particulars of the complaint against him. In response, he was provided with a list of all documents that the opposing counsel intended to introduce before the Committee of Inquiry and Mr. Gilliss' counsel was also provided with complete access to the file prepared by the Barristers' Society against Mr. Gilliss. The New Brunswick Court of Appeal held that:

> … Mr. Gould's letter of September 27, 1983 (not to mention the earlier appearance by Mr. Gilliss and his counsel before the Professional Conduct Committee) would amply draw Mr. Gilliss' attention to the conduct which was to be the subject of the Inquiry so that he could properly prepare his answer. [at para. 19]

What was dispositive of the issue, in other words, was Mr. Gilliss' awareness of the facts alleged to constitute his misconduct, and therefore the case against him and his consequent ability to respond, notwithstanding the lack of extensive particulars in the notice of the proceedings against him.

[50] Focusing on whether the member charged is aware of the case he has to meet—rather than exclusively focusing on the charge itself—is consistent with how courts approach charges laid by an administrative body. In *Re Stevens and Law Society of Upper Canada* (1979), 55 OR (2d) 405 (H Ct J) at 409, Cory J. held that:

> … A solicitor faced with … an allegation [of professional misconduct] is entitled to and should receive the particulars that form the basis of the allegation against him. …

Nonetheless,

> [t]he charges brought against a professional person by his governing body should not, in most cases, be approached as though they were counts in an indictment alleging that he committed an offence or offences contrary to the *Criminal Code*.
> …

[51] In short, procedural fairness will only be violated by inadequate particulars if the member is deprived of knowledge of the facts alleged to constitute misconduct, and is therefore deprived of knowledge of his case to meet. This is consistent with the Rules of the Law Society of Saskatchewan applicable to disciplinary hearings. Rule 432 of the Rules of the Law Society of Saskatchewan states:

> …
>
> (4) A member may, at any time before the hearing commences, apply for disclosure of the circumstances of the alleged misconduct.
>
> (5) An application under subrule (4) shall be made:
>
> (a) to the Chairperson of the Hearing Committee which has been appointed to hear the formal complaint; and
>
> (b) in writing or, with the approval of the Chairperson of the Hearing Committee, in person or by telephone.
>
> (6) The Chairperson of the Hearing Committee shall, if satisfied that an allegation in the formal complaint does not contain sufficient detail of the circumstances of the alleged unbecoming conduct to give the member reasonable information with respect to the act or omission to be proved, and to identify the transaction referred to, order Counsel to the Conduct Investigation Committee to disclose further details of the circumstances.
> …

[52] On this basis, I find the Hearing Committee's August 19, 2013 decision regarding Mr. Hesje's application for further and better particulars was reasonable. First, the Hearing Committee correctly noted that cases concerning applications for better particulars focus on whether the "person who is facing a disciplinary charge … know[s] clearly what allegations they must address and to marshal their evidence accordingly," and moreover, that

"the standard of particularity for charges in disciplinary cases of this kind is not as demanding as it is for charges in criminal matters." Furthermore, the Hearing Committee noted that it was impossible "to reduce standards of professional conduct to a list of specific 'dos' and 'don't's.'" Thus, it is clear that the Hearing Committee's August 19, 2013 decision was grounded in a proper understanding of the law on the purpose of providing particulars.

[53] Indeed, Mr. Hesje's contention that he did not know the case he had to meet because the particulars did not specify the precise scope of his alleged misconduct is not defensible on the evidence. The evidence discloses that Mr. Hesje knew the case against him well before the hearing for the charges against him began. First, and subsequent to the Hearing Committee's August 19, 2013 order for further and better particulars, he knew that his failure to keep G.L. reasonably informed was alleged to have occurred from August 10, 2011 to February 1, 2012.

[54] Second, Ms. Prisciak for the Disciplinary Investigation Committee sent a letter to Mr. Hesje on November 28, 2012. In his January 22, 2013 response, Mr. Hesje explained why he had not contacted G.L. for several years and his reasons for proceeding with the application for summary judgment. In that same letter, Mr. Hesje also stated that he was satisfied that Mr. Froese's efforts to contact G.L. constituted due diligence, but that "[w]ith hindsight, it is always possible to identify something further that might have been done." This clearly shows Mr. Hesje was alive to the case being made against him.

[55] Third, Ms. Prisciak swore an affidavit on August 30, 2013, attesting to providing Mr. Hesje with 150 pages of disclosure, which included the April 17, 2013 report of the Conduct Investigation Committee. Moreover, the Hearing Committee, in its August 19, 2013 decision, specifically noted that Mr. Hesje

had received extensive disclosure, including the complaints against him and Mr. Froese filed by G.L. All of this is to say that Mr. Hesje was aware that his and Mr. Froese's failure to contact G.L. was alleged to constitute conduct unbecoming.

[56] Simply put, the evidence supports the Hearing Committee's August 19, 2013 decision that Mr. Hesje was well aware of the facts and the Disciplinary Investigation Committee's case against him. The Hearing Committee's August 19, 2013 decision to include the period of time for which Mr. Hesje's failure to keep G.L. reasonably informed constituted conduct unbecoming, but not otherwise amending the charges against Mr. Hesje, is reasonable. This ground of appeal is dismissed.

(b) Was the Hearing Committee's interpretation of "conduct unbecoming" unreasonable?

[57] Mr. Hesje submits that his conduct could not amount to conduct unbecoming because his failure to contact G.L. was an isolated incident, made honestly and in good faith. Even if it was not an isolated decision, Mr. Hesje submits that negligence should not result in disciplinary proceedings unless it is gross or habitual, and the standard of conduct that is "conduct unbecoming" is a wilful and reckless failure to maintain even the most minimal standards of competence and quality of service.

[58] This Court, however, has held otherwise. Addressing the meaning of "conduct unbecoming" in a series of decisions regarding Mr. Merchant, this Court has held that "[t]he *Code* leaves the responsibility for determining whether a member's conduct is unbecoming to the committees of the benchers which includes a hearing committee," and that such conduct can include acts

of negligence and does not necessarily include moral turpitude. (See: *Merchant v Law Society of Saskatchewan*, 2002 SKCA 60 at para 86, 213 DLR (4th) 457; *Segal v Law Society of Saskatchewan* (1999), 189 Sask R 134 at para 6 [*Segal*], quoting *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 880 [*Pearlman*].)

[59] In *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 WWR 478 [*Merchant* 2009], for instance, this Court addressed Mr. Merchant's negligent conduct and whether it could constitute "conduct unbecoming." In *Merchant* 2009, Mr. Merchant:

> 4 … [C]ommenced a class action after a train derailment near the City of Estevan caused the evacuation of a number of homes and businesses in the vicinity. In a mail campaign, [Mr. Merchant] sent a letter and Retainer Agreement to 150 Estevan residents inviting them to engage the appellant's services in the class action.
>
> 5 Unknown to [Mr. Merchant], his legal assistant attached an obsolete form of retainer agreement, one that had caused controversy for [Mr. Merchant] a few years earlier during his involvement with residential school claims. That controversy resulted in disciplinary action being taken. [Mr. Merchant] was sanctioned for using a form of retainer agreement that was considered misleading when read in conjunction with the firm's letter of solicitation.

[60] The Hearing Committee found that Mr. Merchant's distribution of the obsolete form of retainer—despite the fact that his assistant distributed the letters and he was unaware she had used the obsolete form—constituted conduct unbecoming. Mr. Merchant appealed, arguing, *inter alia*, that "[a] single, inadvertent mistake made by a lawyer's assistant cannot justify a determination of conduct unbecoming on the part of a lawyer, and the Hearing Committee's decision is unreasonable." (See: *Merchant* 2009 at para. 14.)

[61] This Court quashed the finding of conduct unbecoming. However, it did not do so because "a single, inadvertent mistake" is incapable of meeting the definition of conduct unbecoming. Instead, this Court quashed the decision of

the Hearing Committee because the wording of the charge against Mr. Merchant read as if it required "deliberate action on the appellant's part." The charge alleged that Mr. Merchant:

> 6 …
> … is guilty of conduct unbecoming a lawyer in that he did correspond to various residents of Estevan, Saskatchewan, by letter dated August 10, 2004, with attached Retainer Agreement, which letter and Retainer Agreement, were reasonably capable of misleading the recipient or the intended recipients.

[62] In fact, at the hearing itself, counsel for the Law Society "acknowledged [that] the Committee was not dealing with a 'strict liability offence'. Accordingly, in the result, the charge had to be read as alleging deliberate or conscious action on the part of the appellant, and evidence of negligence or carelessness was insufficient to warrant the Committee's finding of conduct unbecoming." (See: *Merchant* 2009 at para. 55.)

[63] However, this Court went on to hold that negligent conduct can be conduct unbecoming and moral turpitude is not a necessary element of conduct unbecoming. Specifically, the Court noted that the historical interpretations of "conduct unbecoming"—which required moral turpitude—"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*." Concluding her discussion on this point, Wilkinson J.A. held that:

> 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. (See: *Merchant* 2009 at para 62.)

Consequently, the definition of "conduct unbecoming" in *The Legal Profession Act, 1990* "is necessarily broad and can encompass a wide range of potentially unethical conduct. In short, the degree of fault required to be established in any case will vary depending on the particulars of the allegation and its context." (See: *Merchant* 2014 at para. 62.)

[64] It is clear that regardless of whether Mr. Hesje's conduct was an isolated decision made in good faith, a negligent act can meet the definition of "conduct unbecoming" and moral turpitude is not a necessary element. Therefore, the standards put forth by Mr. Hesje (that an isolated decision made in good faith is not conduct unbecoming, or that a wilful and reckless failure to maintain even the most minimal standards of competence and quality of service is required for conduct unbecoming) are higher than what this Court has held can constitute "conduct unbecoming." In that sense, the standards of "conduct unbecoming" suggested by Mr. Hesje—with their focus on the *bona fides* of Mr. Hesje's conduct and his lack of malicious intent in failing to contact G.L.—appear to be an attempt to smuggle moral turpitude back into the definition of conduct unbecoming. Such a standard is directly contrary to this Court's holding in *Merchant* 2009. Perhaps just as importantly, no compelling argument was made to reconsider this Court's decision in *Merchant* 2009.

[65] The Hearing Committee's decision to find that Mr. Hesje's conduct amounted to conduct unbecoming is therefore reasonable. While the Hearing Committee did not find that Mr. Hesje had acted wilfully or recklessly in failing to contact G.L., or that Mr. Hesje had acted with *mala fides*, it was not

required to do so. The standard of conduct unbecoming encompasses acts of negligence and does not require moral turpitude. The Hearing Committee held that in light of the imperative to contact a client "when a judgment has been rendered against him … the attempts made to contact G.L. fell short of what was reasonable and necessary in the circumstances." In so holding, the Hearing Committee relied on the nature of the litigation against G.L., as well as the fact that G.L. was not a sophisticated client. As "conduct unbecoming" encompasses negligent actions that in turn do not necessarily disclose moral turpitude, this conclusion was defensible in light of the facts and the law. The Hearing Committee's conclusion was reasonable. This ground of appeal is dismissed.

(c) Did the Hearing Committee err by failing to articulate the standard of conduct that Mr. Hesje was required to meet, making its decision unreasonable?

[66] Mr. Hesje submits that the Hearing Committee failed in its reasons to articulate the standard of conduct against which it was assessing his conduct. However, in attempting to make this argument, Mr. Hesje then argues that:

> … [T]he standard of conduct that the Committee imposes is that of perfection – the lawyer cannot (be permitted to) fail. It is unreasonable to dictate that a lawyer is simply **never** permitted to fail in his or her efforts to contact a client. The problems with such a standard are obvious: a lawyer would be required to utilize every potential method of investigation, exploration and communication to contact his or her client. (See: Factum of the Appellant at para. 65.) [emphasis in original]

[67] In that sense, Mr. Hesje appears to be contesting the standard applied by the Hearing Committee in assessing his conduct, rather than arguing that the Hearing Committee did not articulate any standard.

[68] In any event, the Hearing Committee very clearly articulated a standard of conduct. The Hearing Committee's decision states:

> 60. As a starting point, we think it is important to note that the precise matter of which it is alleged that the Members failed to reasonably inform G.L. It seems to us that the importance of the matter under consideration is critical to a determination of whether a lawyer should be obligated to inform a client about that matter.
>
> 61. In the course of defending civil litigation, there are a multitude of matters that a lawyer should keep his/her client informed of and other matters a lawyer must keep his/her client informed of. The Committee believes there is no more important matter for a client in the defence of an action than at a stage where there is a potential for a final adjudication of the client's case. This may be by way of a trial or, as is the case here, a summary judgment application. It is our view that it is generally imperative that a client be informed when the possibility of final judgment exists, whether or not a lawyer assesses the likely outcome as favorable or unfavorable. [emphasis in original]
>
> 62. The best interests of the public can only be served when a legal professional keeps the client informed of the progress of the litigation, especially at such a critical point.
>
> 63. In instances where a lawyer is dealing with a highly sophisticated client, or a client who has close and frequent contact with the lawyer, it is possible that the need to specifically inform a client at every step of the proceedings may be more relaxed because it can be assumed that the client is in possession of sufficient information to allow him or her to make appropriate choices. In this case G.L. was not a sophisticated client with a grasp of his legal options. Hesje had spoken to G.L. briefly on two, maybe three occasions, in the course of six years, and it does not appear that he had kept extensive records even of those discussions. Froese had never spoken to nor even seen G.L.

[69] In coming to this conclusion, the Hearing Committee did not hold Mr. Hesje to a standard of perfection. Instead, the Hearing Committee recognized a flexible standard when it outlined that the sophistication of the client and the importance of the matter to the client must be taken into account when a lawyer is determining whether the client must be notified of a pending proceeding. The less sophisticated the client, the more important it is for the lawyer to keep the client informed. The more important the matter in question, the more important it is to keep the client informed. When the client is unsophisticated and the matter is important (as in this case), the burden on the lawyer to contact the client is high; more than a series of failed phone calls is

required. It is, in other words, clear that the Hearing Committee imposed a standard that varies depending upon the sophistication of the client and the importance of the matter in question. Despite Mr. Hesje's assertions to the contrary, a variable and circumstance-dependent standard is simply not a standard of perfection. This ground of appeal is dismissed.

(d) Did the Hearing Committee lack the proper evidentiary foundation to find that Mr. Hesje's conduct fell below a quality of service equal to that which lawyers generally expect of a competent lawyer in a like situation?

[70] Mr. Hesje submits that "[n]o evidence was led by the Investigation Committee as to what lawyers generally would expect of a competent lawyer in a like situation, or that the steps that Mr. Hesje and Mr. Froese took were not consistent with such expectation." As a consequence, "[t]he Investigation Committee failed to meet its evidentiary burden of proof by adducing clear, cogent and convincing evidence that the charge was made out and that Mr. Hesje engaged in professional misconduct." (See: Factum of the Appellant at para. 75.)

[71] This ground of appeal is without merit. As the Supreme Court has held, "No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body." See: *Pearlman* at p. 880 and *Segal* at para. 6. Indeed, "[w]hat is and what is not professional misconduct is a matter for the benchers to determine, and the court must be very careful not to interfere with the decision of the benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply." (See: *Re Wilson and Law Society of British Columbia* (1986), 33 DLR (4th) 572 (BCCA) at 575-576.)

[72] There is no point, in other words, to requiring additional evidence about what a competent lawyer in a circumstance similar to Mr. Hesje's would do. As "[n]o one is better qualified to say what constitutes professional misconduct than a group of practicing barristers," there is simply no reason, in this case, to insist upon evidence of what a competent lawyer would do in a like situation. This ground of appeal is dismissed.

(e) Did the Hearing Committee fail to properly take into account relevant surrounding circumstances and competing considerations?

[73] On this ground of appeal, Mr. Hesje raises a number of circumstances at the time of his alleged misconduct that he submits the Hearing Committee disregarded, as well as competing considerations that he says should have informed the Hearing Committee's reasons. Mr. Hesje's argument on this point is simply that the Hearing Committee's alleged failure to take into account these circumstances and considerations renders the decision unreasonable.

[74] In my view, there is nothing to suggest that the Hearing Committee's decision was unreasonable because it failed to take into account the considerations identified by Mr. Hesje. Moreover, the Hearing Committee did, in fact, take into account many of the considerations and circumstances that Mr. Hesje argues were not considered.

[75] First, Mr. Hesje submits that the Hearing Committee failed to take into account that G.L. initially instructed him to defend the lawsuit. As noted by the Hearing Committee, aside from a telephone call shortly after mediation, there was no contact between G.L. and Mr. Hesje for four years and five

months. The Hearing Committee's non-reliance on G.L.'s initial instructions to Mr. Hesje is not surprising in the circumstances.

[76] Second, Mr. Hesje submits that the "litigation risk" attendant to another adjournment of the hearing for summary judgment was not in the client's best interests. However, Mr. Hesje's argument that this was not taken into account is contradicted by the Hearing Committee's decision. In fact, the importance of the matter to the client was one of two factors that the Hearing Committee weighed in deciding that Mr. Hesje had a duty to inform his client of the proceedings. It is disingenuous of Mr. Hesje to suggest that the "litigation risk" or potential outcome of the proceedings against G.L. were not taken into account when in fact those exact risks formed one of the two main bases upon which the Hearing Committee made its decision.

[77] Third, Mr. Hesje submits that the Hearing Committee did not identify the "more robust efforts" he should have taken. Mr. Hesje is incorrect in this assertion. Throughout its analysis, the Hearing Committee repeatedly identified other means of communication that were available to Mr. Hesje in his efforts to contact G.L. At para. 69, for instance, the Hearing Committee noted that "[t]here was no evidence that Froese considered sending a letter to the address on G.L.'s file or employing a courier or an investigative service." In the very next paragraph, the Hearing Committee referred to Mr. Froese's testimony "that it was not his 'practice' to obtain instructions from clients by mail, but in this instance, more vigorous and varied means of locating G.L. should have been used." It is clear that the "more robust efforts" referred to by the Hearing Committee involved, at the very least, the simple and common step of mailing a letter to G.L.

[78] Fourth, Mr. Hesje submits that the Hearing Committee did not take into account that "more robust efforts" to contact G.L. might not have accomplished anything, because there was evidence that G.L. may not have been residing in Saskatoon at the time the Application was brought. However, at the time of the events in question, Mr. Hesje did not know if G.L. was living in Saskatoon because Mr. Hesje had not made any attempts to contact G.L. beyond having Mr. Froese call the phone numbers written on the McKercher LLP file. In fact, as the Hearing Committee stated, Mr. Hesje did not know whether G.L. was alive or dead. Thus, it is not, in my view, clear that the potential unproductiveness of "more robust efforts" to contact G.L. is a relevant consideration. The fact is, none were taken.

[79] Fifth, Mr. Hesje submits that the Hearing Committee did not take into account the fact that the allegations against Mr. Hesje were novel. However, in this submission, Mr. Hesje submits that the novelty of the case required "a more fulsome analysis." In my opinion, the Hearing Committee did fully analyze the facts and it is unclear what additional analysis of them would accomplish.

[80] Sixth, Mr. Hesje submits that the confidentiality of the lawyer-client relationship had to be protected. On this point, Mr. Hesje submits that sending a letter to G.L.'s last known address ran the risk of another person opening the letter and confidentiality being breached. The Law Society's response that Mr. Hesje's argument on this point "is a spurious suggestion" is correct. It is difficult to see how the possibility that a third party might be inclined to open a letter addressed to someone else could outweigh the risks of failing to communicate with one's client in such circumstances. Moreover, if the letter simply says, "Please contact us," confidentiality is maintained.

[81] Seventh and lastly, Mr. Hesje's submission is that "overarching policy considerations" ought to have been taken into account. In particular, Mr. Hesje essentially argues that the Hearing Committee's decision will result in diminishing protection for the best interests of the public, as lawyers who cannot contact their clients will withdraw. With respect, however, protection of the public was explicitly referenced in the Hearing Committee's decision, and the Hearing Committee's focus on the sophistication of the client and the importance of the matter to the client is quite clearly a reflection of the overriding concern of the Hearing Committee that the public (and individual clients) be protected.

[82] In short, Mr. Hesje has not identified any considerations that were relevant and needed to be (but were not) taken into account by the Hearing Committee. This ground of appeal is dismissed.

(f) Did the Hearing Committee consider irrelevant evidence and disregard relevant evidence?

[83] Finally, Mr. Hesje submits first that the Hearing Committee considered irrelevant evidence, and second, that it disregarded relevant evidence. I will address these two submissions in turn.

i. Considering irrelevant evidence

[84] Mr. Hesje submits that the Hearing Committee improperly considered irrelevant evidence. Mr. Hesje submits that the litigation strategy that he employed, the events that occurred outside the time period described in the complaint against him, and his management of G.L.'s client file were all irrelevant pieces of evidence considered by the Hearing Committee.

[85] However, all evidence that is admissible must first be relevant. (See: *R v White*, 2011 SCC 13 at para 31, [2011] 1 SCR 433.) More importantly, s. 48(10) of *The Legal Profession Act*, *1990* specifically gives the Hearing Committee the authority to "accept any evidence that it considers appropriate and [the Hearing Committee] is not bound by the rules of law concerning evidence." Accordingly, it does not appear as if Mr. Hesje is seriously challenging the Hearing Committee's decision to admit the impugned evidence. Instead, his emphasis appears to be on the use to which the Hearing Committee put that evidence. In fact, Mr. Hesje noted that the evidence the Committee admitted went far beyond such insight and was used for more than context. Mr. Hesje is, in other words, asking this Court to intervene based on the Hearing Committee's use of certain evidence.

[86] The Hearing Committee's approach to the evidence was reasonable. Regarding Mr. Hesje's litigation strategy, the Hearing Committee certainly referred to it throughout its reasons. For instance, Mr. Hesje takes issue with the Hearing Committee's reference to his litigation strategy in para. 64 of its decision. However, it is clear that the Hearing Committee was simply outlining how little communication there had been between Mr. Hesje and G.L.:

> 64. Hesje had very limited contact with G.L. He never reviewed the Defence with him before it was filed. Other than the Memorandum he made following the mediation, he did not have a single note of substance of any interview with G.L. He never made an inquiry as to who asked G.L. to pose the Question. He never considered a third party claim or for that matter seeking contribution formally, or informally, from the Manager or her employer.
>
> 65. By the time the Notice of Motion was served, Hesje had not spoken to G.L. for more than 4½ years.

[87] The same holds true for references to Mr. Hesje not having contacted G.L. to ascertain whether G.L. would apologize to Mr. Vellacott, and the

possibility of a consent judgment. The references to litigation strategy, put in the context of the whole judgment, simply illustrate the absence of contact between G.L. and Mr. Hesje. Contrary to Mr. Hesje's submissions, the Hearing Committee's references to Mr. Hesje's litigation strategy do not show that the Hearing Committee was reliant on matters immaterial to whether or not he kept G.L. informed of the proceedings against him; they simply show that Mr. Hesje was not in contact with G.L.

[88] Similarly, Mr. Hesje's submission that the Hearing Committee relied on events that occurred outside the specified time period in which the misconduct was alleged to have occurred is baseless. Quite simply, the events that occurred prior to the dates specified in the allegation against Mr. Hesje either served to provide a narrative, or were used by the Hearing Committee to illustrate how little contact there was between Mr. Hesje and G.L. which served to elevate the imperative that he contact the client. In fact, the Hearing Committee, at para. 59 of its decision, acknowledged the obligation it faced with respect to the specified time period as follows:

> … We admitted evidence concerning the facts and events outside the specified time period, as this evidence was necessary to understand what occurred, but we may only find fault for actions or omissions by Hesje and Froese in that time period. In order to judge these Members fairly, we need to analyze what each of them knew, and what each of them did or omitted to do.

[89] Lastly, Mr. Hesje takes issue with the Hearing Committee's references to his management of the file. Again, however, the Hearing Committee's references to Mr. Hesje's file management either go to establishing a narrative, or serve to illustrate how little contact he had with G.L. They do not make the decision unreasonable.

[90] The Hearing Committee relied on the inadequate efforts of Messrs. Froese and Hesje to contact G.L. in holding that Mr. Hesje was guilty of conduct unbecoming. In holding that the efforts of Messrs. Froese and Hesje to contact G.L. were inadequate, the Hearing Committee held:

> 69. After judgment was rendered, Froese again attempted to contact G.L. by telephone, conducting a new search of online sources in an effort to find a current telephone number. There was no evidence that Froese considered sending a letter to the address on G.L.'s file or employing a courier or an investigative service. The Hearing Committee's view is that even if there were any doubt that a client deserves to be advised when his case might be finally decided, there can be no doubt a client deserves to be advised when a judgment has been rendered against him.
>
> 70. In our view, the attempts made to contact G.L. fell short of what was reasonable and necessary in the circumstances. It is clear that it was not a straightforward matter to contact G .L., in circumstances [*sic*], but where the stakes for him were so high, we think that more robust efforts were called for. Froese testified that it was not his "practice" to obtain instructions from clients by mail, but in this instance, more vigorous and varied means of locating G.L. should have been used. The pro bono policy put in evidence before us indicated that the pro bono clients are entitled to the same level of services as other clients, and more thorough or even more costly efforts to track down G.L. would have been more consistent with the level of service expected of lawyers. No further attempt was made to contact G.L. until a newspaper reporter contacted Froese on February 13. Froese, after consulting an online directory, was able to reach G.L. the very same day.

[91] Notwithstanding references to litigation strategy, events outside the time particularized in the complaint, and Mr. Hesje's file management, the Hearing Committee quite clearly was concerned with the means used to try and contact G.L. in its assessment of Mr. Hesje's conduct.

ii. Disregarding relevant evidence

[92] Mr. Hesje submits that the Hearing Committee erred by failing to consider: (i) the honesty of his belief that G.L. could not be contacted; (ii) the efforts taken to contact G.L.; (iii) conflicting testimony; (iv) the final result of the litigation against G.L.; and (v) G.L.'s failure to notify him that G.L. could

no longer be contacted at the phone number he had originally given to McKercher LLP.

[93] With respect to Mr. Hesje's good faith belief that G.L. could not be contacted, the Hearing Committee quite clearly addressed the fact that good faith is not a defence to a charge of conduct unbecoming. As discussed above, the Hearing Committee correctly instructed itself regarding this Court's interpretation of "conduct unbecoming" in *Merchant* 2009. At para. 55, the Hearing Committee stated:

> As stated by the Saskatchewan Court of Appeal in *Law Society of Saskatchewan v. Merchant*, (2009) SKCA 33, "conduct unbecoming" is the subject of an expansive definition and may be established through intention, conduct, negligent conduct or total insensitivity to the requirements of acceptable practice. …

[94] The Hearing Committee was, in other words, alive to the fact that the *bona fides* of an action do not determine whether the conduct is conduct unbecoming.

[95] Moreover, the record does not support Mr. Hesje's argument that Mr. Hesje's efforts taken to contact G.L. were given insufficient weight. The Hearing Committee expressly remarked that "[i]t is clear that it was not a straightforward matter to contact G.L., in circumstances [*sic*], but where the stakes for him were so high, we think that more robust efforts were called for."

[96] Regarding the ultimate result of the litigation, the fact that it was not as detrimental to G.L. as it could have been is not relevant to whether Mr. Hesje kept G.L. reasonably informed. Similarly, G.L.'s failure to inform Mr. Hesje that he could no longer be reached at the phone number listed on the McKercher LLP file does not address whether Mr. Hesje's efforts to keep G.L. reasonably informed were adequate. In any event, the difficulties faced by

Mr. Hesje were adequately summarized when the Hearing Committee noted that "[i]t is clear that it was not a straightforward matter to contact G.L."

[97] As to the conflicting testimony, Mr. Hesje notes that there was conflicting testimony as to whether G.L. was residing in Saskatoon in August of 2011. However, as the Supreme Court noted in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[98] In fact, whether or not G.L. was residing in Saskatoon is beside the point. The issue was that Mr. Hesje's efforts to contact G.L. were inadequate. Resolving whether or not G.L. was in Saskatoon would not have changed the adequacy of Mr. Hesje's efforts to contact G.L.

[99] In sum, the decision of the Hearing Committee is reasonable. In the circumstances of this matter, Mr. Hesje had a duty to contact his client and he failed to take adequate steps to do so. This outcome is within the range of possible reasonable conclusions that are acceptable, rational and defensible in fact and law. As such, there is no basis for this Court to intervene with the Hearing Committee's weighing of the evidence. This ground of appeal is dismissed.

IX. Conclusion

[100] None of Mr. Hesje's grounds of appeal has merit. Mr. Hesje had adequate particulars to meet his case. The Hearing Committee's interpretation of "conduct unbecoming" was reasonable and disclosed no error. The Hearing Committee articulated a flexible standard against which it assessed Mr. Hesje's conduct, and that standard was not a standard of perfection. The Hearing Committee did not require any additional evidence as to what a competent lawyer would do in a similar circumstance to that faced by Mr. Hesje. The Hearing Committee did not fail to take into account relevant circumstances. Lastly, there is no reason for this Court to interfere with the Hearing Committee's weighing of the evidence. Mr. Hesje's appeal is dismissed with costs to the respondent in the usual way.

DATED at the City of Regina, in the Province of Saskatchewan, this 8th day of January, A.D. 2015.

"Herauf J.A."

Herauf J.A.

I concur "Herauf J.A."

(as authorized by) Ottenbreit J.A.

I concur "Caldwell J.A."

Caldwell J.A.