The Law Society of Saskatchewan

AJIT KAPOOR
HEARING DATE: April 27, 2016
PENALTY HEARING DATE: September 14, 2016
HEARING DECISION DATE: June 25, 2016
PENALTY HEARING DATE: October 17, 2016
***Law Society of Saskatchewan v. Kapoor*, 2016 SKLSS 13**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF AJIT KAPOOR,
A LAWYER OF TORONTO, ONTARIO

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. A Hearing of this matter was conducted in-person at Saskatoon on April 27, 2016, before a hearing committee comprised of Gerald Tegart (Chair), William Davern and Judy McCuskee. Ajit Kapoor ("the Member") was in attendance, represented by Morris Bodnar, QC. Timothy F. Huber represented the Conduct Investigation Committee. There were no objections to the constitution of the Hearing Committee.

2. The Formal Complaint alleges that the Member is guilty of conduct unbecoming a lawyer in that he:

> 1. Failed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application on March 18, 2014.

3. The Member is a retired Member of the Law Society of Saskatchewan. According to the Certificate of the Executive Director of the Law Society filed as Exhibit L2 in these proceedings, he changed his status from active to inactive on June 30, 2014, and remained an inactive Member until he retired on January 1, 2016.

DECISION

4. For the reasons set out below, the Hearing Committee finds the Formal Complaint to be well founded.

PRELIMINARY APPLICATION

5. Counsel for the Member made an application at the outset of the Hearing asking us to dismiss the complaint on the basis it did not allege conduct capable of being conduct unbecoming. Rule 4.01 of the Law Society's *Code of Professional Conduct* addresses the lawyer's responsibilities as advocate. Rule 4.01(1) sets out the general obligation of the lawyer as advocate:

> 4.01(1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

6. Rule 4.01(2) describes several specific types of conduct from which the lawyer is required to refrain. Counsel for the Member drew our attention in particular to rule 4.01(2)(i):

> 4.01(2) When acting as an advocate, a lawyer must not: …
>
> (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party….

7. The Formal Complaint alleges the Member "failed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect". It goes on to provide what counsel for the Member described as particulars: "by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application on March 18, 2014". Rule 4.01(2)(i) specifically addresses conduct similar to that described in the complaint, with the notable difference that the rule speaks to a failure to inform the tribunal of *binding* authority. Counsel for the Member submitted that a complaint based on a failure to inform a tribunal of *non-binding* authority would not disclose conduct capable of being conduct unbecoming.

8. Counsel for the Investigation Committee opposed the application. He acknowledged the absence of "binding" in the wording of the complaint but submitted that a complaint was not required to be based on the specified types of conduct in rule 4.01(2).

9. The Hearing was adjourned briefly for the Hearing Committee to consider the application. On reconvening, we dismissed the application. We were not prepared to accept that a failure to bring non-binding authority to a court's attention is not, as a matter of law, capable of constituting conduct unbecoming. Whether such conduct will constitute conduct unbecoming will depend on the circumstances established by the evidence.

10. The main Hearing resumed.

FACTS

11. The evidence tendered on behalf of the Investigation Committee was largely comprised of the transcript of a trial in the Provincial Court of Saskatchewan at Kindersley on March 18, 2014, on a charge of driving while disqualified. The Member represented the accused at the

trial. At the close of the Crown's case the member made what turned out to be an unsuccessful application for non-suit. One of the arguments he advanced in support of his application was that the Crown had failed to satisfy an onus to prove that, at the time of the alleged offence, the accused was not registered in Saskatchewan's alcohol ignition interlock device program. The court ultimately held that the Crown bore no such onus and dismissed the non-suit application.

12. In support of this argument, the Member referred the court to an annotation to the offence section in Alan D. Gold, *The Practitioner's Criminal Code* (LexisNexis, 2013 Edition). The annotation reads in part:

> On a charge of operating a motor vehicle in Canada while disqualified from so doing, contrary to s. 259(4) of the *Criminal Code*, the Crown was required by the terms of s. 259(4) to prove, as elements of the offence, that the accused was not "registered in an alcohol ignition interlock device program established under the law of the province in which the [accused] resides" and, if the accused was so registered, that the accused was not in compliance with the conditions of that program.

13. This excerpt was linked to a footnote containing the following list of cases and further commentary:

> *R. v. Lariviere (2000), 38 C.R. (5th) 130, [2000] Q.J. No. 3086 (Que. C.A.); R. v. Liptak, [2009] A.J. No. 1271 (Alta. Prov. Ct.); Contra R. v. Whatmore, 2011 ABPC 320, [2011] A.J. No. 1147 (Alta. Prov. Ct.) (onus on accused to prove registration and compliance with interlock program).*

14. Neither the trial judge nor the prosecutor had a copy of this same annotated *Criminal Code* and the Member did not have copies of the relevant pages to provide to them. Consequently, they were not able to follow along as the Member made his submissions in relation to the annotation.

15. The Formal Complaint rests on the manner in which the Member advanced the principle contained in the above-referenced annotation and his reference to the *Lariviere* and *Liptak* decisions in support of the principle, while failing to mention the more recent decision in *Whatmore* rejecting the principle.

16. As the Member began advancing the principle and referring to *Lariviere*, it was clear the trial judge was struggling, both to be sure he understood the argument and then to accept it. He indicated to the Member that he was unaware of the case and was surprised by the principle for which it was being cited. He indicated he would have to read the case. However, the Member did not have a copy of either this case or the *Liptak* decision.

17. The Member went on to cite *Liptak* as further authority for the same principle. However, he made no mention of the *Whatmore* decision.

18. The Member then moved to a second, unrelated argument in support of the non-suit application.

19. The prosecutor made his submissions opposing the application. During the exchange between the prosecutor and the trial judge, the judge again mentioned his surprise in relation to the Lariviere case (at p. 107 of the transcript):

> Now, Mr. Kapoor said that an element of the offence is that the Crown must – according to the Quebec Court of Appeal in *Lariviere* – in 2000, I've expressed some surprise at that because it would not appear to me to be an element of the offence. I've never heard it addressed as such.

20. He asked the prosecutor if he could comment on *Lariviere* (at p. 108 of the transcript):

> If you have any comment on the *Lariviere* case out of the Quebec Court of Appeal in 2000, or any decisions you can refer me to where it's been, you know, cited or whether it's been with approval or whether it's been followed in this province, or whatever, I'd like to hear it. … Because frankly, I'm quite surprised. Without reading the entire decision, that that would be an element of the offence, because it's, as you say, then the Crown is having to prove a negative.

21. The prosecutor indicated in response that he wasn't familiar with the cases and therefore wasn't able to comment on them.

22. The Member asked for an opportunity to speak to the issue again. He again did not mention the *Whatmore* decision.

23. At the conclusion of the Member's submissions, the trial judge announced his decision (at p. 113 of the transcript):

> Well, I have made up my mind, Mr. Kapoor, to the contrary, because I just don't accept that that is an element of the offence. Notwithstanding that you cited the *Lariviere* case. But it's the Quebec Court of Appeal, the year 2000. You haven't given me any authority where that was followed in our own courts, any level. Where it's even been cited in our own courts. I don't accept that as a general proposition that that is required to prove.

24. There then ensued a further discussion between the Member and the trial judge. At p. 116 of the transcript the trial judge stated the motion for non-suit was dismissed.

25. There was a brief adjournment to allow the Member to decide whether to call evidence in the trial itself. During the break, the trial judge asked to see the Member's copy of the *Criminal Code* and reviewed the annotation referred to earlier. When court reconvened he confronted the Member with his failure to mention the *Whatmore* decision. The Member acknowledged that he was aware of the *Whatmore* case. He attempted to explain his conduct in more than one way. At

one point he indicated he was "having trouble saying anything, so I … did not cite it" (p. 126 of the transcript). Later (at p. 127) he stated:

> I had expected that you will look at it because I wasn't getting anywhere – any conversation I could not carry on. And you told me, I'm not going to follow it, so why bother?

26. At p. 131 of the transcript the following exchange is recorded:

> Mr. Kapoor: What difference –
>
> The Court: I came to the – what difference does it make? Is that as an officer of the court, you're bound to tell me about all the decisions, especially if it's right there under your nose.
>
> Mr. Kapoor: Well, Your Honour, the problem is, as I said, you see how much difficulty I was having putting my position across. And I couldn't go anywhere with it.
> …
> The Court: The difficulty was, I was having a lot of difficulty, and I made that point several times, accepting a proposition that you were putting forward. I said, I just can't understand that would be the law. Tell me a case in Saskatchewan. You –
>
> Mr. Kapoor: There are no cases in Saskatchewan.
>
> The Court: -- could have easily told me, well, you know, it wasn't by the way, followed two years later in Alberta, as a matter of fact. But I'm not going to tell you about the one that supports your position.

27. No evidence was presented on behalf of the Member.

REASONS FOR DECISION

28. The facts central to the determination of the complaint are not in issue. The Member acknowledged he was aware of the *Whatmore* decision, which was adverse to the position and the case authority he was citing. While he may have suggested to the trial judge that his failure to mention *Whatmore* was innocent, this position is not tenable when considering the whole of the discussion recorded in the transcript, and counsel for the Member did not advance this in the Hearing.

29. The consideration of the complaint can be reduced to two main issues. The first, which is preliminary to the second issue, is whether the failure to bring relevant and adverse *but non-binding* case law to the attention of the court is capable of constituting conduct unbecoming, particularly but not entirely in light of the specific wording of rule 4.01(2)(i) of the *Code of Professional Conduct* (the "Code"). This requires us to consider the manner in which the Code is to be interpreted and applied.

30. Counsel for the Member argued that the Code should be considered all-inclusive and exhaustive. Since it contains a specific obligation to inform a tribunal of adverse authority, any charge related to this type of conduct must be brought within the wording of that provision in the Code. Since in this case it is acknowledged that the authority to which the Member failed to draw the Court's attention was not binding authority, it does not fall within the Code's specific prohibition.

31. Counsel for the Investigation Committee asked us to consider the Code as a non-exhaustive guide.

32. Neither counsel cited any case authority on the manner in which the Code should be interpreted.

33. The authority for the Code is rooted in s. 10(c) of *The Legal Profession Act, 1990*, which allows the Benchers of the Law Society to make rules "prescribing a code of professional conduct for members". The following excerpt from the preface to the Code provides some assistance in interpreting and applying it in the context of the discipline process:

> The standard of acceptable ethical conduct is enforced by the Law Society's discipline process which holds lawyers accountable for conduct found to be "conduct unbecoming" defined by the Act as:
>
>> […] 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;
>
> The Benchers of the Law Society of Saskatchewan are responsible for determining what constitutes conduct unbecoming in any circumstance. In this Code, the Benchers attempt to define and illustrate appropriate standards of conduct expected in a lawyer's professional relationship with clients, the profession and the justice system. It is impossible for any code to prescriptively or exhaustively establish what might constitute conduct unbecoming. That determination is left to the Benchers who are guided by the legislation, this Code, other decisions of the Benchers of the Law Society of Saskatchewan and other Law Societies, the jurisprudential authority of the Courts and the legitimate expectations of the public.
>
> The rules and principles in this Code are therefore intended to prohibit some conduct, and to otherwise provide general guidance for these purposes. This Code, and its interpretation, is intended to provide a framework within which the lawyer may fulfill the core duties of integrity, competency and loyalty.
>
> This Code should not be construed as all-encompassing or as limiting other duties imperative to the protection of the public, and the public interest generally. Instead, this Code is intended to articulate those immutable ethical principles that assure a philosophy

> where the legal profession is dedicated to the high standards of ethical behaviour that are required, and must evolve over time in a changing society.
>
> This preface is part of this Code.

34. In our view, the Code should not be interpreted strictly, unless the Formal Complaint itself uses a specific provision of the Code in describing the charge. So, for example, if the charge in this case had stated that the Member's conduct contravened rule 4.01(2)(i) of the Code, the elements of that rule would have to be proved unless the charge were amended. But, that is not the charge set out in the complaint.

35. Similarly, the fact a Code provision deals with related or similar subject matter does not affect the validity of a complaint related to conduct not specifically addressed in that provision.

36. Having reached this conclusion, we are now required to consider the second and central issue, which is whether, in the circumstances of this case, the Member's failure to bring the *Whatmore* case to the trial judge's attention constituted conduct unbecoming.

37. As counsel for the Member contended, this requires a balancing of the duty of candour with the duty of a criminal defence counsel to fully represent his or her client. This balance is articulated to some degree in rule 4.01(1) itself, quoted earlier but repeated here for convenience of reference:

> 4.01 (1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

38. The first paragraph of commentary to this rule states in part:

> In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done.

39. To act "fearlessly" on behalf of a client charged with a criminal offence is a useful and powerful characterization of the lawyer's obligation to his or her client. However, it must be tempered by the lawyer's other potentially competing obligations.

. Counsel for the Member expressed concern that a finding of conduct unbecoming here would cast too wide a net and necessitate discipline proceedings in multiple cases in the future. We acknowledge the validity of a cautionary note and the importance of striking an appropriate balance. That balance must be found by criminal defence counsel, by judges hearing criminal

cases and by the Law Society when it considers a complaint, including in the initial stages of a complaint. The balance may be difficult to find at times. However, we do not see this is as one of those times. There are two factors present here that will separate this case from many others.

41. First, the authorities, for and against, were relevant to an issue the Member placed before the court. Neither the trial judge nor opposing counsel would reasonably have anticipated a need to address the issue and prepare accordingly.

42. Secondly, the trial judge clearly demonstrated to the Member that he wanted more input in relation to the position the Member was advancing and the two cases supporting it. It is difficult to understand how the Member could not conclude the court would be keenly interested in knowing of the contrary authority of which the Member was clearly aware.

43. Conduct of this kind is functionally limited to "tribunal" proceedings, which would include court proceedings by virtue of the definition of "tribunal" in the Code. Counsel for the Member urged us to let the judges deal with this type of conduct. We cannot accept that.

44. Judges will, on occasion, address similar conduct as part of the court proceedings. In *R. v. Lynn*, 2015 SKQB 398 (CanLII), Danyliuk J. described the expectations of courts (at para. 19):

> Where a reported case clearly deals with the issue squarely before the Court … it is the expectation of this Court that such case will be brought to the Court's attention.

45. Notwithstanding the role of judges in addressing the same or similar conduct, where it constitutes conduct unbecoming the obligations of the law to regulate lawyer conduct and protect the public require a consideration of possible discipline proceedings independent of the response if any from the court.

46. While a failure to bring an adverse case to the court's attention will not in all circumstances give rise to discipline, we find the Member's failure to bring the *Whatmore* decision to the court's attention was, in the limited circumstances specific to this matter, conduct unbecoming a lawyer and we find the Formal Complaint to be well founded.

PENALTY HEARING

47. A penalty hearing will be scheduled in due course.

"G. Tegart" Gerald Tegart (Chair)	"June 25/16" Date
"W. J. Davern" William Davern	"June 25, 2016" Date
"J. McCuskee" Judy McCuskee	"24 June 2016" Date

PENALTY HEARING DECISION

Hearing Committee: Gerald Tegart (Chair), William Davern, Judy McCuskee
Representing the Conduct Investigation Committee: Timothy Huber
Representing the Member: Morris Bodnar QC.

INTRODUCTION

48. In a written decision issued June 25, 2016, the Hearing Committee found the Member to be guilty of conduct unbecoming a lawyer based on a Formal Complaint that the Member:

> 1. Failed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application on March 18, 2014.

49. A Hearing regarding penalty was held by conference call on Wednesday, September 14, 2016, at 10:00 a.m.

FACTS

50. The Member is a retired member of the Law Society of Saskatchewan. According to the Certificate of the Executive Director of the Law Society filed as Exhibit L2 in the main proceedings, he changed his status from active to inactive on June 30, 2014, and remained an inactive Member until he retired on January 1, 2016.

52. The facts underlying the complaint are set out in the Hearing Committee's earlier decision. For ease of reference, they are reproduced here:

> The evidence tendered on behalf of the Investigation Committee was largely comprised of the transcript of a trial in the Provincial Court of Saskatchewan at Kindersley on March 18, 2014, on a charge of driving while disqualified. The Member represented the accused at the trial. At the close of the Crown's case the Member made what turned out to be an unsuccessful application for non-suit. One of the arguments he advanced in support of his application was that the Crown had failed to satisfy an onus to prove that, at the time of the alleged offence, the accused was not registered in Saskatchewan's alcohol ignition interlock device program. The court ultimately held that the Crown bore no such onus and dismissed the non-suit application.
>
> In support of this argument, the Member referred the court to an annotation to the offence section in Alan D. Gold, *The Practitioner's Criminal Code* (LexisNexis, 2013 Edition). The annotation reads in part:
>
>> On a charge of operating a motor vehicle in Canada while disqualified from so doing, contrary to s. 259(4) of the *Criminal Code*, the Crown was required by the terms of s. 259(4) to prove, as elements of the

> offence, that the accused was not "registered in an alcohol ignition interlock device program established under the law of the province in which the [accused] resides" and, if the accused was so registered, that the accused was not in compliance with the conditions of that program.

This excerpt was linked to a footnote containing the following list of cases and further commentary:

> *R. v. Lariviere* (2000), 38 C.R. (5th) 130, [2000] Q.J. No. 3086 (Que. C.A.); *R. v. Liptak*, [2009] A.J. No. 1271 (Alta. Prov. Ct.); Contra *R. v. Whatmore*, 2011 ABPC 320, [2011] A.J. No. 1147 (Alta. Prov. Ct.) (onus on accused to prove registration and compliance with interlock program).

Neither the trial judge nor the prosecutor had a copy of this same annotated *Criminal Code* and the Member did not have copies of the relevant pages to provide to them. Consequently, they were not able to follow along as the member made his submissions in relation to the annotation.

The Formal Complaint rests on the manner in which the member advanced the principle contained in the above-referenced annotation and his reference to the *Lariviere* and *Liptak* decisions in support of the principle, while failing to mention the more recent decision in *Whatmore* rejecting the principle.

As the Member began advancing the principle and referring to *Lariviere*, it was clear the trial judge was struggling, both to be sure he understood the argument and then to accept it. He indicated to the Member that he was unaware of the case and was surprised by the principle for which it was being cited. He indicated he would have to read the case. However, the Member did not have a copy of either this case or the *Liptak* decision.

The Member went on to cite *Liptak* as further authority for the same principle. However, he made no mention of the *Whatmore* decision.

The Member then moved to a second, unrelated argument in support of the non-suit application.

The prosecutor made his submissions opposing the application. During the exchange between the prosecutor and the trial judge, the judge again mentioned his surprise in relation to the *Lariviere* case (at p. 107 of the transcript):

> Now, Mr. Kapoor said that an element of the offence is that the Crown must – according to the Quebec Court of Appeal in *Lariviere* – in 2000, I've expressed some surprise at that because it would not appear to me to be an element of the offence. I've never heard it addressed as such.

He asked the prosecutor if he could comment on *Lariviere* (at p. 108 of the transcript):

> If you have any comment on the *Lariviere* case out of the Quebec Court of Appeal in 2000, or any decisions you can refer me to where it's been, you know, cited or whether it's been with approval or whether it's been followed in this province, or whatever, I'd like to hear it. … Because frankly, I'm quite surprised. Without reading the entire decision, that that would be an element of the offence, because it's, as you say, then the Crown is having to prove a negative.

The prosecutor indicated in response that he wasn't familiar with the cases and therefore wasn't able to comment on them.

The Member asked for an opportunity to speak to the issue again. He again did not mention the *Whatmore* decision.

At the conclusion of the Member's submissions, the trial judge announced his decision (at p. 113 of the transcript):

> Well, I have made up my mind, Mr. Kapoor, to the contrary, because I just don't accept that that is an element of the offence. Notwithstanding that you cited the *Lariviere* case. But it's the Quebec Court of Appeal, the year 2000. You haven't given me any authority where that was followed in our own courts, any level. Where it's even been cited in our own courts. I don't accept that as a general proposition that that is required to prove.

There then ensued a further discussion between the Member and the trial judge. At p. 116 of the transcript the trial judge stated the motion for non-suit was dismissed.

There was a brief adjournment to allow the Member to decide whether to call evidence in the trial itself. During the break, the trial judge asked to see the Member's copy of the *Criminal Code* and reviewed the annotation referred to earlier. When court reconvened he confronted the Member with his failure to mention the *Whatmore* decision. The Member acknowledged that he was aware of the *Whatmore* case. He attempted to explain his conduct in more than one way. At one point he indicated he was "having trouble saying anything, so I … did not cite it" (p. 126 of the transcript). Later (at p. 127) he stated:

> I had expected that you will look at it because I wasn't getting anywhere – any conversation I could not carry on. And you told me, I'm not going to follow it, so why bother?

At p. 131 of the transcript the following exchange is recorded:

> Mr. Kapoor: What difference –
>
> The Court: I came to the – what difference does it make? Is that as an officer of the court, you're bound to tell me about all the decisions, especially if it's right there under your nose.
>
> Mr. Kapoor: Well, Your Honour, the problem is, as I said, you see how much difficulty I was having putting my position across. And I couldn't go anywhere with it.
> …
> The Court: The difficulty was, I was having a lot of difficulty, and I made that point several times, accepting a proposition that you were putting forward. I said, I just can't understand that would be the law. Tell me a case in Saskatchewan. You –
>
> Mr. Kapoor: There are no cases in Saskatchewan.
>
> The Court: -- could have easily told me, well, you know, it wasn't by the way, followed two years later in Alberta, as a matter of fact. But I'm not going to tell you about the one that supports your position.
>
> No evidence was presented on behalf of the member.

JOINT SUBMISSION AS TO PENALTY

53. Counsel agreed on a joint submission recommending a reprimand. They were not in agreement with respect to the matter of costs. While counsel for the Member agreed that an award of costs is appropriate, he asked that the amount requested by counsel for the Investigation Committee be significantly reduced.

54. As a preliminary matter, it was necessary for the Hearing Committee to consider whether the submission with respect to the reprimand could be considered a joint submission when the overall penalty, including costs, was not agreed to. We have concluded that it can.

55. Penalty determinations in discipline matters are frequently based on joint submissions. The required consideration of a joint submission was addressed by the Saskatchewan Court of Appeal in *Rault v Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII). In that case, the Hearing Committee had rejected a joint submission that would have allowed the Member to resign in the face of discipline, substituting a decision of disbarment without eligibility to apply for readmission for five years.

56. The Court of Appeal quashed the decision of the Hearing Committee and substituted the penalty agreed to by the parties in the joint submission, adding the stipulation that the member could not apply for readmission for three years from the date of the Hearing Committee's decision.

57. In reaching this conclusion, Hunter J. first considered the application of the principles pertaining to the consideration of a joint submission in relation to a sentence in a criminal case, citing the decision of the court in *R v Webster*, 2001 SKCA 72 (CanLII):

> In Saskatchewan, the principle related to joint submissions for criminal law purposes is set out in *R. v. Webster [2001 SKCA 72]*, …wherein Cameron J.A. adopted the principles described by the Alberta Court of Appeal in *R. v. G.W.C.* … In summary, those principles establish that there is an obligation on a trial judge to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so. (para. 13)

58. The court went on to conclude that joint submissions to a Hearing Committee in a discipline matter should be considered in the same principled way.

59. The underlying reasons for the deference owed to joint submissions sometimes include references to the importance of encouraging guilty pleas and the need to allow the parties to make the compromises necessary to achieve them. There was no guilty plea in the instant case. The consideration of penalty follows a half day hearing and a determination that the complaint was well founded. Does this change the application of the principles set out in *Rault*? We think not. The deference due joint submissions is not based solely on the desirability of reducing the various demands placed on the system by the conduct of full hearings. It also reflects the respect appropriately given to the earlier phases of the discipline process and the responsibility of the parties to seek a justifiable resolution with respect to both the decision on the complaint itself and the penalty required where the complaint is well founded.

60. The application of the principles described in *Rault* is sometimes restated as a requirement that the recommended penalty fall within a range of penalties that are reasonable in the circumstances. Counsel for the Investigation Committee referred us to the following decisions that both counsel argued establish an appropriate range within which to consider their joint submission:

> *Law Society of Alberta v. Arends*, [1998] L.S.D.D. No. 17, at paras. 26, 27 and 30 – Misleading the court in order to obtain a default judgment; acting in an unprofessional manner. Reprimand and costs.
>
> *Law Society of British Columbia v. Lowther*, [2002] L.S.D.D. No. 13 at pg. 3 – Misleading the court registry (reprimand); breaching consent order (2 week suspension). Costs.
>
> *Law Society of BC v. Hart*, 2007 LSBC 50 – Relying on client affidavits known to be false. $2,000 fine and costs.

Law Society of Alberta v. Piragoff, [2005] L.S.D.D. No. 47 at paras. 5-7 and 53 – Failure to correct misapprehension of court and opposing counsel; reckless misleading of the court and defence counsel. $15,000 fine and costs.

Law Society of BC v. Batchelor, 2014 LSBC 11 – Filing improperly sworn affidavits and false representations to the court regarding their execution. 1 month suspension and costs.

Law Society of British Columbia v. Samuels, [1999] L.S.D.D. No. 43 – Misleading the court to obtain a late stage adjournment of trial. 3 month suspension and costs.

(The descriptive comments included with the citations are those of counsel.)

61. Having considered the circumstances of this case within the context of those cases, we find that the recommended penalty of a reprimand falls within an appropriate range. We find as well that the recommended penalty is neither unfit nor unreasonable nor contrary to the public interest. Our conclusion in this respect is based in part on the fact the Member is retired. Consequently, we accept the recommendation.

COSTS

62. Counsel for the Conduct Investigation Committee submitted the following list of costs and asked for an award of the full amount:

Tim Huber's time: 22.8 hours @ $200.00/hour:	$4,560.00
Royal Reporting for April 30, 2016:	367.50
Royal Reporting for September 14, 2016 (est):	315.00
Radisson Hotel – Room Rental for April 30, 2016:	275.00
Honorarium for Hearing Committee Members: 3 x $225.00 (Gerald Tegart, Judy McCuskee & William Davern)	675.00
TOTAL COSTS:	**$6,192.50**

63. Counsel for the Member argued that the costs attributed to counsel for the Investigation Committee were excessive, with his emphasis placed mainly on the hourly rate of $200.00. He made no objection to the other components of the total amount.

64. S. 53(3)(a)(v) of *The Legal Profession Act, 1990* provides authority for the Hearing Committee to require a Member found guilty of conduct unbecoming a lawyer to pay "the costs of the inquiry, including the costs of the Conduct Investigation Committee and Hearing Committee" as well as "the costs of the Society for counsel during the inquiry" and "all other costs related to the inquiry". However, the award of costs, including the costs attributed to counsel for the Investigation Committee, must be reasonable: see *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (CanLII).

65. In our view, neither the hourly rate for Investigation Committee counsel nor the total number of hours attributed to the complaint were unreasonable or excessive. This hourly rate has been applied in previous discipline matters. See for example *Law Society of Saskatchewan v. Phillips*, 2015 SKLSS 2 (CanLII).

ORDER

66. Having found the complaint to be well founded and having heard and considered the submissions of counsel with respect to penalty, the Hearing Committee reprimands the Member and orders the Member to pay the costs related to the complaint in the amount of $6,192.50.

"G. Tegart"	"Oct. 17/16"
Gerald Tegart (Chair)	Date
"W. J. Davern"	"Oct. 17/16"
William Davern	Date
"J. McCuskee"	"Oct. 17/16"
Judy McCuskee	Date