THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2012 SKCA 7 Date: 20120131

Between: Docket: CA 1789

Sterling Gilbert McLean

Appellant

- and -

The Law Society of Saskatchewan

Respondent

Coram:
Cameron, Lane & Jackson JJ.A.

Counsel:
Ian D. McKay, Q.C. for the Appellant
Timothy F. Huber for the Respondent

Appeal:

From:	Order of the Discipline Committee of The Law Society of Saskatchewan made June 12, 2009
Heard:	December 1, 2011
Disposition:	Appeal Allowed
Written Reasons:	January 31, 2012
By:	The Court

The Court

1. Introduction

[1] This is an appeal from a decision of the Discipline Committee of The Law Society of Saskatchewan, regarding the penalty imposed upon Sterling McLean, a lawyer practising in Regina. The Discipline Committee suspended Mr. McLean's ability to practice for four months and placed him on indefinite supervision, following his guilty plea to five counts of conduct unbecoming a lawyer.

[2] Mr. McLean appealed the length of the penalty imposed upon him. He submitted that the Committee: (i) failed to consider the explanation for his behaviour; (ii) assigned a level of blameworthiness to his conduct that the facts do not warrant; and (iii) imposed a penalty that is far outside the range of penalties for conduct similar to what occurred in this case.

[3] We are all of the view that the Discipline Committee fell into error when it refused to consider and weigh the explanations, offered in the Agreed Statement of Facts and by Mr. McLean's counsel, regarding why Mr. McLean acted the way he did. Notwithstanding the fact that Mr. McLean pled guilty to these infractions, he was nonetheless entitled to attempt to explain what had transpired—not as justification, but as mitigation. Further, the Committee mischaracterized Mr. McLean's conduct in several ways and turned mitigating factors into aggravating ones. A penalty of four months with an indefinite supervision order was not defensible, having regard for sentences

imposed in other cases. As a result of the cumulative effect of these errors, the Committee's decision is unreasonable and must be set aside.

[4] A fit penalty in this case would have been something in the order of 60 days. In light of the time he has already been suspended—before the Committee's decision was stayed by this Court—and in light of the extensive time he has spent under supervision, Mr. McLean must serve a further suspension of 25 days. The supervision order will be brought to an end when Mr. McLean commences his suspension.

2. Overview of the Complaint and the Proceedings

[5] The amended formal complaint against Mr. McLean alleged the following:

> THAT Sterling McLean, of the City of Regina, in the Province of Saskatchewan:
>
> 1. Is guilty of conduct unbecoming a lawyer in that he did fail to comply with a trust condition imposed by letter dated June 19, 2007, which he accepted, upon the use of documents in connection with a transfer of land from DDC to his client BN;
>
> Reference Chapters XVI of the *Code of Professional Conduct*.
>
> 2. Is guilty of conduct unbecoming a lawyer in that, during the course of his representation of a vendor in a real estate transaction, he did breach an undertaking provided to W.J., a fellow member, wherein he undertook that he would not release purchase funds provided to him in trust without first having secured a discharge in relation to a Federal Writ on the title to the property being sold;
>
> Reference Chapter XVI of the *Code of Professional Conduct.*
>
> 3. Is guilty of conduct unbecoming a lawyer in that he failed to act in a conscientious, diligent and efficient manner on behalf of the Estate of D.D. in that he failed to complete estate business in a timely fashion;
>
> Reference Chapter II of the *Code of Professional Conduct*.
>
> 4. Is guilty of conduct unbecoming a lawyer, in that he did attempt to mislead a member of the public K.D., by misrepresenting the status of an estate matter;

> Reference Chapter I of the *Code of Professional Conduct*.
>
> 5. Is guilty of conduct unbecoming a lawyer, in that he failed to serve his client, J.L., in a conscientious, diligent and efficient manner in the course of a real estate transaction;
>
> Reference Chapter II of the *Code of Professional Conduct*. [Appeal Book, pp. 2a-3a]

[6] A Hearing Committee was constituted under s. 47 of *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1 to review the matter. During the proceedings before the Hearing Committee, the parties introduced an Agreed Statement of Facts, signed by Mr. McLean and counsel for the Law Society, dated April 9, 2009.

[7] According to the Agreed Statement of Facts, the five complaints arose out of four files: (i) count number one concerns a complaint of a breach of undertaking wherein Mr. McLean refused to release funds, constituting the final holdback under *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, in order to fund a deficiency claim; (ii) count number two concerns a breach of an undertaking to attend promptly to the discharging of a writ of execution from a land title; (iii) count numbers three and four involve two separate complaints from two beneficiaries under the same estate; and (iv) count number five pertains to a complaint of delay in attending to the discharge of a real estate mortgage (Appeal Book, p. 7a). Mr. McLean also admitted to having been previously disciplined on June 14, 2006 for: (i) failing to provide an acceptable level of service to clients and failing to respond to a fellow member; and (ii) breaching an undertaking by not complying with it in a reasonable time (see Appeal Book, p. 74a). On that occasion, Mr. McLean

was reprimanded and supervised by the Office of the Practice Advisor for one year.

[8] Following receipt of the Agreed Statement of Facts in this case, Mr. McLean pled guilty to each of the counts before the Hearing Committee. After accepting Mr. McLean's guilty plea, the Hearing Committee referred the question of the appropriate penalty to the Discipline Committee on May 27, 2009.

[9] On June 11, 2009, the Discipline Committee heard submissions from counsel for the Law Society and for Mr. McLean. The Discipline Committee retired at 11:29 a.m. to consider the question of penalty, and reconvened at 1:20 p.m. to announce its decision in these terms:

> It is our decision that you be suspended for a period of four months. It is our wish that such suspension commence within the next month, but we wish to hear from you or your counsel on the effective date of that suspension being mindful of the interests of your client and your—the ability of [your partner] and others in your office to manage the transition. Your resumption of practice will be conditional upon you practicing under the supervision of a practice advisor chosen by the Chair of Discipline Executive on such terms and for such duration as the Chair may determine over time. You are ordered to pay costs in the amount of $3,396.25 not later than June 12th, 2010, one year from now. [Transcript, pp. 74-75.]

The Committee then indicated its wish to hear from counsel as to the effective date of the suspension. After brief submissions and a further brief recess, the Chair of the Committee stated:

> Having considered the question of timing, it is our decision that the suspension be effective Monday, June 15th, 2009, as indicated, for a period of four months from that date. Written reasons will follow. [Transcript, p. 76; emphasis added.]

The Discipline Committee did not give any indication at that time as to the basis for its decision and did not allocate the penalty among the various counts.

[10] Mr. McLean filed his Notice of Appeal on June 16, 2009, without the benefit of the Committee's written reasons. The Committee released its reasons on November 30, 2009.

3. The Standard of Review

[11] The Supreme Court of Canada fixed the standard of review with respect to the imposition of penalties by Law Societies on lawyers for conduct unbecoming the profession in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247. According to *Ryan*, a reviewing court, such as this one, must look to the reasons of the Discipline Committee to determine whether its decision is reasonable (see para. 54). The review, however, must be a meaningful one, having regard for the existence of justification, transparency and the intelligibility of the decision under review, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

[12] In *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at para. 38, the Supreme Court of Canada emphasized that reasonableness "encompasses a quality requirement that applies to … reasons and to the outcome of the decision-making process." Most recently, the Supreme Court has made it clear that a tribunal's reasons "must be read

together with the outcome and serve the purpose of showing whether the result falls within a range of reasonable outcomes" (see: *Newfoundland and Labrador Nurses' Union*, 2011 SCC 62 at para. 14. In the case at hand, the review for reasonableness required the Court to consider: (i) the existence of justification for the reasons; and (ii) the defensibility of the outcome in light of the reasons that could be appropriately offered for Mr. McLean's conduct and the applicable jurisprudence regarding the range of sentence.

4. Assessment of the Reasons

[13] In the Discipline Committee's written reasons, the penalty is applied globally to all of the counts. It is clear, however, that the Committee considered the major infractions to be the first two counts—being the breaches of the two undertakings. The other three infractions concern dilatory practice, promises to complete work "by Friday next" and two statements that work had been completed when it had not been. The Committee's reasons, in relation to the last three counts, are brief, encompassing seven paragraphs only. In those paragraphs, the Committee makes it clear that dilatory practice does not normally attract a suspension, but that in this case, because of the Committee's view of the whole of Mr. McLean's behaviour, those infractions too were considered in an unfavourable light:

> l02. Dilatory practise in itself generally does not warrant a sanction beyond a fine, reprimand or practice conditions unless there is a well entrenched pattern or other aggravating factors. In this case, the Discipline Committee is sufficiently concerned about Mr. McLean's poor insight into and understanding of his behaviour, such that there is a risk of recurrence that must be addressed in the totality of the sanction imposed for all five charges, and upon his ultimate return to practice. [Emphasis added.]

Deference is clearly owed to the Committee's assessment of the evidence, but in our respectful view, the Committee's statement regarding "Mr. McLean's poor insight into and understanding of his behaviour," is not justified on the record. The similarity between his earlier infraction, and these new counts, is troubling, but the facts reveal that there is nothing of the dishonesty and cavalier behaviour that the Discipline Committee saw.

[14] The Court's concerns, in this regard, are best illustrated by a careful review of the Committee's reasons in relation to the two most serious counts. As counsel for the Law Society submitted to the Committee, those counts are determinative of the appropriate penalty (see Transcript, p.16).

4.1 Count Number One – First Breach of Undertaking

[15] According to the Agreed Statement of Facts, in relation to this count, Mr. McLean was the solicitor for the buyer of a new home, which was under construction. On June 19, 2007, a developer, acting as the vendor and the builder of the home, sent the following documents to Mr. McLean: a land transfer, a power of attorney, a partial discharge and a real property report. The transfer was submitted to Mr. McLean on the basis of several trust conditions. One trust condition stated the following:

> We forward the enclosed transfer on the following trust conditions:
>
> …
>
> 3. Respecting the seasonal holdback, prior to disbursement of mortgage funds we will provide your office with an inspection report indicating the amount of this holdback. When the seasonal work is completed, we will also provide you with an inspection report and request release of the holdback. Seasonal holdback money must be completely forwarded to our office once the final inspection is sent to your office. [see Appeal Book, pp. 8a and 26a, emphasis added.]

[16] Mr. McLean registered the transfer of the home into the name of his client. By virtue of his actions in registering the transfer, he accepted the above undertaking.

[17] In late August 2007, the developer began phoning Mr. McLean to obtain the release of the initial holdback. On October 15, 2007, the developer provided a letter and final inspection report, indicating that: (i) the seasonal work and, in fact, all work had been completed in relation to the home; and (ii) the property was 100% complete. The letter requested the release of both the builders' lien holdback of $18,784.78 and the "seasonal holdback" of $9,547.00 as was contemplated and required by the above trust condition.

[18] On November 8, 2007, Mr. McLean wrote to the lawyer for the developer and paid the initial builders' lien holdback of $18,784.54. In that letter, Mr. McLean stated that certain deficiencies still existed in relation to the home such as a missing front step stair railing and a malfunctioning jet tub. Mr. McLean advised that he had received instructions from his client to retain the $9,547.00 designated as the "seasonal holdback" until the deficiencies had been resolved. The deficiencies were unrelated to the work for which the "seasonal holdback" was held.

[19] As a result of Mr. McLean's stance in relation to the "seasonal holdback," the lawyer for the developer complained to the Law Society on December 18, 2007. Mr. McLean's response to that complaint, dated January 21, 2008, formed part of the Agreed Statement of Facts. In that letter, Mr.

McLean argued that the house was not in fact 100% complete due to the existing deficiencies, which gave him the right to retain the "seasonal holdback" to secure his client's position, and asked the Law Society for a ruling as to whether he was entitled to withhold funds to complete the home.

[20] On February 25, 2008, Mr. McLean forwarded the $9,547.00 to the lawyer for the developer, acknowledging that he was not in a "position to hold back the seasonal deficiency of $9,547.00 pending resolution of the claims for deficiencies and/or warranty work" (see Appeal Book, pp. 10a and 44a). In the Agreed Statement of Facts, Mr. McLean agreed that he "chose to ignore the trust condition that he had previously accepted in order to benefit the interests of his own client" and that he had "attempted to use the seasonal holdback amount as leverage in relation to his client's warranty claim and in so doing, breached trust condition #3 as set out in the letter from [the developer] dated June 19, 2007" (see Appeal Book, p. 10a).

[21] The Discipline Committee's reasons, pertaining to count number one, are as follows:

> 47. In relation to Charge #1, Mr. McLean accepted the trust conditions imposed upon his office. He used the documents provided to him on that basis. He chose to ignore the trust conditions and ultimately refused to comply with those conditions as "leverage ..." to advance the interests of his client. He ultimately fulfilled the condition, but not until a complaint had been filed by the lawyer representing the complainant and the Law Society of Saskatchewan intervened.
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> …
>
> 49. Each case is a straightforward example of a lawyer knowingly and deliberately breaching a trust condition and failing to fulfill an undertaking. In each case, the complainants' interests were prejudiced. In relation to Charge #1 the breach was deliberately committed for that purpose and to pressure the complainants to the advantage of Mr. McLean's client.
>
> …

53. As the facts indicate, the breach of trust by Mr. McLean in relation to Charge #1 involved a deliberate breach of trust and a broken promise reflecting adversely on his integrity and trustworthiness....

…

56. In relation to Charge #1 we find it troubling that he admitted to breaching his undertaking to gain "leverage" within months after the Law Society's Practice Advisor ended his supervision of Mr. McLean's practice. In the face of the new complaint and the letter from the Law Society, he initially refused or failed to recognize his misconduct. Rather than immediately remedying the problem, he attempted to justify his breach of undertaking by rationalizing it against other circumstances he was not entitled to take into account according to the terms of the trust imposed upon and accepted by him. He ultimately admitted he breached a trust condition, as alleged by the comp1aint.

…

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

…

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

…

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

67. We have considered the impact on the complainants and others. We reject his counsel's suggestion that there was no prejudice to the complainants. The

> misconduct in each case did cause prejudice to both complainants. The complainant in Charge #1 was deprived of its funds for a period of time. … In each case the complainants lost confidence in the promise and commitment of a member of the trusted legal profession sufficient to file a formal complaint.
>
> …
>
> 71. In the end, there was no offer of restitution or apology to any of these individuals. Indeed, much of Mr. McLean's submissions at the sentencing hearing were premised on an attempt by him to cast the complainants or others in each case as being unreasonable or dilatory themselves.
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> …
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> 73. ... But the Discipline Committee was left with the concern that Mr. McLean's initial response to the Law Society in relation to Charges #1 and #2, the timing of those matters, and his submissions to the Discipline Committee suggest a lack of remorse and failure to accept responsibility for these serious acts of misconduct.
>
> 74. While his conduct is therefore not deserving of the most serious sanction in the range established for misconduct of this nature, the sanction must recognize the importance of specific deterrence for his refusal to understand or acknowledge his wrongdoing. In the end, his misconduct reflects negatively on his integrity. He has knowingly broken a promise given to and relied upon by others in circumstances where such promises must be kept in all events. A pattern of serious misconduct, including a previous record, also invokes the need for general deterrence to control such behaviour generally and to maintain the public's legitimate expectation of censure. The circumstances of this case invoke the imperatives of specific and general deterrence. [Emphasis added.]

[22] These reasons leave the clear impression that Mr. McLean set out from the moment that he received the transfer to use the "seasonal holdback" as leverage to secure an unwarranted advantage for his client and that he never—at any point—honestly believed he could retain the "seasonal holdback" to pay for deficiencies.

[23] The Certificate of Completion in this case is dated October 10, 2007 (see Appeal Book, p. 29a). Mr. McLean stated that he believed at the outset he was entitled to question whether the home was complete. He ultimately

concluded he was wrong in this regard, but in assessing the gravity of the breach, the Committee was required to consider Mr. McLean's belief and the fact that the *Act* requires that the contract be complete before the final holdback is released. Having raised these issues, the Committee could not say the complaint was "a straightforward example of a lawyer knowingly and deliberately breaching a trust condition and failing to fulfill an undertaking."

[24] Mr. McLean accepted a series of documents—including a land transfer—on the faith of several undertakings. One of those undertakings is in itself either an obligation imposed by s. 43(1)(b)(i) of *The Builders' Lien Act* or the contract. This condition gives the developer another lever or remedy not provided by the *Act* or the contract: the ability to complain to the Law Society if the lawyer does not comply promptly, and without question, with the holdback requirements.

[25] Far be it for this Court to say the undertaking requested by the developer is not appropriate, but it can be said with some confidence that a lawyer—who legitimately questions a certificate of completion—is not automatically guilty of a breach of an undertaking or guilty of a breach of integrity.

[26] The Committee stated that it was concerned about Mr. McLean's efforts to "minimize his state of mind in the face of his admissions in evidence" and that his submissions "suggest a lack of remorse and failure to accept responsibility for these serious acts of misconduct" (at paras. 59 and 73, respectively). In concluding their reasons, the Committee mentioned that Mr. McLean's "failure to accept responsibility at the sentencing hearing" was one

factor that " supports a suspension closer to the high end than the low end of the range, with practice conditions of an indefinite duration" (at para. 103). Thus, the Committee drew a number of adverse inferences from Mr. McLean's submissions in mitigation of sentence so to speak, adverse inferences that served to add to the Committee's appreciation of the seriousness or gravity of his conduct. That the Committee did so is troublesome in the circumstances.

[27] Having pled guilty, Mr. McLean was nonetheless entitled to place his explanation before the Committee in mitigation of his sentence. Indeed, much of what was said on Mr. McLean's behalf was before the Committee by way of letters to the Law Society, appended to the Agreed Statement of Facts. Far from considering the explanation, or the existence of extenuating circumstances, the Committee appears to have penalized Mr. McLean for having put forward an explanation. For example, in response to questioning from one of the Benchers regarding one of the cases that had been cited by counsel for the Law Society, Mr. McLean's counsel said this:

> I think in [the first count], Mr. McLean was just trying to get [the developer] to act reasonably. It was within their power to do whatever they had to do to fix the tub and put the railing on the front porch and make things safe. Put yourself in the position of the client that paid $240,000 for a house, and they can't take a bath in it. So he's just trying to encourage reasonableness from these people who had it within their power to be reasonable and they weren't going to be reasonable, they chose not to be. He knew all along that he had to comply with the trust conditions and he did eventually comply with it. [The lawyer for the developer] knew full well what the situation was when the matter was referred to him, and he knew what the outcome would be (Transcript, pp. 47-48).

In referring to this exchange in their reasons, the Committee took his explanation as aggravating:

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

> for a "ruling". But in his submissions at the hearing his counsel admitted Mr. McLean "knew all along that he had to comply with the trust conditions and he did eventually comply with it." This indicates a clear consciousness and deliberateness inconsistent with any good faith claim of innocence. [Emphasis added.]

In addition to treating the fact of the explanation as aggravating, the Committee gave little weight to the fact, first, that Mr. McLean agreed to the execution of an Agreed Statement of Facts that does not in any way sugar coat his behaviour and, second, that he pled guilty.

[28] Mr. McLean was guilty of breaching the undertaking in relation to count number one because: (i) he attempted to use the funds in his possession as leverage instead of using other methods to resolve the matter; and (ii) he was dilatory. He did not, however, accept the undertaking, knowing or intending not to comply, and he never lost control of the funds. Further, he believed that he had a right to insist that the Certificate of Completion be accurate. When he determined that “completion” under the *Act* or the contract did not encompass rectification of the deficiencies in this case, he released the holdback, but took far too long to reach this conclusion.

[29] By common agreement, this count is the most serious of all of those with which Mr. McLean was charged. On the whole, the Committee made more of this count than the facts, and Mr. McLean’s explanation, merited.

4.2 Count Number Two – Second Breach of Undertaking

[30] In relation to this matter, Mr. McLean acted for the vendors on the sale of seven properties pursuant to an agreement for sale dated July 18, 2003 to the purchaser represented by W.T.J., another Regina lawyer. This transaction

had been on-going for some time (see Appeal Book, p. 48a). The purchase was made by a down payment with payments to follow on an *ad hoc* basis until the balance was paid in full.

[31] On March 8, 2006, W.T.J. provided Mr. McLean with a trust cheque for the final installment of $40,906.01, representing payment of the balance of the funds due under the 2003 agreement for sale. Mr. McLean was instructed by his clients, H.K. and C.K., the joint owners and vendors of the seven properties, to accept the same as payment in full of the balance of the funds.

[32] In exchange for the funds, Mr. McLean delivered to W.T.J. a transfer of the last two pieces of property. While the funds had not been sent to Mr. McLean on the basis that the title to the property would issue free and clear of any writs of execution, Mr. McLean wrote to W.T.J. on June 16, 2006, wherein he gave the following undertaking:

> From 1304 Angus Street, we undertake to discharge Bank of Montreal caveat Interest #10733789 and Federal Writ IR# 110271417.
>
> From 1930 Quebec Street, we undertake to discharge Federal Writ IR# 110271417.
>
> We undertake not to release the funds provided to us in your letter dated March 8, 2006 until the above interests have been discharged. [Appeal Book, p. 11a.]

[33] Federal Writ IR# 110271417 was a writ of execution dated May 11, 2005, filed by the Canada Revenue Agency for arrears of taxes in the amount of $25,416.01 owed by H.K., one of two spouses who were joint owners of each of the above properties. The writ had been registered on December 9, 2005—midway between the date of the agreement for sale and the release of the final funds.

[34] Immediately upon receipt of the funds from W.T.J., Mr. McLean wrote to the Canada Revenue Agency and requested a partial discharge of its writ of execution in relation to the payment of funds, which were held in trust for H.K. The Agency did not provide Mr. McLean with a written response, notwithstanding a number of phone calls to its collectors (see Appeal Book, p. 49a).

[35] On April 19, 2007, Mr. McLean notified Canada Revenue Agency in writing that one-half of the sale proceeds was the sole property of C.K., as joint owner of the property, and had not been attached by the Agency's writ of execution (see Appeal Book, p. 50a). At that time, Mr. McLean forwarded a partial discharge of the writ with respect to the two properties for the execution of Canada Revenue Agency. Mr. McLean received no response.

[36] On September 13, 2007, notwithstanding the fact that Mr. McLean had not yet received any response from Canada Revenue Agency, he released $20,453.00, being one-half of the funds subject to the above trust condition, to C.K. The release of these monies meant that Mr. McLean was no longer in a position to discharge the whole of the federal writ against the two properties according to the wording of the undertaking he had given.

[37] H.K's purchaser subsequently re-sold the land, at which time W.T.J. gave an undertaking regarding the removal of the writ of execution from the land. When the writ of execution was not removed, the new purchaser filed a complaint against W.T.J. When the Law Society investigated the complaint

against W.T.J., it opened a further investigation against Mr. McLean. The Law Society asked Mr. McLean for his response sometime in July 2008.

[38] In his July 11, 2008 letter to the Law Society with respect to this complaint, Mr. McLean indicated he thought the only way to resolve the problem would be to apply to the Court of Queen's Bench. He asked the Law Society for its view of the matter.

[39] Mr. McLean subsequently applied to the Court of Queen's Bench for an order discharging the writ. He did so without costs to his clients or W.T.J.'s clients sometime in March 2009. Counsel for the Canada Revenue Agency prepared the Order dated April 23, 2009. The Order directed Mr. McLean's law office to pay to the Receiver General of Canada the sum of $20,670.96 before directing the Registrar of the Land Titles Registry to discharge Interest Register No. 110271417, as registered under interest numbers 138156521 and 132318413, from the two titles above-mentioned. The Order also preserved the possibility of an action by H.K. against Mr. McLean with respect to his having paid any money over to the Canada Revenue Agency pursuant to the Order.[1]

[40] The Committee's reasons make it clear that the members did not consider Mr. McLean's letter of explanation to the Law Society, appended to the Agreed Statement of Facts, when they assessed the gravity of the complaint:

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[1] H.K. had throughout denied that he owed the Canada Revenue Agency any money for taxes, and had resisted paying any taxes at all.

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

49. Each case is a straightforward example of a lawyer knowingly and deliberately breaching a trust condition and failing to fulfill an undertaking. In each case, the complainants' interests were prejudiced. ...

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

…

53. … While there is no evidence Mr. McLean deliberately intended to compromise the complainant's interest in relation to Charge #2, it is clear from the evidence he knowingly put himself in a position where he could not comply with and fulfill the undertaking he gave as a condition of receiving and disbursing the funds from trust.

…

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

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

… In Charge #2, Mr. McLean put himself in a position where he could not fulfill the trust condition and where a court application was needed to discharge the writ some 24 months after funds were released in breach of the trust conditions. He admitted and entered a plea of guilty to a breach of an undertaking.

…

60. With respect to Charge #2, Mr. McLean's counsel again attempted to equivocate or qualify the scope of the undertaking given by Mr. McLean stating this undertaking was given "with the expectation of a reasonable response from the Crown". With respect, this submission again fails to appreciate the requisite duty of the lawyer as trustee, where the lawyer must become the impartial stakeholder,

acting without discretion or any expectation a complainant such as this may be obliged to accept anything less than full compliance with a trust condition.

…

65. … He put himself in a position where, on instructions from his client, he could not pay funds to the complainant in Charge #2. In pleading to both charges he admitted to a breach in any event.

66. … Altogether, we find his conduct to represent a serious disregard for his professional obligations in relation to both Charges #1 and #2. ...

67. We have considered the impact on the complainants and others. We reject his counsel's suggestion that there was no prejudice to the complainants. The misconduct in each case did cause prejudice to both complainants. The complainant in Charge #1 was deprived of its funds for a period of time. … In relation to Charge #2, the writ holders' interests were prejudiced. It was denied the payment of funds required by the undertaking given by Mr. McLean. The title holder was unable to immediately obtain clear title and to complete a subsequent transaction in relation to the property. In each case the complainants lost confidence in the promise and commitment of a member of the trusted legal profession sufficient to file a formal complaint.

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

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

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

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

[41] With respect to this count, the Discipline Committee appears to have mis-described the complaint in three ways. First, there are some factual errors. The Committee stated that Mr. McLean "made no attempt to discharge the writ in fulfillment of his undertaking until a complaint was made to the Law Society by another member" (para. 48). According to Mr. McLean's letter to the Law Society, immediately after he gave the undertaking, he contacted the Canada Revenue Agency and tried repeatedly to gain that Agency's attention, to no avail. The Committee also stated that a court application was needed to discharge the writ "some 24 months after funds were released in breach of the trust conditions" (para. 57). This implies that Mr. McLean's actions required court intervention, which is incorrect. Mr. McLean took steps to move the matter along. As a last resort, he applied to the Court. Further, the Committee's reasons do not reflect the understanding that W.T.J. did not ask for the undertaking—which could have created difficulties of another sort—rather, it was Mr. McLean who *offered* the undertaking. It is an undertaking, nonetheless, but the fact that Mr. McLean saved his colleague from a potential difficulty adds an important nuance to the complaint. The Committee also stated that the complainant was prejudiced and that there was no offer of restitution, but there was no evidence of prejudice or loss.

[42] Secondly, the complainant was not Canada Revenue Agency or W.T.J. The complaint came from the ultimate purchaser whose lawyer relied upon the undertaking given by W.T.J., who had acted for the intermediate purchaser. Of course, the ultimate purchaser was entitled to rely upon W.T.J.'s undertaking, but no complaint came from those persons most intimately

familiar with: (i) the history of the transaction; and (ii) Mr. McLean's client, who, according to the evidence, objected to paying any tax under any circumstances to anyone. Indeed, no complaint was made against Mr. McLean. Mr. McLean's error came to light as a result of a complaint against W.T.J. This does not diminish the fact that Mr. McLean did not act promptly in the matter, but again it provides necessary context. The Canada Revenue Agency did not act, according to the timetable needed to resolve the transaction, and may have failed in the beginning to understand its entitlement fully, but the Agency received neither more nor less than it was entitled to receive.

[43] Thirdly, and perhaps most importantly, the Committee accepted that Canada Revenue Agency was not entitled to the full amount of $25,000 (see para. 68). Nonetheless, the tenor of the reasons leads one to conclude that Mr. McLean's only option was to pay the full amount of $25,000 over to the Receiver General of Canada, and if he had done so, all would have been resolved. This would have been the means to dispose of one aspect of the matter quickly, but the reason why Mr. McLean could not have done so is that there was a real question as to whether Canada Revenue Agency would have been entitled to this amount, which the Court order paying the Agency the lesser amount indicates. If Mr. McLean had complied fully with the undertaking, he would have left himself (and potentially the Lawyers' Assurance Fund) open to a claim from C.K.

[44] As with count number one, the Discipline Committee states categorically that once an undertaking is given, it must be complied

with—even if it is in error, and would cause someone else loss. While generally a lawyer must comply without question to an undertaking, it may not be specifically so. In any event, when assessing the gravity of the breach of an undertaking, it is a relevant factor to know that the fulfillment of the undertaking would have caused someone else loss. Mr. McLean is guilty of having not drafted the undertaking properly, and he was dilatory in addressing the problems that arose from the actions of his recalcitrant client, but he is not guilty of diverting funds properly belonging to one party to another.

5. Application of the Standard of Review to the Discipline Committee's Decision

[45] In the case at hand, the review for reasonableness raises concerns regarding both arms of the *Dunsmuir* test: (i) the existence of justification for the reasons; and (ii) the defensibility of the outcome. The review for reasonableness, however, is not a mechanical exercise (see: *Newfoundland*, *supra*). Even if the reasons cannot be justified based on the record, deference is owed to the decision-maker, if the outcome is, nonetheless, defensible. With respect to the penalty imposed by the Discipline Committee, it can stand in these circumstances only: (i) if the charges are as serious as the Committee found them to be; and (ii) the penalty is comparable to other penalties imposed in similar circumstances.

[46] The Discipline Committee describes Mr. McLean's infractions in terms normally reserved for cases of defalcation or some form of moral turpitude. The reasons leave the distinct impression that Mr. McLean accepted undertakings, knowing he could not fulfill them, and he did so, for his own or

someone else's ends, and caused significant harm. The Committee's reasons specifically state that Mr. McLean does not understand the seriousness of the matters, does not accept responsibility for his actions and is not remorseful. Further, the reasons state that Mr. McLean made no offer of restitution, suggesting that his actions caused loss for which restitution had been proven and was required to be paid. However, when the Agreed Statement of Facts, including Mr. McLean's letters of explanation, are considered in light of Mr. McLean's submissions and the fact of his guilty pleas, one is left with an appreciably different understanding of the matter.

[47] The transactions, involving the breaches of undertaking, were more complex than the Discipline Committee described and, in each case, Mr. McLean had an explanation for acting the way he did. With the exception of the developer, which engaged a lawyer to use the complaints procedure rather than any contractual or statutory remedies, no one suffered any actual loss or incurred any additional cost.[2] And even in the case of the developer, there was no proof of loss or claim from the developer. Most importantly, all monies, to which anyone was entitled, remained in Mr. McLean's control. He saved witnesses from testifying and, perhaps, in some cases, explaining their behaviour.

[48] Mr. McLean's guilty pleas meant that the Discipline Committee did not have to determine whether he had a lawful justification for not complying with his undertakings, but that did not mean the Committee was not required to

[2] Since the hearing, Mr. McLean also wrapped up the estate referred to in counts 3 and 4, charging no fees for doing so.

consider his explanation and the existence of extenuating circumstances. Not only did the Committee not assess his explanation, the members used the fact Mr. McLean had proffered an explanation to conclude that he did not accept full responsibility for his actions—and this in the face of a guilty plea and a statement by prosecuting counsel that Mr. McLean had, in fact, accepted full responsibility for his actions (Transcript, p. 5).

[49] The Discipline Committee stated it was motivated to emulate penalties imposed by other jurisdictions in an effort to achieve national standards:

> 44. The provincial law societies are committed to achieving national standards in their core areas of regulatory responsibility through their membership and participation in the Federation of Law Societies (of Canada). Mobility and other arrangements between provincially constituted societies are made through the Federation to ensure they meet a principled national standard.
>
> …
>
> 46. … To this end, the collective decisions of all societies constitute a comprehensive jurisprudential footing for guiding future decisions of the Benchers in all provinces. Where these decisions meet the requirement of being sufficiently transparent and principled, they are a valuable reference in the discipline decisions of all societies.

Since neither counsel for the Law Society, in his submissions to the Discipline Committee, nor the Committee, in the oral hearing, suggested that Mr. McLean's penalty would be fixed according to a national standard, this reason appears to justify the penalty imposed, rather than acting as a reason for it.

[50] Moreover, the Committee mentioned two decisions only from outside Saskatchewan to establish the applicable national standard: *Law Society of British Columbia v. Kruse*, 2001 LSBC 32, 2002 LSBC 15 and *Law Society of British Columbia v. Hordal*, 2004 LSBC 36. In Mr. Kruse's case, he had ceased practice and did not respond to the law society or appear before it when

it rendered its decision. While the hearing committee dealing with Mr. Kruse made strong comments in relation to a lawyer's obligation with respect to giving an undertaking, such statements are easily made when the member has left the profession. In the case of Mr. Hordal, he induced the opposing party to provide a release, and offered his undertaking, knowing that the undertaking could not be fulfilled. Mr. Hordal also provided a draft transfer to opposing counsel and told them that his client would be signing it the following day, which Mr. Hordal knew not to be true. Neither of these decisions, therefore, is clearly on point. The *Hordal* decision was, nonetheless, the only decision relied upon by the Committee to establish the upper limit of a range of six months.

[51] In sentencing Mr. McLean to a four-month suspension and an indefinite supervision order, the Committee was required to address *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 W.W.R. 478, leave to appeal to S.C.C. refused, [2009] 1 S.C.R. xi). *Merchant 2009* affirmed a decision of a Hearing Committee dated June 23, 2006. The member in that case had pled not guilty to the infraction, which had necessitated a hearing, and he had a previous history with the Law Society. The Hearing Committee imposed a two-week suspension on Mr. Merchant, with no supervision order, for: (i) withdrawing or authorizing the withdrawal of trust funds belonging to a client, contrary to a Court Order, and without the client's consent; and (ii) corresponding to various residents of Estevan, Saskatchewan, attaching a retainer agreement, which letter and retainer agreement were reasonably capable of misleading the intended recipients. Mr. Merchant had been previously disciplined for an infraction similar to the second count (see:

Merchant v. Law Society of Saskatchewan, 2002 SKCA 60, 213 D.L.R. (4th) 457).

[52] The Committee declined to follow *Merchant 2009* for the following reasons:

> 86. In the reasons for the decision in *Merchant*, there is no definitive statement showing whether the Benchers gave full consideration to the public interest objective in sentencing or the range of sentencing options suggested by the jurisprudence. It is therefore difficult to rationalize the decision in *Merchant* with the relevant sentencing objectives and the applicable jurisprudence. As the Benchers concluded in *Nolin* [[2008] L.S.D.D. No. 158 (QL)]:
>
> > 58. For all these reasons, the Benchers should be cautious about simply referencing and following outcomes in earlier decisions. Consistency and fairness is best achieved in the application of similarly reasoned principled decisions reflecting the legitimate objectives of the sentencing power and responsibility. Likewise, where an earlier precedent seems incorrect in approach or result, this should not be compounded by a similar approach or outcome in other cases.
> >
> > 59. Thus, the Benchers are not bound by mere outcomes in earlier decisions. While each case must be decided on its own facts and merits, each decision must also withstand the scrutiny of others, including the Benchers. Where a previous decision does not appear to support the Law Society's paramount mandate to protect the public, such decisions cannot bind Discipline Committees to a similar outcome.
>
> As indicated above, decisions of the Benchers in this and other jurisdictions are of useful reference where they are sufficient in their reasons and consistent with the sentencing responsibility. In the context of all the jurisprudence before us and in the circumstances of this case, we find the decision itself in *Merchant* to be of limited value. With this exception, we find the cases referenced above to reflect the prevailing range of sentencing options in cases involving a breach of trust or an undertaking. [Emphasis added.]

[53] When the Committee developed their reasons in this case, it would have been clear that Mr. McLean's four-month suspension and indefinite supervision order could not stand together with the two-week suspension imposed on Mr. Merchant. One of them had to have been wrongly decided. While deference is owed to the Committee's assessment of *Merchant 2009*, it

is worth noting that Mr. McLean, who would have had no notice that the earlier decision would not be considered a good precedent, prior to receiving the Committee's reasons, can rightly have a sense of grievance. Moreover, even when *Merchant 2009* is set to one side, it is still necessary to assess the fitness of the penalty in this case, having regard for the objective gravity of the counts to which Mr. McLean pled guilty, all of the decisions relied upon by the Committee and other decisions of the Law Society.

[54] The Law Society's decisions are well-documented: decisions pertaining to 2007, and after, are available at www.lawsociety.sk.ca. Decisions prior to 2007 are not yet available on-line but may be obtained from the Law Society. With one exception, suspensions greater than one month involve one or more of the following aspects: (i) failure to comply with an Order of the Discipline Committee regarding trust accounts— 2007 SKLS 2; (ii) a personal benefit taken or accruing to the member—1984 SKLS 4; 1996 SKLS 5; 1997 SKLS 2; 1998 SKLS 3; 1999 SKLS 9; 2003 SKLS 10; 2004 SKLS 4; 2005 SKLS 3; 2005 SKLS 4; (iii) a conflict of interest on the part of either the member or the client—1981 SKLS 2; 1989 SKLS 4; 1998 SKLS 1; (iv) a misrepresentation to a court, a tribunal or the Law Society itself, 1999 SKLS 8; (v) a misrepresentation as to the legal status of affairs knowing that someone will rely on the misrepresentation to their detriment—(*Law Society of Saskatchewan v. J.G.*, order dated February 18, 2011); and (vi) multiple and egregious failures to respond to the Law Society—2004 SKLS 8.[3] Significant loss is often a factor in the above

[3] The references to SKLS are to a Discipline Digest kept by the Law Society of Saskatchewan Library in Regina.

decisions. Importantly, the Discipline Committee did not rely upon any of the above decisions to support the penalty imposed on Mr. McLean. The one exception is *Law Society of Saskatchewan v. Stinson*, order dated December 12, 2008.

[55] In the case of Mr. Stinson, he received a two-month suspension with an indefinite practice supervision requirement. Like Mr. McLean, Mr. Stinson breached two undertakings. Unlike Mr. McLean, however, it was found that Mr. Stinson knew or ought to have known that the undertakings might never be fulfilled, and indeed they were never fulfilled. Moreover, two institutions suffered loss, which places Mr. Stinson's case more easily in the group of cases where the Law Society has imposed a suspension greater than one month. Unlike Mr. McLean, however, Mr. Stinson had no prior discipline record.

[56] The case of Mr. Stinson represents a benchmark decision for the purposes of the within appeal. The Committee correctly relied upon it. Both men pled guilty to two breaches of undertakings. In Mr. Stinson's case, there are the aggravating factors of granting undertakings that he could not fulfill and loss caused as a result. In Mr. McLean's case, his blameworthiness stems, in large measure, from not acting promptly to address problems that were not largely of his own making. On the other hand, he has a prior disciplinary record for dilatory practice and he has, on this occasion, pled guilty not just to breaching two undertakings, but to three other infractions as well, which also contain the hallmarks of dilatory practice. Mr. McLean's prior discipline record is an important factor in fixing the penalty. As in that previous

complaint, Mr. McLean's actions in all of the counts are characterized by a failure to act promptly when confronted by a problem.

[57] In this case, as we have indicated, the Committee's reasons are not justifiable in light of the record. In addition, having regard for *Stinson* and the other decisions above mentioned, and in light of the objective gravity of Mr. McLean's infractions, the Committee's decision to impose a four-month suspension and indefinite supervision does not lie within the range of defensible outcomes. Apart from the *Stinson* case, the Law Society has not before suspended a member for more than 30 days in the absence of one or more of the aggravating features mentioned in relation to its past decisions. Since the Committee's decision cannot be sustained having regard for the justification of the analysis and the defensibility of the outcome, it must be set aside.

[58] A final matter should be mentioned. The Discipline Committee prepared its reasons some significant time after the Notice of Appeal had been filed. In *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, the Supreme Court of Canada discussed the practice of rendering reasons after a verdict, particularly where it is apparent they have been crafted after the announcement of the verdict and in the face of an appeal. While we would not in any way suggest that the Discipline Committee engaged in result-driven reasoning, every decision-maker should keep *Teskey* in mind when writing reasons after the verdict has been announced.

6. What is the appropriate penalty?

[59] Neither party wished that the matter be remitted to the Discipline Committee, which means that it falls to this Court to assess the appropriate penalty in accordance with s. 56(5) of *The Legal Profession Act*, *1990* which empowers this Court to make any order that it considers appropriate.

[60] But for Mr. McLean's prior record and the fact of five charges, a fit penalty in this case might very well have warranted a suspension of something up to 30 days. In this case, however, his prior record and the five counts permit the imposition of a penalty greater than that, and more in accordance with Mr. Stinson's penalty.

[61] In this case, however, the Court should take into account the time that Mr. McLean has spent on supervision prior to the hearing of this appeal. While a significant part of that delay falls yet again at Mr. McLean's feet, he has nonetheless suffered a significant emotional and financial penalty by the lapse of time.

[62] We are also cognizant of Rule 1607.1 of the Law Society Rules, which provides that a member who is suspended shall not be listed on any firm's letterhead or in any other marketing activity unless the suspension is for a period of less than 30 days. This makes a penalty of 30 days, or more, an even more significant hardship. Finally, we note that Mr. McLean served a short period of suspension of until such time as the stay of that suspension was imposed by this Court.

[63] Having regard for all of these factors, a further suspension of 25 days is imposed upon Mr. McLean. If Mr. McLean has not already paid the costs imposed upon him, he has 60 days to do so.

[64] This appeal also brings the supervision order to an end, as of the day the suspension begins. If for some other reason, Mr. McLean is required to be supervised, the Law Society will have to take such steps as are necessary to bring about that result.

7. Conclusion

[65] In conclusion, the decision of the Discipline Committee, other than the order with respect to the payment of costs, is set aside. Mr. McLean is suspended for 25 days. The effective date of that order should be set by agreement of the parties. Failing agreement, the suspension will take effect February 15, 2012. Mr. McLean is entitled to his costs in the usual way.

DATED at the City of Regina, in the Province of Saskatchewan, this 31st day of January, A.D. 2012.

"Cameron J.A."
Cameron J.A.

"Lane J.A."
Lane J.A.

"Jackson J.A."
Jackson J.A.