The Law Society of Saskatchewan

JOEL ARVID HESJE, Q.C.
December 13, 2013
***Law Society of Saskatchewan v. Hesje*, 2013 SKLSS 13**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF JOEL ARVID HESJE, Q.C.,
A LAWYER OF SASKATOON, SASKATCHEWAN

PRELIMINARY APPLICATION AND HEARING COMMITTEE DECISIONS

PRELIMINARY APPLICATION FOR FURTHER AND BETTER PARTICULARS
Application Date: August 16, 2013

Members of Hearing Committee:	Beth Bilson, Q.C. (Chair) Maurice Laprairie, Q.C. Ron Barsi, P.Geo.
Counsel:	Karen Prisciak, Q.C. for the Conduct Investigation Committee

1. In a Formal Complaint dated May 13, 2013, the Law Society of Saskatchewan made the following charge:

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

2. Both members made application to the Hearing Committee for further and better particulars with respect to the charges against them. Ms. Prisciak provided a response to the application in a letter dated July 12, 2013. Both Applicants indicated that their concerns remained unsatisfied by the response, and asked to have an opportunity to address the Hearing

Committee. A conference call was convened on Friday, August 16. Prior to this Mr. Hesje and Ms. Prisciak filed further material with the Hearing Committee.

3. It was argued on behalf of both Applicants that the charges as they stand do not point with sufficient specificity to the misconduct which is alleged against the Applicants. They acknowledged that they had received significant disclosure from counsel for the Disciplinary Investigation Committee, including the complaints on which the charges were based and material from the files of the law firm whose services were the subject of the complaints.

4. Rule 432(4) of the Rules of the Law Society of Saskatchewan provides that a member charged with misconduct may ask for "disclosure of the circumstances" of the alleged misconduct. Mr. Hesje argued that the fulfillment of the obligation of disclosure under this Rule does not relieve the Disciplinary Investigation Committee or the Hearing Committee of complying with the principles of fairness and natural justice that provide a framework for all administrative proceedings of this kind. Ms. Prisciak acknowledged that the principles of administrative fairness must be followed, but expressed the view that the documents disclosed to the Applicants would enable them to understand the case they would be required to meet.

5. The Hearing Committee is not, of course, privy to the documents that were disclosed to the Applicants, and is not yet familiar with the facts underlying the emergence of this dispute. The parties do, however, seem to be in agreement about certain basic items: that the charges refer to one piece of litigation commenced on behalf of the client G.L.; and that, while this litigation unfolded over a period of four to five years, the main focus of the charge is on the period of approximately three weeks while Mr. Froese was involved with this file.

6. The parties referred the Hearing Committee to several cases concerning applications for particulars in professional disciplinary proceedings, and these all contained the observation that the purpose of providing particulars is to permit the person who is facing a disciplinary charge to know clearly what allegations they must address and to marshal their evidence accordingly. These cases also state that the standard of particularity for charges in disciplinary cases of this kind is not as demanding as it is for charges in criminal matters.

7. As counsel for Mr. Froese acknowledged, the possible scope of the charge against his client is inherently limited because of the restricted period in which he played any role in relation to the relationship with the complainant. Mr. Hesje, however, argued that it is unclear from the charge whether in his case the focus is primarily on the period during which Mr. Froese was involved with the file, or whether the charge might relate alleged misconduct during earlier stages of the litigation.

8. We have concluded that there is merit to the argument put forward by Mr. Hesje. It is unclear from the charge in its current form whether it is intended to pertain to a particular phase of the litigation – namely, the time during which Mr. Froese was involved – or whether counsel on behalf of the Committee would be making allegations against Mr. Hesje independent of whatever role he may have played in "aiding" Mr. Froese, and relating to different periods of the relationship with the client G.L. Though we will be requiring that the Disciplinary Investigation Committee amend the charge in order to reflect this, we do not think this leads to the

consequence Mr. Prisciak expressed concern about – that she would not be permitted to lead evidence on the evolution of the litigation and the relationship with this particular client. It is unlikely that the Hearing Committee would be able to understand the allegations of misconduct relating to the period when Mr. Froese was involved without gaining some insight into the development of the solicitor-client relationship. Our ruling should not be read as precluding the parties from introducing evidence of this kind.

9. On the other hand, we do not accept the argument put forward by Mr. Hesje that it is incumbent on the Disciplinary Investigation Committee to state what precise actions on the part of the two Applicants would have met the standard of keeping the client reasonably informed. We take his point that the Hearing Committee should not be making up its own standard of conduct. It is not possible, however, to reduce standards of professional conduct to a list of specific "dos" and "don't's." We are cognizant of the need to be fair to the Applicants, and to ensure that the charges give a meaningful indication of the issues they are expected to address.

10. It is inevitable, however, that the conduct expected of a professional person will to some extent be defined in terms of what is "reasonable," what is "diligent," or what is "conscientious." In deciding whether there was a departure from these expectations in any given case, the decision-making body will have to be guided by the evidence and argument in the case, comments of disciplinary bodies which have had occasion to consider similar circumstances, the rules of the regulator as stated, and its own understanding of the level of conduct required to protect members of the public.

11. We will allow the applications to the extent of making the following order:

> That the Formal Complaints issued with respect to Mr. Hesje be amended by indicating the time period during which their misconduct is alleged to have occurred.

DATED at Saskatoon, Saskatchewan, the 19th day of August, 2013.

"Beth Bilson, Q.C."
Hearing Committee Chair

"Maurice LaPrairie, Q.C."
Hearing Committee Member

"Ron Barsi"
Hearing Committee Member

PENALTY DECISION

Members of Hearing Committee: Beth Bilson, Q.C. (Chair)
Maurice Laprairie, Q.C.
Ron Barsi, P.Geo.

Counsel: Karen Prisciak, Q.C.
for the Conduct Investigation Committee
Michael Milani, Q.C. for the Member

12. In a report dated October 4, 2013, the Hearing Committee (the Committee) determined that Joel Arvid Hesje, Q.C. (the Member) was guilty of conduct unbecoming a lawyer in that he:

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

13. The Committee reconvened on December 13, 2013, to hear representations from counsel for the Member and the Conduct Investigation Committee (CIC) concerning the appropriate penalty to be imposed. Counsel for the CIC submitted that the appropriate penalty would be i) a reprimand; ii) a fine in the range of $3000 to $5000; and iii) payment of all costs, to include legal costs for the hearing in the amount of $23, 677.63 and costs for the hearing room and court reporter of approximately $1,671.08.

14. Counsel for the Member agreed that a reprimand would be appropriate, but argued that the Member should not be required to pay the full costs associated with the hearing, and that a fine would be inappropriate.

15. The authority of the Committee to impose sanctions on a member of the Law Society of Saskatchewan is found in section 53(3) of *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1:

> 53 (3) If a hearing committee finds that a formal complaint is well founded, the hearing committee may, by order, do one or more of the following:
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> (a) assess any penalties or impose any requirements that it considers appropriate, including but not limited to:
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> (i) directing that the member be disbarred and setting the period, not exceeding five years, during which the person is not eligible to apply for reinstatement;
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> (ii) suspending the member from practice for a specified period or until specified requirements are met, including requirements that the member:
> (A) successfully complete specified classes;
> (B) obtain medical treatment or treatment for addiction to drugs or alcohol;
>
> (iii) specifying conditions under which the member may continue to

practise, including conditions that the member:

(A) not do specified types of work;
(B) successfully complete specified classes;
(C) not have exclusive control of the member's trust account;
(D) obtain medical treatment or treatment for addiction to drugs or alcohol;
(E) practise only as a partner with, or as an associate or employee of, one or more members that the committee may specify;

(iv) imposing a fine in any amount that the committee may specify;

(v) requiring the member to pay:

(A) the costs of the inquiry, including the costs of the conduct investigation committee and hearing committee;
(B) the costs of the society for counsel during the inquiry; and
(C) all other costs related to the inquiry;

(vi) reprimanding the member;

(vii) permitting the member to resign from the society;

(b) if the formal complaint that has been determined to be well founded relates to the transfer of identified property or funds in an ascertainable amount, require the member to transfer the property or the amount to the rightful owner;

(c) make any direction or set any requirement that the committee considers appropriate.

(4) In addition to an order made pursuant to subsection (3), the hearing committee may order that, if a member fails to make payment in accordance with an order pursuant to subclause (3)(a)(iv) or (v), the member be suspended from practice.

16. Counsel referred the Committee to a number of decisions made under this provision and comparable provisions in other jurisdictions, though they were in agreement that in none of those instances were the factual circumstances giving rise to the imposition of sanctions analogous to the circumstances in this case.

17. Counsel pointed to a number of professional disciplinary decisions in which a hearing committees or a court on appeal had suggested criteria that should be considered in arriving at a penalty for conduct unbecoming. In *Camgoz v. College of Physicians and Surgeons of Saskatchewan* (1993), 114 Sask. R. 161 (Q.B.), the Court, in an appeal suggested at para. 55 that it would be appropriate to consider:

1. The nature and gravity of the proven allegations;
2. The age of the offending physician;
3. The age of the offended patient;

4. Evidence of the frequency of the commission of the particular acts of misconduct with particularly, and without generally, the Province;
5. The presence or absence of mitigating circumstances, if any;
6. Specific deterrence;
7. General deterrence;
8. Previous record, if any, for the same, or similar, misconduct; the length of time that has elapsed between the date of any previous misconduct and the conviction thereon; and, the member's (properly considered) conduct since that time;
9. Ensuring that the penalty imposed will, as mandated by s. 69.1 of the Act, protect the public and ensure the safe and proper practice of medicine;
10. The need to maintain the public's confidence in the integrity of the respondent's ability to properly supervise the conduct of its members;
11. Ensuring that the penalty imposed is not disparate with penalties previously imposed in this jurisdiction particularly, and in other jurisdictions in general, for the same, or similar acts of misconduct.

18. In *Law Society of Saskatchewan v. Cory Bliss*, 2010 LSS 4, the Hearing Committee cited the list of factors laid out in *Law Society of Alberta v. Ter Hart*, [2004] L.S.D.D. No. 25, as follows:

a) Was there a specific duty that was breached?
b) What conflicting duties was the member under and how evenly were they balanced?
c) Was the Member favoring his personal interests over his duties to his clients?
d) Were the circumstances and duties such that it is appropriate to conclude that the Member must have known at the time, or be taken to have known, at the time that the course of action chosen was wrong?
e) Was it an isolated act?
f) Was it planned?
g) What opportunity did the Member have to reflect on the act or the course of action?
h) What opportunity did the Member have to consult with others?
i) What result flowed from the course of action taken?
j) What subsequent steps could have been taken to correct the error or its consequences and were such steps taken?

19. In *McLean v. Law Society of Saskatchewan*, 2012 SKCA 7, the Saskatchewan Court of Appeal referred to the list of factors enumerated in its earlier decision in *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33:

a) the range of sentences imposed in prior decisions for similar misconduct;
b) the objective gravity of the counts;
c) the collective reputation of the profession;
d) mitigating and/or aggravating factors which may include:
    i) age;
    ii) experience;

iii) discipline history; and
iv) unique circumstances of the member.

20. These lists of factors suggest that a hearing committee, when considering the appropriate penalty to be imposed on a member of the Law Society of Saskatchewan, should consider, not only the specific circumstances surrounding the commission and impact of an instance of professional misconduct, but the likely effect of such misconduct on the credibility and reputation of the profession, its message to other members of the profession, and its gravity in comparison to other situations in which penalties have been imposed.

21. As we have said, counsel were in agreement that none of the disciplinary decisions to which they referred the Committee is directly analogous to the case we are dealing with here. It is not necessary to canvass all of the decisions cited to us in detail, but it is perhaps helpful to note several examples. In both *Law Society of Saskatchewan v. Kloppenburg*, 2011 SKLSS 3, and *Law Society of Saskatchewan v. McLean*, 2013 SKLSS 6, for example, failure to keep a client reasonably informed was one of several charges laid against a member; in the former case, the penalty for three different charges was a reprimand, a fine of $1000 and costs in the amount of $3,275.00. In *Law Society of Saskatchewan v. Wilson*, 2011 SKLSS 8, there was a charge of failing to keep a client reasonably informed along with a charge that the member had offered to reduce his legal bill in exchange for an agreement by the client not to complain to the Law Society; the penalty in that case was a reprimand, a fine of $2,200 and costs in the amount of $1,435.00. In *Law Society of Alberta v. Matthew Merchant*, 2008 LSA 6, the charge of failing to keep clients informed was one of eight different charges leading to the imposition of a reprimand, fines totaling $10,000, payment of the actual costs of the hearing and referral to the practice review committee.

22. In the *Bliss* decision, cited above, the member was a prosecutor who misled opposing counsel concerning certain police evidence; the penalty imposed was a reprimand and costs of $1,075.00. Like *Bliss*, misrepresentation was one of the elements in the disciplinary case of Michael Megaw, 2008 SKLSS 6, where a reprimand and costs of $563.57 were imposed. Integrity was also an issue in the case of William T. Johnston, 2011 SKLSS 7, where the member failed to disclose a conflict of interest; a reprimand and costs of $1,955.00 were imposed. Similarly, in the case of Catherine Knox, case 03-01, a fine of $3000, costs of $1000 and practice conditions were imposed; in that case, the hearing committee took into account that the member was addicted to alcohol and had taken steps to address that. In the case of Bradley Tilling, where one charge was that the member had misled a client with respect to the status of an appeal, a suspension was imposed, along with costs of $1000.

23. Counsel for the Member argued that the most similar circumstances to the case before us are found in *Law Society of Alberta v. Warnock*, 2010 ABLS 2, where the member was charged with failing to keep his clients informed concerning a property purchase, and failing to obtain instructions from them; the hearing committee imposed a reprimand with no costs and no fine.

24. The message we have drawn from the catalogues of factors developed by hearing committees and courts, and from the results of the cases cited to us by counsel, is that, although fairness demands that we compare the penalties assessed in other cases to ensure proportionality

and consistency, it is equally important to consider the circumstances of each case, the character of the misconduct and the likely impact of that misconduct on the reputation of the profession.

25. In this case, the Member is 58 years old, and has practiced law in Saskatoon for 30 years. Prior to the Committee's findings in October 2013, his disciplinary record was unblemished. He is an elected Bencher of the Law Society of Saskatchewan, and received the designation of Queen's Counsel in 2003.

26. As we outlined in our October report, the charges in this case arose from the representation of a client, G.L., who had been sued for defamation, after G.L. had, at the request of an organizer for an opposing candidate, asked a series of questions on an open-line television program during an election campaign. Activity on this action had been sporadic, and the Member had not been in contact with G.L. for over four years when an application for summary judgment was filed in August 2011. The Member asked an associate in the firm, Timothy Froese, to handle the application. Prior to the hearing, which ultimately took place on August 25, 2011, Mr. Froese reported to the Member that he had been unable to contact G.L. Though they considered the option of withdrawing as counsel, Mr. Froese and the Member eventually determined that it would be less prejudicial to the interests of the client to proceed with the hearing. It was their judgment that the materials filed in support of the application were weak, and that the motion for summary judgment was unlikely to be granted. At the hearing before the Committee, the Member said that he was satisfied that proceeding to oppose the summary judgment application was consistent with the terms of his initial retainer from G.L. The motion for summary judgment was in fact granted in January 2012, and a judgment for $5000 was issued in February 2012. Mr. Froese was finally able to contact G.L. in February 2012 but not before the media had first contacted G.L. and informed him of the judgment.

27. G.L. complained to the Law Society of Saskatchewan about the failure of Mr. Froese to inform him of this sequence of events. When the complaint was referred to Mr. Froese for a response, the Member stepped forward and accepted responsibility for the decisions that had been made concerning G.L. A charge of conduct unbecoming was laid against Mr. Froese, as well as against the Member. In the event, the Committee found that the charge against Mr. Froese was not well-founded, but determined that the Member was guilty of conduct unbecoming.

28. Counsel for the Conduct Investigation Committee argued that we should take into account that the Member had not displayed remorse; nor had he apologized to G.L. for the stress and the effects on his health brought about by the way the legal proceedings had unfolded, or for the disillusionment with the legal system occasioned by his dealings with lawyers and courts. The Committee was informed that the judgment registered against G.L. remains in place but that there have been no efforts to enforce it.

29. It is true that, throughout the disciplinary hearing – at which he represented himself – the Member took the position that, while he would have preferred to receive instructions from G.L. at all stages, he was confident that he was acting consistently with G.L.'s original instructions and that he exercised a legitimate professional judgment in deciding that Mr. Froese should proceed to oppose the summary judgment application despite the absence of any contact with the

client. He had been unable to identify any case where a member of the Law Society had been charged with conduct unbecoming in relation to a failure to keep a client reasonably informed in isolation from charges based on other conduct; indeed, he argued that the absence of such precedents was an indication that the failure to inform as such might more properly be dealt with as a matter for a practice advisor under the auspices of the Professional Conduct Committee than as a disciplinary question.

30. The absence of precedent, which seems to have been confirmed by the search carried out by counsel prior to the sentencing hearing, does not alter the view of the Committee that the failure to keep a client reasonably informed is a form of professional misconduct amenable to disciplinary sanction. It is difficult to know what impact it might have had for G.L. to be able to participate and give instructions, but we do not agree that it can be assumed it would have made no difference, and in any case, the entitlement of a client to take part in decision-making concerning litigation is a basic feature of responsible legal practice, quite apart from the competence of the legal judgment exercised. We do not doubt, however, that at the time of the disciplinary hearing, the Member saw the argument based on absence of precedent as a legitimate argument to make, and that there was support for it in the jurisprudence, not only of this Law Society, but of professional regulators in other jurisdictions. Though we have expressed the view that the Member's conduct fell below the standard that one would expect of members of the Law Society of Saskatchewan, we do think there is a distinction between the conduct at issue here and the instances of dishonesty in the *Bliss*, *Megaw*, *Tilling* or *Matthew Merchant* cases, or the failure to disclose a conflict of interest in the *Johnston* case, and that this distinction has some status as a mitigating factor. The Member was entitled to make a defense to the charges against him, and although we found it to be an error on his part to conclude that the original instructions given to him by G.L. could be stretched as far as he assumed, we do not think his adoption of the position that the failure to communicate in itself was not grounds for discipline should be taken as proof of obliviousness to the situation of G.L.

31. We also find it worthy of note that the Member, who was not named in the original complaint by G.L., came forward to accept responsibility for his supervision of Mr. Froese during the time period relevant to these proceedings. Though he did not agree that the failure to make effective efforts to contact G.L. constituted misconduct for which Mr. Froese should be disciplined, he was willing to bear the consequences if he was in error in that respect. Though he did not "self-report" in quite the terms used in the *Bliss* and *Megaw* cases, he did, in essence, volunteer to have his conduct scrutinized after the complaint against Mr. Froese. In neither the *Bliss* nor the *Megaw* case was a fine considered appropriate. Both of these cases involved misrepresentations by the members, a circumstance that makes their conduct somewhat more blameworthy than the lapse of the Member in this case. We have concluded that a fine should not be part of the penalty.

32. It should also be noted that the Member, through his counsel, has agreed that a reprimand is an appropriate penalty for his misconduct, and also that he should assume at least a portion of the costs of the hearing.

33. The Committee has clear authority under section 53(3)(a)(v) to direct that a member pay the costs related to the disciplinary proceedings. Counsel for the Conduct Investigation

Committee argued before us that the Member should pay the total costs associated with the proceedings, which she placed at $25,348.71. She also argued that account should be taken of the fact that the Member did not agree to a statement of facts or to a joint submission on penalty.

34. Counsel for the Member did not propose any specific figure the Member should be responsible for. He did point out, however, that there were additional costs attributable to the fact that the Law Society retained outside counsel because of the Member's status as a sitting Bencher. He also noted that a hearing was conducted by telephone to decide an application filed by the Member and Mr. Froese for further and better particulars, and that the Member was in part successful in this application. The costs of this application have not been isolated from the other costs, and it would be difficult in any case to allocate them precisely given the mixed nature of the outcome.

35. A third complication in relation to the costs arises from the fact that there were originally two members facing related charges, and the hearing went forward as a joint proceeding until the Committee issued its report in October. Though in the end the charges against Mr. Froese were found not to have been well-founded, it is hard not to imagine that, had he been convicted, he would have had to bear half of the costs of the proceedings.

36. The fact that the Member did not agree to a statement of facts or to a joint submission as to penalty may have played some role in adding to the costs incurred by the Conduct Investigation Committee in pursuing the charges against him. Counsel for the Conduct Investigation Committee seemed to be suggesting that we should attach additional significance to this, and that it was somehow indicative of an unwillingness to co-operate on the part of the Member. We do not agree with this suggestion. The Member was entitled to mount a defence, and to develop his own submissions concerning a penalty; though we did not accept his defence, we do not view this as signifying that he was compounding his misconduct by putting it forward.

37. In the same way as the Member was entitled to put forward a defence, the Conduct Investigation Committee was entitled to make the decision to use outside counsel, and we do not think that decision should preclude the Conduct Investigation Committee from seeking to recoup the additional cost arising from it.

38. What is more difficult from our point of view is determining what the impact on the costs assessment should be of the fact that there were originally two members facing these charges. On the one hand, though it is probable that facing two members with slightly different interests in the proceedings created some additional complexity for counsel in preparing and presenting the case, it is unlikely that the work was actually doubled by the presence of an additional respondent. It is impossible to calculate exactly what effect the joint nature of the proceedings had on the work of counsel; had the Law Society proceeded against each member in separate proceedings, it is also unlikely that the work of counsel would have been doubled. On the other hand, it is hard not to come to the conclusion that, had our finding with respect to Mr. Froese been a different one, the costs of the proceedings would have been split in half between the two members.

39. We have concluded that the Member should be responsible for half of the costs of the proceedings, which would amount to $12,674.35.

40. We accordingly direct that a reprimand be imposed on the Member and that he pay the sum of $12,674.35 towards the costs of the proceedings.

"Beth Bilson, Q.C."
Hearing Committee Chair

"Maurice LaPrairie, Q.C."
Hearing Committee Member

"Ron Barsi"
Hearing Committee Member