The Law Society of Saskatchewan

ROBERT LOUIS STEVENSON
November 20, 2013
***Law Society of Saskatchewan v. Stevenson*, 2013 SKLSS 9**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF ROBERT LOUIS STEVENSON,
A LAWYER OF SASKATOON, SASKATCHEWAN

PRELIMINARY APPLICATION AND HEARING COMMITTEE DECISIONS

PRELIMINARY APPLICATION
Date: March 1, 2013
Location: Saskatoon, SK

Hearing Committee: George Patterson, Q.C. (Chair), Miguel Martinez and Lorne Mysko
Counsel for Member: Gary A. Meschishnick, Q.C.
Counsel for Law Society of Saskatchewan: Timothy F. Huber

1. Robert Louis Stevenson (the Member) faces an Amended Formal Complaint containing six allegations of conduct unbecoming a lawyer.

2. The Member applied to the Hearing Committee to:

   a. dismiss the Amended Formal Complaint on the grounds that the Hearing Committee does not have jurisdiction to hear the charges against him because of a reasonable apprehension of bias involving one of two lawyers who sat on his Conduct Investigation Committee (CJC); or

   b. if the first application is not granted, direct that the CIC cannot amend the Formal Complaint to include citations in addition to those contained in the CIC's report.

3. For the reasons that follow, we deny the first application and grant the second.

History
4. In July 2008 the Law Society of Saskatchewan (the Law Society) received a complaint about the Member from a senior employee of the Saskatchewan Ministry of Finance.

5. The Law Society's complaints counsel investigated the complaint and ultimately referred the matter to a CIC consisting of two members of the Law Society.

6. On January 15, 2010, the CIC issued a written report recommending the Member be charged with three citations of conduct unbecoming a lawyer.

7. On June 24,2010, a Vice-chair of the Law Society's Discipline Committee issued the original Formal Complaint against the Member and appointed this Hearing Committee.

8. The Member received the Formal Complaint on June 28,2010.

9. At some point after receiving the Formal Complaint, the Member remembered that lawyer W, one of the two lawyers who sat on the CIC, had been listed as one of his unsecured creditors in the Statement of Affairs his Trustee in Bankruptcy filed on his behalf in 2002. In February 2004 the Member received an Absolute Order of Discharge from Bankruptcy and for this reason he never paid lawyer W's account.

10. By letter dated February 14,2011, the Member's counsel first alerted the Law Society to the issue of apprehension of reasonable bias in respect of lawyer W's involvement on the CIC.

11. For his part, lawyer W, in his affidavit filed in response to the Member's application, states that he does not remember charging the Member for any services. He says that he remembers being surprised when he saw his name in the Member's Statement of Affairs. He says that he searched his firm's records and, not finding any record of having billed the Member, he did nothing further. In addition, he denies that he bears any animosity towards or is biased against the Member. Reasonable Apprehension of Bias

12. Although, on the facts in this case, we would have arrived at a different conclusion, counsel for the Law Society invited us to assume, for the purpose of this preliminary application, that a reasonable apprehension of bias exists in respect of lawyer W.

13. The gist of the Member's argument is that the reasonable apprehension of bias in respect of lawyer W so tainted the process leading to the Formal Complaint against him that it cannot be cured by a hearing before this Hearing Committee.

14. The Member's submission is that the CIC is not a mere investigator because it does more than simply gather and review evidence about a complaint to the Law Society. It decides whether the evidence is sufficient to found a formal complaint against the member. In order to make this decision it necessarily must interpret the Rules of the Law Society of Saskatchewan, the Law Society's Code of Conduct, and any provincial or federal legislation that has a bearing on the Member's conduct.

15. The Member submits that the CIC is subject to all of the principles of natural justice. This means that he must be afforded the right to know the nature of the complaint against him and have an opportunity to respond, and most importantly in this case, the decision-maker must be independent and impartial. In support of his submission, the Member referred us to the following

passage from *Newfoundland Telephone Company v. Newfoundland*, [1992] I S.C.R. 623, [1992] S.C.J. No. 21, 1992 CanLII 84 (S.C.C.):

> "40 Everyone appearing before administrative boards are entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established ... Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void."

16. The Member also relied on *Ocean Port Hotel Ltd v. British Columbia*, [200 1] 2 S.C.R. 781, [2001] S.C.J. No. 17, SCC 52 (S.C.C). In *Ocean Port*, an initial police investigation and subsequent investigation by a Senior Inspector of British Columbia's *Liquor Control and Licensing Branch* led to allegations that the respondent had committed several infractions of the Liquor Control and Licensing Act and Regulations. Following a hearing, the Senior Inspector found that all of the allegations had been substantiated and imposed a penalty. The respondent appealed to the Liquor Appeal Board by way of a hearing de novo. The Board upheld the Senior Inspector's decision on four of the five allegations. The respondent appealed the Board's decision. The British Columbia Court of Appeal set aside the Board's decision on the grounds that the government-appointed members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties. The government of British Columbia appealed this decision to the Supreme Court of Canada.

17. The Supreme Court upheld the appeal and remitted the case to the Court of Appeal. Speaking on behalf of the court, Chief Justice McLachlin had the following to say about the independence required of members of administrative tribunals:

> "20 ... It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as whole to determine the degree of independence the legislature intended.
>
> 21 Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice ... In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice ... Indeed, courts will no lightly assume that legislators intended to enact procedures that run contrary to this principle, although **the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make.**" [emphasis added]

18. The Supreme Court specifically left open for the Court of Appeal the question whether if there was a reasonable apprehension of bias it was cured by the de novo proceedings before the Board [at para. 44]. Ultimately, the Court of Appeal confirmed that any "breach of natural justice at the initial determination may be cured by the opportunity to engage in a full and fair evidentiary hearing before a neutral tribunal" [see: (2002) 213 DLR (4th) 273; [2002] 7 WWR 406; 40 Admin LR (3d) 103; 1 BCLR (4th) 225, at para. 12].

19. The Member also referred us to two Saskatchewan cases for the proposition that this Hearing Committee has no jurisdiction unless the CIC acted fairly and was properly constituted (no apprehension of bias): *Hawrish v. Cundall*, [1989] S. J. No. 339,76 Sask. R. 208,39 Admin. L. R. 255, 15 A. C. W. S. (3d) 407 (Q. B.) and *Kuntz v. Saskatchewan Assn. of Optometrists*, [1992] S. K. No. 644, [1993] 3w. R. 651, 107 Sask. R. 81,8 Admin L. R. (2d) 312,37 A. C. W. S. (3d) 977 (Q. B.).

20. In *Hawrish*, the applicant lawyer alleged that the CIC had not treated him fairly because only the chair of the committee and not the other two members of the committee met with and questioned him. Mr. Justice Gerein summarized the law applying to administrative tribunals as follows [Sask. R., p. 217, para. 28]:

> "From my reading of all the decisions and several others I draw the following:
>
> (1) it is of no value to go through the process of determining whether a statutory body or tribunal is judicial, quasi-judicial or administrative in deciding if it must act with fairness;
> (2) the duty to act fairly arises whenever such body has the power to make a decision which will affect any rights of an individual;
> (3) whether a particular body has such power or function is to be ascertained from the whole of the legislative scheme."

21. In *Kuntz*, Madam Justice Gunn applied those principles in quashing a disciplinary decision against an optometrist because he was not treated fairly at the investigative stage as he was not given particulars of the complaint against him.

22. For its part, the Law Society agrees that the rules of natural justice apply to the CIC. However it submits that any apprehended bias that existed at the investigative stage can be cured by a full and fair hearing before an independent tribunal.

23. . In support of its submission, the Law Society relies, in large part, on the Manitoba Court of Appeal's ruling in *Histed v. Law Society of Manitoba*, [2006] M. J. No. 290,2006 N. B. C. A. 89,274 D. L. R. (4th) 326, 10 W. W. R. 624,208 Man R. (2d) 44,50 Admin L. R. (4th) 119, 151 A. C. W. S. (3d) 715, [2006] Carswell Man 287. In *Histed*, the appellant alleged that there was a reasonable apprehension of bias on the part of members of the Complaints Investigation Committee which authorized the charges against him and for this reason his conviction by a panel of the Discipline Committee of the Law Society of Manitoba was a nullity.

24. For the purpose of its decision, the Court of Appeal assumed, without finding, that the circumstances of the Complaints Investigation Committee created a reasonable apprehension of bias. The Court reviewed the role of the Complaints Investigation Committee as delineated by its governing legislation and found that its role was investigative rather than adjudicative. Relying on *King v. University of Saskatchewan*, [1969] S.C.R. 678 and *Mondesir v. Manitoba Association of Optometrists* (1998), 129 Man.R. (2d) 96 (C.A.) (leave to appeal refused, [1998] S.C.C.A. No. 405), the Court of Appeal held that "a reasonable apprehension of bias at an early investigative stage of proceedings can be cured by a subsequent hearing that adheres to the principles of natural justice" [para. 48; emphasis in original].

25. The discipline process under *The Legal Profession Act, 1990*, SS 1990-91, c. L-1 0.1, changed substantially since the originating complaint in this matter. Both parties agree that the legislation as it stood before July 1, 2010, applies in this case. The relevant provisions at that time were:

> **Preliminary review**
> 40(1) Where the society:
>
> (a) receives a complaint with respect to a member, alleging conduct unbecoming;
>
> ….
>
> a person designated by the benchers shall review the conduct of the member.
>
> (2) If, on completion of a review pursuant to subsection (1), the person designated by the benchers is of the opinion that:
>
> …
>
> (b) the matter raises an issue of discipline, the person shall refer the matter to the chairperson of the discipline committee;
>
> …
>
> **Duty of chairperson re: complaints**
> 42(1) The chairperson of the discipline committee shall review each matter submitted to him or her pursuant to section 40, 40.1 or 41 and, notwithstanding section 40, may investigate any conduct of a member that may constitute conducting unbecoming.
>
> (2) On completion of a review pursuant to subsection (1), the chairperson of the discipline committee shall:
>
> …
>
> (b) if the chairperson is of the opinion that the matter does not constitute conduct unbecoming, direct that no further action be taken, or
>
> (c) in any other case, appoint an investigation committee pursuant to subsection 44(1) to inquire into the matter or any aspect of the matter...
>
> **Appointment of investigation committee**
> 44(1) The chairperson of the discipline committee may:

> (a) appoint an investigation committee consisting of any number of benchers or members that the chairperson considers advisable; and
> (b) designate a member of the committee to be chairperson of the committee.
>
> (2) An investigation committee:
>
> (a) shall inquire into the matter referred to it pursuant to clause [sic] 42(2)(b); and
> (b) may investigate any other matter that comes to the attention of the committee during the course of an investigation that appears to constitute conduct unbecoming.
>
> **Decision of investigation committee**
> 46(I) On the completion of its investigation, an investigation committee shall make a report to the chairperson of the discipline committee and recommend that:
>
> (a) a hearing committee be appointed to hear and determine the formal complaint set out in the written report...
>
> (2) A report signed by a majority of the members of an investigation committee is the decision of the investigation committee.
>
> **Appointment of hearing committee**
> 47(1) Where the report of an investigation committee:
>
> (a) makes a recommendation pursuant to clause [sic] 46(1)(a), the chairperson of the discipline committee shall appoint a hearing committee to hear and determine the formal complaint ...
>
> (2) A hearing committee appointed pursuant to this section shall consist of not more than five benchers or members, none of whom were members of:
>
> (a) the investigation committee that inquired into the matter that is the subject of the formal complaint ...

26. On a plain reading of the Act, the CIC's role is investigative and not adjudicative. The CIC decides whether a formal complaint should be made against the member. The Hearing Committee decides whether the formal complaint is well founded. The CIC investigates and the Hearing Committee adjudicates.

27. In *Hawrish*, Mr. Justice Gerein analyzed the CIC's role-which has not changed in any material respect since then -and concluded that it was limited to investigating the alleged improper conduct and then presenting the formal complaint. Justice Gerein went on to hold that "the presenting of the formal complaint does not give rise to the duty to act "fairly" in the broad meaning of that term." (Sask. R. page 217, emphasis added]

28. There is no doubt the Law Society's duty to act fairly at the investigative stage includes giving the Member particulars of his alleged misconduct (see: *Kuntz*) and affording the member the opportunity to respond. The Member's own affidavit confirms that all of this occurred before the matter was referred to the CIC.

29. Both *Ocean Port* and *Newfoundland Telephones* dealt with government-appointed boards empowered to regulate specific industries. In *Ocean Port* the role of the Senior Inspector was not to simply investigate the allegations against the respondent, but also to decide whether they were well founded, and if substantiated, to impose a penalty. In *Newfoundland Telephones* the issue of a reasonable apprehension of bias arose because of public comments made by a member of the board charged with deciding the appellant's application for payment of certain of its costs. In other words, in both cases, the issue of reasonable apprehension of bias arose in the context of administrative tribunals performing adjudicative functions.

30. As the CIC does not perform an adjudicative function, we are not persuaded that the Supreme Court of Canada's decisions in either *Ocean Port* or *Newfoundland Telephones* have a direct bearing on this application. Rather, we agree with the Courts of Appeal of Manitoba and British Columbia in *Histed* and *Ocean Port*, respectively, that an apprehension of bias at the investigative stage can be cured by a full and fair hearing before an independent hearing committee.

31. In addition to the issue of reasonable apprehension of bias, the Member alleges that the CIC acted unfairly because it did not contact him or his counsel as part of its inquiry. It is common ground between the parties that, in this case, the CIC limited its inquiry to the material presented to it by the Law Society's complaints counsel who conducted the initial review of the complaint against the Member.

32. In our opinion, a CIC is not restricted in how it conducts its inquiry and it is not obligated to go any further than reviewing the evidence presented to it by complaints counsel. As Mr. Justice Gerein said about the CIC in *Hawrish*:

> "The committee was charged with inquiring into whether the allegations brought against the applicant warranted a formal complaint. It was open to them to conduct their investigation as they saw fit." [Sask. R., p. 220, para. 50]

Amendment of Formal Complaint

33. The Formal Complaint against the member dated June 24, 2010, contained the following citations:

> "THAT Robert Louis Stevenson, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:
>
> 1. Fail in his professional duty to meet financial obligations incurred or assumed in the course of practice, namely the payment of PST to the Saskatchewan Minister of Finance, when called upon to do so;

2. Wrongfully convert, for his own use or the use of his legal practice, funds collected from clients as PST and held pursuant to a statutory trust;

3. Receive monies from or on behalf of a client expressly for a specific purpose, namely for payment of PST on legal accounts, and filed [sic], without the client's consent, to pay them to the Saskatchewan Minister of Finance for that purpose."

34. These were the citations recommended in the CIC's report.

35. On February 22, 2012, the CIC purported to amend the Formal Complaint to add three citations:

"THAT Robert Louis Stevenson, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:

1. Fail in his professional duty to meet financial obligations incurred or assumed in the course of practice, namely the payment of PST to the Saskatchewan Minister of Finance, when called upon to do so;

2. Wrongfully convert, for his own use or the use of his legal practice, funds collected from clients as PST and held pursuant to a statutory trust;

3. Wrongfully convert, for his own use or the use of his legal practice, funds collected from clients as GST and held pursuant to a statutory trust;

4. Wrongfully convert, for his own use or the use of his legal practice, funds representing employee payroll deductions held pursuant to a statutory trust;

5. Receive monies from or on behalf of a client expressly for a specific purpose, namely for payment of PST on legal accounts, and failed, without the client's consent, to pay them to the Saskatchewan Minister of Finance for that purpose;

6. Receive monies from or on behalf of a client expressly for a specific purpose, namely for payment of GST on legal accounts, and failed, without the client's consent, to pay them to the Receiver General for Canada for that purpose." [Emphasis added]

36. The Member submits that:

1. only the Hearing Committee may amend a Formal Complaint, and

2. as the CIC did not apply to the Hearing Committee for leave to amend the Formal Complaint, citations numbered 3, 4, and 6 are not properly before the Hearing Committee.

37. The Law Society submits that the CIC is charged with prosecuting the Formal Complaint and this means it can amend a Formal Complaint where the circumstances require, both by necessary implication and by virtue of its responsibility to regulate the legal profession in the public interest.

38. In our opinion, subsections 44(2), 46(1), and sections 49 and 51 of *The Legal Profession Act, 1990* (prior to July 1, 201 0) provide a complete answer to this issue.

39. First, the CIC must investigate the allegations of misconduct referred to it by complaints counsel:

> 44(2) An investigation committee:
>
> > (a) shall inquire into the matter referred to it pursuant to clause [sic] 42(2)(b); and
> >
> > (b) may investigate any other matter that comes to the attention of the committee during the course of an investigation that appears to constitute conduct unbecoming.

40. Second, if the CIC believes there is sufficient evidence to found a formal complaint against a member of the Law Society it must prepare a report to that effect for the chairperson of the discipline committee:

> 46(1) On the completion of its investigation, an investigation committee shall make a report to the chairperson of the discipline committee and recommend that:
>
> > (a) a hearing committee be appointed to hear and determine the formal complaint set out in the written report.

41. Third, the CIC may direct the prosecution of the formal complaint if instructed to do so by the chairperson of the discipline committee. The CIC's power to prosecute is limited to prosecuting the formal complaint set out in its report:

> 49(1) The chairperson of the discipline committee shall: .
>
> > (a) direct; or
> > (b) instruct an investigation committee that makes a report pursuant to section 46 to direct; the **prosecution oft be formal complaint set out in the report •••** [emphasis added]

42. Fourth, only the hearing committee may amend the formal complaint. The hearing committee's power to amend the formal complaint is limited to amendments the committee believes are necessary to determine the charges indicated in the formal complaint or to amend, add or substitute charges it believes may be warranted by the evidence before it. In the latter

case, the hearing committee must grant the member an adjournment to prepare a defence to the amended, added or substituted charges:

> **Powers during hearing**
> 51 (I) During the course of a hearing, the hearing committee may amend the formal complaint before it if the amendment is, in the committee's opinion, necessary to determine the charge indicated in the formal complaint.
>
> (2) Subject to subsection (3), a hearing committee may:
>
> > (a) find that the complaint is well founded on any charge revealed by the facts; and
> > (b) for the purpose of clause [sic] (a):
> > > (i) substitute the charge mentioned in clause [sic] (a) for, or
> > > (ii) amend or add to;
>
> the charge set out in the formal complaint that the committee was appointed to hear.
>
> (3) Where, during the course of a hearing, the evidence shows that the conduct of the member who is the subject of the hearing may warrant a charge that is different from or in addition to a charge specified in the formal complaint, the hearing committee;
>
> > (a) shall notify the member of that fact; and
> > (b) may amend, add to or substitute the charge in the formal complaint
>
> (4) Where a hearing committee acts pursuant to clause [sic] (3)(b), it shall adjourn the hearing for any period that the committee considers sufficient to give the member an opportunity to prepare a defence to the amended, added or substituted charge in the formal complaint, unless the member otherwise consents.

43. In short, we find that the CIC cannot amend the charges in the original Formal Complaint without the consent of the Member and of the Hearing Committee. 44. The Member did not consent to amend the Formal Complaint and the Law Society did not apply for leave to amend it. For these reasons, the hearing will proceed on the following citations only:

> “
> “THAT Robert Louis Stevenson, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:
>
> > 1. Fail in his professional duty to meet financial obligations incurred or assumed in the course of practice, namely the payment of PST to the Saskatchewan Minister of Finance, when called upon to do so;

2. Wrongfully convert, for his own use or the use of his legal practice, funds collected from clients as PST and held pursuant to a statutory trust;

3. Receive monies from or on behalf of a client expressly for a specific purpose, namely for payment of PST on legal accounts, and failed, without the client's consent, to pay them to the Saskatchewan Minister of Finance for that purpose."

Dated at Moose Jaw, Saskatchewan this 18th day of April, 2013.

``George Patterson, Q.C.``

DECISION OF THE HEARING COMMITTEE
Date: November 20, 2013
Location: Saskatoon, SK

Hearing Committee: George Patterson, Q.C. (Chair), Miguel Martinez
Counsel for Member: Gary A. Meschishnick, Q.C.
Counsel for Law Society of Saskatchewan: Timothy F. Huber

Introduction

44. The hearing took place on July 11, 2013, at Saskatoon, Saskatchewan. A three-person Hearing Committee was appointed to hear this matter but one of the members of the Committee was not able to attend.

45. A discipline hearing committee may consist of as few as one to as many as five benchers or members of the Law Society of Saskatchewan [*The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, subsec. 47(2)]. The parties agreed that the hearing should proceed before the two remaining members of the Hearing Committee.

46. Mr. Robert Louis Stevenson (the *Member*), faced three allegations of conduct unbecoming a lawyer. After amendment of the Formal Complaint by agreement of the Member and counsel for the Law Society of Saskatchewan (the *LSS*), and with leave of the Hearing Committee, the citations read as follows:

THAT Robert Louis Stevenson, of the City of Saskatoon, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:

1. **Fail in his professional duty to meet financial obligations incurred or assumed in the course of practice, namely the payment of PST to the Saskatchewan Minister of Finance, when called upon to do so;**

2. **Wrongfully convert, for his own use or the use of his legal practice, funds collected from clients as PST and held pursuant to a statutory trust;**

3. **Receive monies from or on behalf of a client expressly for a specific purpose, namely for payment of PST on legal accounts, and failed without the client's consent, to pay them to the Saskatchewan Minister of Finance for that purpose.**

The Evidence and the Facts

47. The facts in this case are not in dispute.

48. Mr. Ken Gorchinsky, the manager of the collection enforcement section for the Saskatchewan Ministry of Finance provided a detailed written summary of the Member's file history from September 2002 to the date of the hearing [Exhibit P2]. What that history reveals is that:

a. the Member was issued a Saskatchewan provincial sales tax (*PST*) vendor number in 2002,

b. the Member declared personal bankruptcy in September 2002,

c. the provincial government issued the Member a new PST number in October 2002,

d. beginning in the fall of 2004, the Member filed his PST returns but did not pay the required remittances, and the Government of Saskatchewan filed writs of execution against him in 2004, 2005, 2007, 2008, and 2010,

e. the government received sporadic small payments of arrears from the Member or from his management corporation in 2005, 2007, 2008, and 2009,

f. in 2006, 2009, and 2012, the Government of Saskatchewan received substantial payments through set-offs (payments otherwise due to the Member for legal services he provided to the Ministry of Justice that were re-directed to the PST collection enforcement section),

g. the 2009 and 2012 set-offs totalling $47,523.09 were obtained through the Member's co-operation with the collection enforcement section, and

h. the Member has remitted his PST when it is due since January 2011.

49. Mr. Gorchinski confirmed that on several occasions the Member attempted to negotiate a repayment plan but the collection enforcement section did not accept any of his proposals.

50. In his examination-in-chief, Mr. Gorchinski explained the Member's PST collection and remittance obligations. Each month the Member receives from the Government of Saskatchewan a PST return on which he must report the PST he owes for that month. The return and the tax remittance are due 20 days after the end of each month. The calculated tax must be

paid whether or not the vendor collects the tax, meaning that the Member was required to pay the calculated PST whether or not his clients paid his accounts for legal services. If an account is written off as uncollectable, the Member may apply for a credit for the uncollected PST. According to Exhibit P2, the Member applied for such credits in 2009 and 2011.

51. Under cross-examination, Mr. Gorchinski agreed that the purpose of the trust provisions contained in section 48 of *The Revenue and Financial Services Act*, S.S. 1983, c. R-22.01, is to help the provincial government collect PST when in competition with other creditors. He confirmed that the statutory trust is of no effect, and that the government is in the same position as any other unsecured creditor, in cases where the tax collector makes an assignment in bankruptcy. He also agreed that the tax collector, in this case the Member, is not required to segregate the deemed trust money in an account separate from his operating account.

52. The Member's bookkeeper since January 2009, Ms. Cara Roney, also testified at the hearing. One of her first tasks was to prepare a detailed reconciliation of the Member's PST remittances, arrears, interest on unpaid arrears, and penalties, in order to ensure that his firm's records coincided with the provincial government's records. According to her analysis, the Member's PST payments were current in March 2006. His remittances again fell substantially behind after that until he brought them back into current status in January 2011. His monthly remittances have been current since then.

53. Both Ms. Roney and Mr. Gorchinski confirmed that, as at the date of the hearing, the Member owed PST arrears of $12,208.28. That figure consisted of remittance arrears in the amount of $2,737.19, together with interest and penalties totalling $9,471.09.

54. Mr. John Allen, the auditor inspector for the Law Society of Saskatchewan, testified that he first became aware that the Member's PST remittances were not current when he reviewed the Member's annual TA-3 reporting form for the fiscal year ending December 31, 2004. He noted that the Member had marked the answer "No" to a question asking whether his required collections and remittances of GST, PST, and employee deductions were up-to-date.

55. Mr. Allen believed the failure to remit taxes was an issue warranting his further scrutiny but not one that he must report as misconduct to the Law Society's complaints counsel (as he would in a case where a lawyer had misappropriated client trust money). Rather, from the outset, Mr. Allen treated the Member's conduct as a practice management or financial management problem which he monitored by corresponding with the Member, by conducting an audit of the Member's trust accounts, by regularly examining financial records of the Member's practice (which he continued to do until October 2012), and by advising and regularly reminding the Member to formulate and institute a plan to bring his remittances to current status.

56. What ultimately led to the investigation of the Member's conduct and to this hearing was a letter of complaint dated July 7, 2008, from the Assistant Deputy Minister of the Saskatchewan Ministry of Finance to Ms. Donna Sigmeth, LSS complaints counsel. In her letter, the Assistant Deputy Minister complained that the Member had "failed to remit Provincial Sales Tax collected or deemed to be collected on the provision of legal services by him" and stated the he had not responded to writs of execution the government had filed against him.

57. Ms. Sigmeth testified that she immediately conducted a preliminary investigation but did not refer the complaint to an Investigation Committee until October 2009. Ms. Sigmeth attributed this lengthy delay, in part, to her need to research whether any other Canadian law society had considered the failure to pay taxes such as PST to be conduct unbecoming a lawyer as there was no Saskatchewan precedent to guide her.

58. The Law Society of Saskatchewan's evidence shows that the Member acknowledged, to Mr. Allen and to Ms. Sigmeth, his obligation to pay the PST remittances and arrears, and his intention to do so when the financial circumstances of his practice allowed:

> In the Member's 2004 TA-3 form he explained why his remittances were not up-to-date, as follows:
>
> "…hard economic circumstances, operating on a cash basis because of insolvency history, many clients too on hard economic times, unavoidable delay in receipt of financial resources in order to address these obligations as well as other accounts receivable on a current basis, but striving to achieve this while at the same time maintaining ethical & legal requirements."
>
> In a letter to John Allen dated April 2, 2008, the Member offered the following explanation for why his PST remittances were in arrears:
>
> "Arrears as reported are direct result of a shortfall of revenue from the practice in order to address them even though the practice is active and prospectively economically sound. Efforts to arrange a reasonable line of credit to even out cash flow which would assist in a addressing these obligations, have to date been unsuccessful because of my insolvency history, even though it is six years ago. Payment in fact is being made to the various accounts as monies become available…"
> In a letter dated July 21, 2008, the Member gave Ms. Sigmeth the following reasons why he could not bring his PST remittances to current status and pay the arrears he owed:
>
> "Mine is a civil and criminal litigation practice. Receipts in order to address regular monthly overhead are not regular. This past spring, I approached my bank with a request for an operating line to ease the cash flow problem which was declined.
>
> In these circumstances, I am at a loss as to what else I can reasonably do to better address my responsibility to the Ministry of Finance."

59. The Member testified that he operates his legal practice on a cash flow basis as he cannot obtain a line-of-credit to smooth out any month-to-month financial fluctuations. As he did in his letters to Mr. Allen and to Ms. Sigmeth, the Member said the reasons why he cannot obtain such credit are his history of personal bankruptcy and the provincial government's writs of execution.

The Member explained that because he cannot obtain a line of credit, he often relied on loans from his wife to help pay his firm's bills.

60. The Member stated that until January 2011, he prioritized paying such things as his office rent, and his staff, over paying his PST remittances. Under cross-examination, the Member admitted that although during the relevant period he did not regularly draw fixed amounts of money from his firm for his personal use, he did use his firm's general account to pay his monthly car loan payment and, from time to time, to repay some of the money his wife loaned his legal practice, and to pay some of his personal expenses, such as meals.

Argument

61. In respect to the first citation in the Formal Complaint, that the Member committed professional misconduct by failing to remit PST, counsel for the Law Society of Saskatchewan argued that the failure to remit PST, for any reason, is conduct unbecoming a lawyer. In support of his submission, counsel referred us to numerous decisions from the Law Society of British Columbia:

Law Society of British Columbia v. Legge, 2003 LSBC 42
Law Society of British Columbia v. Welder, 2007 LSBC 29
Law Society of British Columbia v. Worobec, 2003 LSBC 22
Law Society of British Columbia v. Donaldson, 2003 LSBC 27
Law Society of British Columbia v. Purvin-good, 2004 LSBC 05
Law Society of British Columbia v. Medd, 2004 LSBC 15
Law Society of British Columbia v. Derksen, 2004 LSBC 08
Law Society of British Columbia v. Doyle, 2005 LSBC 06
Law Society of British Columbia v. Hendery, 2005 LSBC 25
Law Society of British Columbia v. Lowes, 2007 LSBC 28
Law Society of British Columbia v. Chipperfield, 2003 LSBC 24

62. The Member's counsel countered with a number of reasons why failing to pay PST is not always professional misconduct.

63. First, he submitted that whether or not failing to meet financial obligations incurred or assumed in the course of practice is professional misconduct depends on the facts and on how the relevant provisions in the *Code of Professional Conduct* (the *Code*) are interpreted. He noted that the first rule in the Code, entitled "Integrity", informs all of the other rules contained in the Code. For this reason, the provision relevant to the case before us —Chapter XIX, Commentary 7 — must be interpreted as meaning that a lawyer is guilty of professional misconduct only if there is some dishonesty or other wrongdoing involved in the Member's failure to meet the financial obligations incurred or assumed in his practice.

64. Alternatively, the Member's counsel urged us to limit the meaning of "financial obligations incurred or assumed in the course of practice" to those incurred on behalf of a client — for example: land titles charges — rather than those incurred in the business of operating a law firm — for example: photocopier lease charges.

65. Finally, he noted the anomalous situation that arises when a lawyer can absolve themselves of professional misconduct for failing to remit PST simply by declaring personal bankruptcy and so ensuring that their financial obligation never will be paid [*Re: Lawyer 6*, 2005 LSBC 33, at para. 13 and 14].

66. In relation to the second count in the Formal Complaint, LSS counsel submitted that as PST remittances are statutorily deemed to be held in trust, the Member wrongfully converted money he held in trust by paying his firm's overhead expenses, and some of his personal expenses, instead of, or in priority to, paying his PST remittances,.

67. The Member offered two counter-arguments.

68. First, the Rules of the Law Society of Saskatchewan specifically exclude from the definition of trust funds, money which is to be remitted to any government by way of taxes.

69. Second, the funds deemed to be held in trust were held in the Member's general operating account, co-mingled with other funds, and no one can identify which funds are deemed to be held in trust and which are not. In law, only identifiable personal property can be converted:

> *Black's Law Dictionary* (6th Ed.)
> "**Conversion.** An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another…"

70. In relation to the final count in the Formal Complaint, the LSS argued that when his clients paid the Member's accounts they expected that he would remit the PST portion of their paid accounts to the Government of Saskatchewan. The Member submitted that, as the LSS did not call any of the Member's clients to testify, we can only speculate about what may have been in their minds when they paid his accounts.

Conclusion

Count 1 – Failing to meet financial obligations incurred in practice

71. The decisions referred to us by counsel for the Law Society of Saskatchewan in relation to the first count in the Formal Complaint do not contain any analysis of the lawyer's conduct. In every case the lawyers admitted that failing to remit PST was professional misconduct. Further, the decisions emanated from British Columbia and it appears that the provincial sales tax regime in British Columbia may differ from Saskatchewan's, or the underlying facts were quite different from the case before us, as the relevant misconduct in every decision was described as failing to remit PST *collected* from clients. For these reasons, those decisions carry little precedential value.

72. Counsel for the LSS and for the Member both referred to Rule XIX, Commentary 7, in support of their arguments:

> "7. The lawyer has a profession duty, apart from any legal liability, to meet financial obligations incurred or assumed in the course of practice when called

> upon to do so. Examples are agency accounts, obligations to members of the profession, trade accounts directly related to the lawyer's practice, fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials as well as the deductible under a governing body's errors and omissions insurance policy."

73. Counsel for the LSS submitted that this commentary stands for the principle that a lawyer who fails to pay, for any reason, any of their professional debts is guilty of unprofessional conduct.

74. As stated earlier, the Member's counsel urged us to limit the definition of "financial obligations incurred or assumed in the course of practice" to those debts incurred on behalf of a client. In support of the latter argument, the Member's counsel emphasized the nature of the debts listed in the commentary: agency accounts, obligations to members of the profession, trade accounts directly related to a lawyer's practice, fees and charges of witnesses, etc.

75. Commentary 7 refers to Note 8, and the note describes only the responsibility of a lawyer to pay a colleague's account when the lawyer has engaged the colleague's services.

76. We did not find the Commentary or the Note to be helpful in resolving the question whether a lawyer's professional responsibility to meet the financial obligations they incur or assume "in the course of practice" is limited in any way. In our opinion, it is not. We do not see how, nor any reason why, a lawyer's obligation to pay their professional debts should differ depending on whether the debt is the fee of an expert witness or the firm's rent. The real question is whether every failure to pay a debt incurred in the course of practice is professional misconduct *per se*.

77. In order to answer this question, we begin by turning to the first rule of the Code — the integrity rule. That rule states, simply, that:

> "The lawyer shall discharge with integrity all duties owed to the clients, the court, other members of the profession and the public."

78. Commentary 2 under this rule says that the principle of integrity is a key element of the remaining rules of the Code. The notes under the rule use adjectives such as disgraceful, morally reprehensible, and dishonest to describe conduct that brings into question a lawyer's professional integrity.

79. For these reasons, we conclude that failing to pay a professional debt, without something more, is not professional misconduct.

80. The only relevant Saskatchewan case cited to us by either counsel was *Law Society of Saskatchewan v. Chornoby*, [2010] L.S.D.D. No. 231. Ms. Chornoby worked for a small law firm as an associate. She was paid based on a percentage of her billings. Over a period of four years, she performed some legal work "off the books" of the firm that employed her. She billed these clients directly for her fees and for the related taxes; however, she did not disclose her

billings to her employer; she did not pay any GST or PST; she did not register with the Government of Saskatchewan as a "vendor" for the purpose of collecting, reporting, and remitting PST; she did not declare her "off the books" income on her annual income tax returns.

81. Among other things, Ms. Chornoby was found guilty of conduct unbecoming a lawyer for failing to pay PST she collected from clients.

82. The *Chornoby* decision clearly illustrates when a lawyer's failure to pay PST should be sanctioned by the Law Society because of the dishonest nature of the lawyer's conduct. Further, in our opinion, not paying *any* PST was sufficiently morally reprehensible to warrant a finding of conduct unbecoming a lawyer. However, the conduct of the Member in the case before us differs significantly from *Chornoby*.

83. When we look beyond the fact that during a period of almost seven years the Member did not pay his PST remittances when they were due, we do not find any underlying element of moral wrongdoing or dishonesty in his conduct. The Member never misled the Law Society of Saskatchewan. He filed his PST returns every month. He was candid with the LSS and the Government of Saskatchewan about why he did not pay the remittances. He attempted to negotiate repayment plans with the Government of Saskatchewan. He paid some money towards the PST arrears when the financial circumstances of his practice allowed him to do so. In recent years he helped the collection enforcement division of the Ministry of Finance obtain substantial set-offs from payments for legal services he performed for the Ministry of Justice. Although he used his firm's money to pay his car loan, and sometimes for small personal expenses, or to repay some of the money his wife had loaned his firm, there is no evidence that these expenditures, either individually or cumulatively, affected the Member's ability to meet his PST obligations in any significant way.

84. For these reasons, we find that the first count in the Formal Complaint is not well-founded.

Count 2 – Wrongfully converting funds held pursuant to a statutory trust

85. Subsection 48(2) of *The Revenue and Financial Services Act*, S.S. 1983, c. R-22.01, creates a deemed statutory trust in favour of the Government of Saskatchewan in respect of PST funds collected or deemed to have been collected by a tax collector (in this case, the Member):

> "Every collector who collects a tax pursuant to any revenue Act, shall hold the amount of the tax in trust for Her Majesty and any collector who collects or is deemed to have collected a tax pursuant to any revenue Act:
>
> (a) is deemed to hold the amount of that tax in trust for Her Majesty; and
>
> (b) is responsible for the payment over of that tax in the manner and at the time provided pursuant to this Part, any revenue Act or the regulations."

86. As Mr. Gorchinski admitted in cross-examination, the deemed statutory trust is a legislative device the sole purpose of which is to give the Government of Saskatchewan priority over other creditors of a tax collector; a priority the government loses in bankruptcy proceedings.

87. A deemed statutory trust is not a true trust in that the property impressed with the trust is not traceable because the tax collector is not required to put the funds in an account separate from his or her own funds:

> *British Columbia vs. Henfrey Samson Belair ltd.*, [1989] 2 S.C.R.24 (S.C.C.), per McLachlin J. (as she then was) writing for the majority:
>
> "Section 18 of the *Social Services Tax Act* creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable." (at p. 30)
>
> "I turn next to s. 18 of the *Social Services Tax Act* and the nature of the legal interest created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money has mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law… But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust." (at p. 34)

88. We assume that this is one of the reasons why rule 900 of the Rules of the Law Society of Saskatchewan specifically excludes from the definition of trust funds, and therefore the related rules governing how lawyers must handle such funds, money which must be remitted to any government by way of taxes:

> **"trust funds"** means any moneys received by a lawyer, in his/her capacity as a lawyer, which are not intended to immediately become property of the lawyer and include:
> …
> (c) funds received from or held on behalf of a third party which relate to a transaction in which a client is involved, but *does not include funds which are to be reemitted to any government by way of taxes or employee payroll deductions*." [italics added]

89. Count 2 is not well-founded as we are of the view that a lawyer cannot convert, or more properly, misappropriate, funds that are not traceable and identifiable, and that are not trust funds as defined by rule 900.

Count 3 – Failing to pay PST without client's consent after client paid their account

90. This charge in the Formal Complaint relies on Chapter I, Note 3(f) of the *Code of Professional Conduct*:

> " (f) receiving moneys from or on behalf of a client expressly for a specific purpose and failing, without the client's consent, to pay them over for that purpose;"

91. When a client pays their lawyer's account, the client has fulfilled their financial obligation to the lawyer. They cannot direct how the lawyer uses the money paid on account as it no longer is the client's money. In addition, the lawyer's legal obligation to pay PST would not change if a client were to tell the lawyer not to pay it. More importantly, in our opinion, Chapter I, Note 3(f) is directed at a lawyer misappropriating trust money and, as we fully discussed above, client payments of PST on lawyer's accounts are not trust funds.

92. For these reasons we find that count 3 of the Formal Complaint is not well-founded.

Dated at Moose Jaw, Saskatchewan, this 20th day of November, 2013.

"George W. Patterson, Q.C. (Chair)"

Dated at Lloydminster, Saskatchewan this 20th day of November, 2013.

"Miguel F. Martinez"