The Law Society of Saskatchewan

DARREN WINEGARDEN
HEARING DATE: April 24, 2017
DECISION DATE: October 11, 2017
***Law Society of Saskatchewan v. Winegarden*, 2017 SKLSS 8**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF DARREN WINEGARDEN,
A LAWYER OF SASKATOON, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Members of the Hearing Committee:	Brenda Hildebrandt, Q.C., Chair Judy McCuskee Marcel St. Onge
Counsel:	Nicholas Stooshinoff, Q.C. on behalf of the Member, Darren Winegarden Timothy F. Huber, on behalf of the Conduct Investigation Committee

INTRODUCTION

1. The Hearing Committee of the Law Society of Saskatchewan (the "Hearing Committee"), comprised of Brenda Hildebrandt, Q.C. as Chair, Judy McCuskee, and Marcel St. Onge, convened on Monday, April 24, 2017 to hear this matter. Counsel for the Conduct Investigation Committee was Timothy F. Huber and Nicholas Stooshinoff, Q.C. represented Darren Winegarden (the "Member"). All parties participated by conference call.

2. The Hearing had previously been scheduled for Thursday, December 8, 2016. However, on December 6, 2016 Mr. Huber and Mr. Stooshinoff made a joint request for an adjournment, indicating that further documentation from health care providers was being sought. The request for an adjournment was granted.

3. On April 24, 2017, neither Mr. Huber nor Mr. Stooshinoff had any objections to the constitution of the Hearing Committee, the conference call format for the Hearing, or any other matter relating to the proceedings giving rise to the Hearing.

4. At the outset of the Hearing, Mr. Huber advised that the parties had agreed to amendment of the wording of the charges from those set out in the Formal Complaint dated January 4, 2016 to those articulated in the Agreed Statement of Facts and Admissions filed with the Hearing Committee. He therefore, along with Mr. Stooshinoff, requested the Hearing Committee's confirmation of the amendment. Of the eight charges enumerated in the Formal Complaint, which is attached as Schedule 2 to the Agreed Statement of Facts and Admission, charges 5 and 8 were effectively withdrawn, charges I through 4 were consolidated into one charge, and charges 6 and 7 were likewise consolidated.

5. Upon the Hearing Committee's confirmation that the amendment was approved, the Member pled guilty to the allegations of conduct unbecoming a lawyer, as outlined in the Agreed Statement of Facts, which were that he:

i. did accept trust funds (retainers) from certain clients and failed to deposit said trust funds into a mixed-trust account in accordance with Law Society of Saskatchewan Rule 910; and

ii. did fail to maintain proper books and records in accordance with Law Society of Saskatchewan Rules 960 and 963.

6. The Hearing Committee accepted the Member's guilty plea, made a finding of conduct unbecoming a lawyer in relation to both allegations, and heard the representations by the parties regarding penalty.

7. The following exhibits were filed with the Hearing Committee:

P-1: Notice of Hearing with proof of service;
P-2: Agreed Statement of Facts and Admissions, with four attached schedules; P-3: Costs summary, consisting of three pages;
P-4: Four reports from health providers, dated December 29, 2016, March 8, 2017, February 17, 2017, and March 22, 2017, respectively.
D-1: December 8, 2016 Final Report of the Darren Winegarden Trusteeship (with no attachments) consisting of 5 pages

With respect to Exhibit D-1, this had been quoted extensively by counsel for the Member during his submissions and the members of the Hearing Committee had requested to see it. Toward the close of the Hearing Mr. Huber, with Mr. Stooshinoff's consent, forwarded it to the Hearing Committee.

8. Written submissions had previously been provided by Mr. Huber and both he and Mr. Stooshinoff made oral submissions and addressed questions from the Hearing Committee. The Member also briefly addressed the Hearing Committee.

BACKGROUND

9. The charges of conduct unbecoming a lawyer in this case arose from the Member's receipt of retainers from clients at a time when he did not have a trust account. Without a trust account in which to place retainers, monies received by him from clients became intermingled with the Member's own personal monies.

10. Accounting and bookkeeping issues were initially identified in the Member's practice during a review by a Law Society of Saskatchewan Practice Advisor. The Practice Advisor's report resulted in a referral to the Conduct Investigation Committee ("CIC") on April 27, 2015.

11. During its investigation, the CIC struggled to obtain information from the Member. For several months he was either non-responsive or only partially responsive to queries from the CIC. Considering the bookkeeping issues identified and the difficulty in obtaining information from the Member, the CIC determined that an Interim Suspension was required. This commenced October 5, 2015. A Trustee for the Member's practice was put in place.

12. The Member has not practised law since imposition of the Interim Suspension on October 5, 2015. In the ensuing months his mental health deteriorated, rendering him unable to address the allegations and resulting in delay in prosecution of the matter.

Rule 910

13. The first finding of conduct unbecoming pertains to the failure to deposit trust funds into a mixed-trust fund as required by Rule 910, the pertinent subsections of which state:

> "910. (1) Subject to subrule (2), a member who receives trust funds shall forthwith deposit the funds into a mixed trust account described in Rule 911.
>
> (2) (a) A member who receives trust funds with written instructions as to where they are to be placed shall first place the funds into a mixed trust account and then place the funds in accordance with appropriate instructions, but a member may not hold or invest monies on behalf of a client outside the Province of Saskatchewan unless the member's primary practice is outside of Saskatchewan, and the trust funds are handled in accordance with the Rules of the Law Society of the member's primary practice, and the monies are received pursuant to that practice.
> (b) Subsection (a) does not prevent a member from forwarding monies pursuant to a client's written instructions or obligations in furtherance of a specific transaction, where such monies are thereafter no longer held in trust on behalf of the client.
>
> (3) Law firms may receive trust and general receipts by credit or debit cards subject to the following conditions:
>
> (a) trust receipts shall be deposited expeditiously and directly into a pooled trust account;

(b) general receipts shall be deposited expeditiously and directly into a general account;
(c) the payor, client name, and file number shall be recorded on the merchant slip;
(d) the word "Trust" shall be recorded on the merchant slip for all trust receipts;
(e) the receipt shall be recorded in the deposit book and the merchant slip shall be attached to the deposit slip in the deposit book. All service charges and discounts, including those related to trust receipts, are the responsibility of the member and shall be withdrawn from the law firm general account.

(4) A member who receives trust funds which belong in part to a client and in part to a member shall:

(a) deposit them into a mixed trust account; and
(b) as soon as it is practicable to split the funds, withdraw the member's funds from the trust account.

(5) A member or law firm shall be permitted to handle their own legal transactions through trust as long as the money is handled in the normal course of a legal file and the money is paid out expeditiously when the matter is concluded."

14. The requirement is that retainers paid to a lawyer prior to work being undertaken must be held in a trust account until the related work is done and an account rendered.

15. Upon imposition of the interim suspension and the appointment of the Trustee, clients began contacting the Trustee requesting refunds of their retainers. They indicated that they had paid the Member, but the work had not yet been done and now would not be completed due to the suspension.

16. In the course of the Trusteeship, refunds totaling $9,500.00 were either paid to clients directly, to people who had made payments on behalf of a client, or to the client's successor counsel. The Member cooperated with the Trustee in establishing the refund amounts.

17. Had the Member complied with Rule 910, holding the funds in a trust account and billing appropriately, the unearned portions of the retainers could have been more easily ascertained. This, in turn, would have enabled the refunds to be processed more swiftly.

Rules 960 and 963

18. The second finding of conduct unbecoming pertains to a failure to maintain proper books and records, as required by Rules 960 and 963, which state:

"960. (1) A member shall maintain an adequate accounting system, including the books, records and accounts described in this Part, in order to record all funds and

other negotiable property received and disbursed in connection with the member's law practice.

(2) A member shall, at the written direction of the Executive Director, make such modifications to the member's accounting system as the Executive Director considers necessary.

963. (1) A member shall maintain at least the following non-trust books, records and accounts:

(a) a daily journal or other book of original entry, which may be in synoptic form, recording:

(i) for all non-trust funds received relating to the law practice, the date of receipt, the amount received and the source of the funds; and
(ii) for all non-trust funds disbursed, the amount, the cheque or voucher number, the date of each disbursement and the name of each recipient;

(b) an accounts receivable ledger or other suitable system to record, for each client, the member/client position on all non-trust transactions with respect to which a bill has been delivered or a disbursement made, and including:

(i) a record of all transfers from a trust account;
(ii) any other receipts from or on behalf of the client; and
(iii) the balance, if any, owed by the client;

(c) copies of billings filed in chronological, alphabetical or numerical order, showing all fees charged or other billings made to clients, the dates such charges are made, and the identification of the clients charged; and

(d) all supporting records, including bank statements, pass books, cancelled cheques, detailed duplicate deposit slips or other records of all deposits, bank vouchers and similar documents and invoices.

(2) The information required to be recorded on the accounts receivable ledger referred to in subrule (1)(b) may be recorded on the clients' trust ledger referred to in Rule 962(b), provided that the entries are clearly identified and are not combined with trust account information.

(3) A law firm shall reconcile its general account(s) within 30 days of month end."

19. The Member had been operating his practice for an extended period without a proper bookkeeping system. He had not billed many of his court appointment files or his legal aid files for years, although the legal work was completed. For example, about 34 legal aid files the Member received no payment because of the lengthy delay in billing.

20. By an agreement dated February 28, 2006, the Member had engaged another Saskatoon law firm to provide administrative assistance in the issuance and collection of invoices for legal services rendered by the Member. Regrettably, this arrangement broke down some considerable time prior to the interim suspension imposed on the Member in October 2015.

21. While the Member suggests that this other Saskatoon law firm contributed to the extreme billing lag and other bookkeeping issues, he was fully aware that files had not been properly closed or billed and that he had not been paid for work done on files. The extent of the Member's own delay in providing time sheets to the other firm is also not established. However, he had a responsibility to either make the contractual relationship workable or secure alternate arrangements. He did neither.

22. The manner and reasons for which the Member received funds from clients was not apparent in his books and records. In some cases, the Member advised the Law Society that amounts received in advance of completing legal work were actually amounts to pay old accounts receivable. However, no records were located to substantiate these assertions.

23. The Member's failure to maintain proper records not only hampered his ability to account for his time and be paid in a timely fashion, it also severely impacted the ability of the Law Society to properly audit and regulate the Member's practice.

24. The Member, who is 56 years of age and was admitted to the Law Society of Saskatchewan in 1995, having moved back to Saskatchewan from British Columbia, was the subject of a professional standards referral in 2006, but has no prior findings of conduct unbecoming a lawyer.

SUBMISSIONS REGARDING PENALTY AND PRACTICE CONDITIONS

25. Counsel for the CIC submitted that the Member's conduct justified a significant suspension, such as eighteen months, with appropriate conditions put in place upon the Member's return to practice. Costs were also sought.

26. Mr. Huber noted that what occurred in this case was technically a misappropriation of funds. There is an oft-cited presumption of disbarment in cases of misappropriation. However, the particular circumstances of a case may be considered by a Hearing Committee in order to impose a lesser penalty.

27. Regarding the Rules of the Law Society of Saskatchewan, counsel for the CIC noted that the Member's failure to maintain a trust account in which to deposit retainers, as required, resulted in him circumventing all of the Rules in place concerning the handling of trust funds. These Rules are designed for protection of the public.

28. The Code of Professional Conduct also requires lawyers to safeguard the clients' property, which includes retainer funds. Section 2.05 states:

> "2.05 (1) A lawyer must:

> (a) care for a client's property as a careful and prudent owner would when dealing with like property; and
>
> (b) observe all relevant Rules and law about the preservation of a client's property entrusted to a lawyer."

29. With these requirements in mind, counsel for the CIC surveyed relevant caselaw to assist in ascertaining the applicable range of sanction. The cases cited have been reviewed by the Hearing Committee, as noted in the following.

30. In *Law Society of Saskatchewan v Wilson*, 2007 SKLSS 4, involving the sale of a business, the lawyer's misappropriation of funds involved depositing client funds into his general account without delivering a bill or issuing a receipt for the funds received. The client funds included refunds received by the lawyer unbeknownst to his client. Following a finding of conduct unbecoming a lawyer in relation to this one instance, the Sentencing Committee imposed a suspension of three months, assessed costs in the amount of $2,588.50, and required Mr. Wilson to work in conjunction with a practice advisor and submit reconciled financial statements for both his general and trust accounts every 90 days. These conditions were to be ongoing until deemed unnecessary by the Law Society.

31. The Sentencing Committee in *Wilson* stated:

> "One of the fundamental principles of the legal profession is that clients be able to have trust and confidence in the relationship with their lawyer, in the service to be provided by their lawyer and in the absolute care to be taken of clients' property. Where a lawyer fails to honor this trust he or she jeopardizes a fundamental basis upon which the public reposes confidence in lawyers individually and in the legal profession as a whole. The Member has breached this trust. The Law Society takes such behavior by this Member or by any other member of the profession very seriously. It is therefore in the public interest that the Member be censured and receive a significant penalty."

32. The case of *Law Society of Saskatchewan v Hagen*, 2003 SKLS 4, involved a lawyer being found guilty of conduct unbecoming in relation to a series of inappropriate transfers of trust funds. Apparently due to a missed limitation period, Mr. Hagen transferred trust money held on behalf of one client to another client. There were at least three separate streams of monies transferred from one client file to another, intended to cover previous shortfalls. Upon the situation coming to light in 2001, Mr. Hagen's firm paid any shortfalls identified. He did not experience any personal gain and never transferred money to himself.

33. Upon a finding of misappropriation, Mr. Hagen was suspended for thirty months and ordered to pay costs in the amount of $8,822.45. His return to practice was under stringent conditions. These included a requirement of counselling as well as organizational and time management training, a prohibition from having signing authority on trust accounts, the

requirement to practice with another member of the Law Society rather than on his own, and a written consent directing health care professionals to provide reports to the Law Society.

34. As in the current situation, the case of *Law Society of Saskatchewan v Tilling*, 2015 SKLSS 1, involved a lawyer who had no trust account but accepted retainers from clients. However, unlike the Member here, Mr. Tilling had a significant disciplinary record:

a. February 2004 - 1 Month Suspension, costs
   i. Dilatory practice - failure to advance an appeal on behalf of his client when he had undertaken to do so; and
   ii. Misleading client and a fellow member as to the status of the appeal;

b. January 5, 2005 - Reprimand; fine, costs
   i. Failure to co-operate with Law Society Investigator; and
   ii. Counseling client to sign an Affidavit attaching exhibits that did not yet exist.

c. November 29, 2013 - 9-month suspension and costs
   i. Dilatory practice (9 counts);
   ii. Intentional misleading of clients (3 counts); and
   iii. Recklessly providing false information to the Law Society.

35. In light of this, Mr. Tilling was disbarred. The Hearing Committee in that decision made the following comments concerning the trust account Rules:

> "The Rules regarding the establishment of trust funds and the care of clients' money are not arbitrary. They are carefully constructed to ensure that the lawyer's obligations in relation to trust funds can be easily and confidently met by the member. In order to meet the required standard, the member need only follow the very simple Rules established by the Law Society. To ignore these Rules demonstrates an attitude that brings into question a lawyer's suitability to practice law."

36. The decision of *Law Society of Saskatchewan v Borden*, 2016 SKLSS 10, involved the granting of application to resign in the face of discipline equivalent to disbarment. Mr. Borden had a trust account, but failed to use it, despite receiving retainers from clients. He had diverted trust funds belonging to clients, to his firm's chequing account and then to his personal use, in breach of the trust accounting Rules and in breach of the Code of Professional Conduct. Additionally, Mr. Borden had billed for work had had not done or for disbursements not actually incurred.

37. In addition to these Saskatchewan decisions, counsel for the CIC noted several cases from other jurisdictions. This is in recognition of the relatively small population of lawyers in our province and the low volume of discipline cases. As well, given increased mobility among lawyers, and a greater emphasis on national standardization, consideration must be given to rendering decisions on penalty which are defensible on a national level.

38. The lawyer in the case of *Law Society of Upper Canada v Freeman*, [2015] LSDD No. 147, admitted that he had improperly handled trust monies, used trust funds for personal purchases, failed to account to clients, and failed to maintain proper books and records. He had no prior discipline history. In such circumstances, the Hearing committee imposed a three-month suspension and ordered costs.

39. The hearing committee in *Freeman* noted that the misconduct relating to books and records went back to early 2013, approximately two years prior to the hearing. In the current situation, it appears the Member's failure to keep proper books and records was for an even longer period of time.

40. A three-month suspension was also imposed in the case of *Law Society of Manitoba v. Fisher*, 1998 MBLS 4. However, that three months came after a 16-month withdrawal from practice, and a consideration of the possibility of disbarment.

41. On five occasions Mr. Fisher had accepted retainers, totaling $3,350.00, from clients. Although he completed the legal work on behalf of each client, he did not deposit the funds into his firm's trust account. The funds were misappropriated by him from the law firm and used to meet his personal financial obligations. The decision notes:

> "These incidents, in the view of the Committee, were clearly a breach of Mr. Fisher's professional fiduciary duty to both his clients and his law firm. Misappropriation of funds, whether from clients or from associates, partners or employers, should be considered most seriously, and in many cases, should result in disbarment."

42. Upon discovery of his conduct, Mr. Fisher immediately withdrew from practice, on April 29, 1997, and remained away from practice until the hearing on September 9, 1998. Thereafter the three-month suspension was imposed, with the hearing committee having clearly taken the prior time away from practice into account. They noted that Mr. Fisher had been:

> "... suffering significant financial penalty. He has 4 repaid to his firm the entire amount misappropriated, and he has sought professional assistance which we are told has assisted him in resolving problems which contributed to his actions."

43. In the case of *Law Society of Upper Canada v Aguirre*, 2009 ONLSHP 0023, the lawyer was found to have misappropriated several retainers, having failed to deposit them into trust. Misleading of clients was also apparent.

44. The hearing committee viewed the misconduct as having stemmed from the lawyer being completely overwhelmed by the workload. The committee also noted the challenges the lawyer had faced throughout his life and considered the medical evidence regarding mental health issues. Taking all these factors into account, the committee permitted the lawyer to surrender his license, provided that he signs an undertaking not to apply to be readmitted to the Law Society. He was also directed to pay $4,150.00 to the Compensation Fund and costs in the amount of $15,000.00.

45. In permitting him to resign as an alternative to disbarment, the hearing committee said:

> "The Lawyer accepted the retainer monies in good faith with the full intention of assisting and serving the best interests of his clients. He did not intentionally set out to fail to provide the contracted services, or to deliberately misappropriate their funds."

46. In *Law Society of Upper Canada v Dyer*, decided October 29, 2004, the lawyer, who was in ill health, admitted to misappropriation of a total of $6,300.00 from his trust account over a period of eight years. In some instances, the amounts were concealed as fees. In others they were simply taken. He did, however, make full restitution of the amounts taken.

47. Unlike the Member in the current case, Mr. Dyer had a prior record of misconduct. In October 2003, he was found guilty of professional misconduct (involvement in a real estate flip scheme). He was given a three-month suspension, commencing January 1, 2003, and he was ordered to pay $7,500.00 in costs. The hearing committee noted that the activity that gave rise to Mr. Dyer's prior discipline proceedings overlapped with the activity that gave rise to the misappropriation charges.

48. At paragraph 12 of the decision, the hearing committee quoted the 1996 decision of their Discipline Committee in the matter of Peter David Clark with approval:

> "The general rule in misappropriation cases, cited time and time again, is that, save in unusual circumstances, disbarment is required. (Re Daniel Gilad Cooper; Re Spencer Black). As sympathetic as we are to the Solicitor's personal difficulties, the primary obligation of the Law Society is to protect the public. In the Committee's view, this cannot be done if the Solicitor is allowed to return to practice. Permitting the solicitor to resign would send the wrong message to the profession and undermine the confidence of the public in the Law Society. The appropriate penalty is that the Solicitor be disbarred."

49. Later, at paragraph 14, the hearing committee stated:

> "The Panel accepts the standard required of solicitors and the test for disbarment as set forth in the prior decisions of the Panels whose decisions are referred to in this matter. We do not find in the material filed or in the submissions of the member the exceptional circumstances that would cause or permit a deviation from the standard. The public must be protected. The confidence of the public in the discipline process must be maintained."

50. The hearing committee in *Dyer* did not find the exceptional circumstances that would permit a deviation from the standard of disbarment. Although the panel indicated great sympathy for the member and his circumstances, it was also noted that his material purported to blame others, including the Society's investigator in the prior proceeding. This indicated that he had not

exhibited the remorse that might go towards a lesser penalty. The panel therefore concluded that the only appropriate remedy for the member's conduct was disbarment.

51. In the Agreed Statement of Facts in the present case, there is likewise a degree of blaming others. Paragraph 13 states:

> "The Member suggests that some responsibility for this extreme billing lag, and other bookkeeping issues, rests with the third-party firm he had contracted with."

52. However, counsel for the CIC noted that, although the Member was aware of the bookkeeping issues and thus the misappropriation was not inadvertent, there was no intention to steal and "nothing that calls into question the fundamental character of the Member."

53. Mr. Huber, in his summary of the case law, noted that a variety of factors have been accepted as creating an exception to the oft-cited presumption of disbarment in cases involving misappropriation, several of which apply in this case. The factors for consideration include:

a. a long unblemished record (present in the current case)
b. mental or physical illness (present in the current case)
c. addiction;
d. restitution (present in the current case)
e. inadvertence;
f. age;
g. absence of deceit (present in the current case);
h. absence of a personal benefit (none beyond the fees actually earned in the present case); and
i. no loss to clients (present in the current case).

54. In light of these factors, Mr. Huber indicated that the CIC is prepared to consider the 18-month period of interim suspension, which had begun October 5, 2015, as a sufficient penalty, provided that appropriate conditions are placed upon the Member's return to practice ensuring the public is protected in future.

55. Before this Hearing committee, in response to questions from the panel, Mr. Huber acknowledged that the 18 months contemplated by CIC was actually past and further recognized that it would take time before the ultimate decision of the hearing committee was released. As such, a suspension to the time of the release of the decision was in order.

56. On behalf of the Member, Mr. Stooshinoff provided further details of Mr. Winegarden's life, noting those events which may have contributed to his anxiety issues. At age 13 the Member first learned he was adopted. His birth mother, a First Nations woman, knew his adoptive father and mother, who were of German and English ancestry respectively. However, it was not until 1984 that the Member met his birth family. He did not meet his birth mother, though, as she had been murdered 20 years earlier. Feeling as if he did not fit in any community, the Member struggled with his own identity.

57. Although born in Alberta, the Member grew up and attended school in Saskatoon, Saskatchewan, graduating from high school in 1978 and earning his Bachelor of Arts degree from the University of Saskatchewan in 1988. Thereafter he moved to British Columbia, graduating from the University of British Columbia Law School in 1991.

58. What was described as a "rocky marriage" commenced in 1994. The parties separated in 2004 and were divorced in 2008, with the Member having custody of the two children in 2011. The Member had a variety of jobs, including several outside the field of law, prior to articling with the Wardell, Worme & Piche firm in 1994-1995. Thereafter he was in several practice arrangements, the last of which concluded in 2005. The agreement regarding administrative, billing and bookkeeping assistance was entered with Semaganis Worme February 28, 2006.

59. During the years 2005 through 2011, the Member did significant work for First Nations across the province. However, when his children came to live with him, the Member elected to reduce his travel time in the four years prior to the imposition of his interim suspension, although this added financial pressures as he bore the full costs of raising the three children. Indeed, it was only one week prior to this hearing that child support matters were finalized by way of a court order, thus granting some relief to the Member.

60. In these circumstances, the Member experienced severe anxiety leading to depression. He was significantly debilitated. With the series of counselling noted in the reports filed as Exhibit P-4, he has made great strides in coming to terms with his identity issues, managing stress and anxiety, finding and employing effective coping measures, and addressing issues of grief and loss.

61. Mr. Stooshinoff emphasized that the Member had no addictions issues and had not undertaken any criminal behaviour. He noted that Mr. Winegarden was adamant that he had not taken any client's money. Rather, he had received money for which he did not have a proper account.

62. Member's counsel further emphasized the degree of cooperation with the Trustee, as noted in the December 8, 2016 Final Report. Mr. Stooshinoff quoted various excerpts from that report:

> “Mr. Winegarden was very concerned about his clients and had no hesitation to walk us through his files which had upcoming Court appearances...
>
> In the immediate days following, Mr. Winegarden reached out numerous times to ensure that the clients were being looked after and that we had all the information that we needed.”

63. The December 8, 2016 Final Report also confirms that the Member's income in the several years prior to his interim suspension was very modest. Mr. Spencer said:

> “Mr. Winegarden did not have either a PST or OST account as the bulk of his work was done for Government agencies. Further, it was plain and obvious that

> Mr. Winegarden's total income over the course of the past several years fell well below the $30,000.00 threshold for OST. Mr. Stooshinoff noted that this low income contributed to the Member's stress."

64. Regarding the penalty, Mr. Stooshinoff submitted that the caselaw demonstrates a wide range. On behalf of the Member he argued that the CIC's suggestion of an eighteen-month suspension, already served, was not the appropriate penalty. He noted that the Member was not asking for credit for the interim suspension, and suggested that the circumstances do not require a suspension of that magnitude. If a suspension is warranted, it should be for a lesser period, somewhere in the range of three to twelve months.

65. Mr. Stooshinoff noted that the primary reason for this shorter suspension period is that the Member did not steal clients' money. Although the funds were certainly co-mingled, they were not taken. The Member had been crippled by his own mental health issues, but there had been no intentional misappropriation of funds.

66. Regarding the principle of deterrence in assessing penalty, Mr. Stooshinoff submitted that the finding of guilt on the two counts, with a suspension in the range of three to 12 months, but certainly less than eighteen months, would send a significant message to the profession. He further noted that the Member appreciates that he will continue to be suspended until the matter is finally resolved.

67. In terms of mitigating factors, Mr. Stooshinoff emphasized the Member's previous unblemished record, the absence of deceit, the refunds to the clients ensuring they experienced no loss, and the unintentional nature of the conduct.

68. Mr. Stooshinoff was frank in noting that any return to work, even as contemplated by the Member's health care professionals, would require ongoing follow-up care and relapse prevention. Mr. Stooshinoff is willing to act as the Member's practice supervisor, particularly as Mr. Winegarden has since December of 2016 been working in the Stooshinoff Bitzer doing "paralegal type work." Further, on behalf of the Member, Mr. Stooshinoff acknowledges that a return to practice plan, with conditions, is in order and says that such could be agreed upon with the Law Society. He noted that counsel for the CIC has some clear precedents, which demonstrate the types of conditions the Law Society of Saskatchewan would expect.

69. The Member was then given the opportunity to speak to the Hearing Committee members and he elected to do so. Mr. Winegarden was very open and transparent regarding the measures he is taking to achieve health. He thanked those involved in the process, particularly Mr. Stooshinoff, who has been of great help to him. He noted that he had learned a lot through the counselling process, particularly about dealing with anxiety.

70. Mr. Winegarden indicated that his area of strength was in aboriginal law, however he identified too closely with his clients. This was anxiety-provoking, and he found it difficult to remit an invoice for what deserved to be billed.

71. Thereafter both Mr. Huber and Mr. Stooshinoff provided information to the Hearing Committee as to the types of conditions that should be imposed as part of any resumption of practice plan. Both contemplated that Mr. Stooshinoff would act as the Member's practice superv1sor.

72. Mr. Huber noted that a year of direct supervision ought to be required, with perhaps a transitional supervision agreement put in place after that, with revised conditions. The Member should be prohibited from handling trust money or the like. Accounting matters should be dealt with by Mr. Stooshinoff's firm. As well, there must be ongoing mental health care.

73. Mr. Stooshinoff indicated that neither sole practice, nor even an associate role, had been contemplated for Mr. Winegarden. He viewed the continuing employment relationship between the Member and his firm to be the most viable. If the nature of the relationship changed, it would be subject to review by the Chair of the Law Society of Saskatchewan Discipline Executive Committee. He further indicated that he and Mr. Huber could jointly submit conditions to either the Hearing Committee or the Chair of the Discipline Executive Committee.

74. Mr. Huber made reference to the 2013 reinstatement hearing regarding Mr. Nolin and the Practice Conditions Summary posted on the Law Society website concerning his practice, suggesting that similar conditions would apply here. These conditions in large part pertain to ensuring that the Member receives health care and counselling support on an ongoing basis.

75. In closing, Mr. Stooshinoff reiterated that the Member does not intend to return to sole practice. His long-term plan, and one which he has discussed in counselling, is to work as an associate, potentially in an institutional setting such as a First Nations entity. The Member is striving for stability and a manageable life.

ANALYSIS

76. While there appears to be consensus that a suspension is in order in this case, the submissions of counsel vary regarding the length. Thus, in assessing a penalty appropriate in the circumstances, the Hearing Committee must begin with an examination of the fundamental principles of penalty assessment in disciplinary matters.

Principles of Penalty Assessment

77. The primary consideration is public protection. The mandate of the Law Society in protecting the public is established by The Legal Profession Act, 1990. Sections 3.1 and 3.2 state:

> "3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
>
> (a) to act in the public interest;
> (b) to regulate the profession and to govern the members in accordance with the Act and the Rules; and

> 3.2 In any exercise of the society's powers or discharge of its responsibilities or in any proceeding pursuant to this Act, the protection of the public and ethical and competent practice take priority over the interests of the member."

78. Related to the mandate of public protection is the need to maintain the public's confidence in the integrity of the profession and the ability of the profession to govern its own members. Gavin MacKenzie in his book *Lawyers & Ethics: Professional Responsibility and Discipline*, states that "the purposes of Law Society discipline proceedings are not to punish offenders or exact retribution but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession."

79. The Hearing Committee concerns with the submission of counsel for the CIC that the mishandling of trust funds, and failure to adhere to trust accounting Rules, is cause for serious concern. These Rules are designed for the protection of the public. The legal profession is one of the few groups to which the public entrust their money. As such, the profession holds a unique and important role in society. Public confidence in the ability of the profession to handle client funds in a careful and proper manner is vital. Therefore, the conduct of the Member must be addressed in a way that both protects the public and fosters public confidence in the legal profession.

80. A further principle is deterrence. This involves both a specific deterrence to the Member and a general deterrence to the entire profession. On behalf of the CIC, Mr. Huber noted that in this case, while specific deterrence is important, the emphasis is on general deterrence. He stated:

> "If the conduct in question is not denounced there is a risk that lawyers might fail to take their trust accounting obligations seriously."

81. On behalf of the Member, Mr. Stooshinoff had also acknowledged the importance of "sending a message" to the profession although, as noted earlier, his submission was that this could be done by way of a suspension in the range of three to twelve months.

Other Factors

82. Other considerations in the assessment of penalty include determining whether any aggravating, mitigating, or other special factors are present. In terms of aggravating factors, Mr. Huber submitted that:

> "The Member's conduct represents a disregard for the Rules of the Law Society surrounding the handling of client funds. Any time a lawyer operates outside of the regulatory structures in place, especially those relating to client funds, the public is put at risk and the credibility of the profession is damaged."

83. The Hearing Committee concurs with this position and further notes that the Member's disregard for the Rules regarding trust funds extended over a very lengthy period. Although he had initially taken steps to engage another firm to handle accounting matters, that relationship broke down. Thus, he was aware, or ought to have been aware, that his accounts did not comply with the Law Society standards.

84. In terms of mitigating factors, these include:

a. the Member pled guilty to the allegations and an Agreed Statement of Facts was facilitated, thus avoiding a full Hearing on the charges;
b. through the Trustee refunds were provided to clients once the amounts were ascertained;
c. there is no evidence suggesting that the Member deceived his clients;
d. the Member did not receive a benefit from the conduct outside of the fees he earned for the services he provided;
e. the Member has struggled with mental health issues which he has made significant efforts in addressing;
f. the Member had no prior record of conduct unbecoming; and
g. apart from having to request reimbursement and await ascertainment of the amounts, there was no monetary loss incurred by the Member's clients.

85. Along with the principles of penalty assessment and the consideration of both aggravating and mitigating factors, the Hearing Committee is mindful of the penalties imposed in past cases for similar conduct in Saskatchewan and other Canadian jurisdictions. A number of these were noted earlier at paragraphs 30 through 50.

86. The Hearing Committee concurs with the submissions of both counsel that disbarment is not required in the circumstances at hand. Unlike the lawyers in both the *Law Society of Saskatchewan v Tilling* and the *Law Society of Upper Canada v Dyer* cases, Mr. Winegarden had no prior record of conduct unbecoming. Further, although the Member here appears to attribute blame to the third-party firm with whom he had contracted, such is not to the degree exhibited in *Dyer*, nor does it demonstrate a lack of remorse or failure to accept responsibility for his conduct.

87. Similarly, the *Law Society of Saskatchewan v Borden* case, in which the lawyer was permitted to resign in the face of discipline equivalent to disbarment, may be distinguished. Most significantly, in addition to failing to properly use his trust account, Mr. Borden had billed for disbursements not incurred and work not done. Such improper billing did not occur in the present case.

88. The circumstances of *Law Society of Upper Canada v Aguirre*, in which the lawyer was likewise permitted to surrender his license as an alternative to disbarment, are similar to the Member's here, particularly regarding the mental health issues and life challenges. However, misleading of clients was evident in Aguirre and is not present here. Thus, a lesser penalty is in order.

89. The Hearing Committee does, however, consider a significant suspension to be required. Particularly compelling are the principles pertaining to public protection and the need to maintain the public's confidence in the integrity of the profession, as well as general deterrence, noted above.

90. With this in mind, the circumstances of *Law Society of Saskatchewan v Hagen* are very much akin to the current case, apart from the one element of Mr. Hagen having settled an action without his client's knowledge. In that case a thirty-month suspension was ordered with subsequent conditions imposed on Mr. Hagen's return to practice. These conditions, like those contemplated by both counsel here, were stringent.

91. In the case of *Law Society of Saskatchewan v Chetty*, 2003 SKLSS 10, which was not included in the survey of cases provided, a two-year suspension was ordered, retroactive to 2001. The conduct had occurred while Mr. Chetty was practicing in British Columbia and held a non-practising status with the Law Society of Saskatchewan. The matters were brought forward to the Discipline Committee here as a result of his stated intention to resume practice in Saskatchewan. The conduct in question included paying money from his trust account to his general account without rendering an account to his clients; on three occasions receiving retainers and failing to deposit them in his trust account; failing to perform monthly trust reconciliations and maintain proper accounting records; and receiving monies in trust from a client then immediately billing the client and transferring the funds into his general account prior to the work being done. Apart from the last element, the conduct is very similar to that the current case.

92. Although a three-month suspension was ordered in *Law Society of Manitoba v Fisher*, the hearing committee had clearly taken into account his prior 16-month voluntary withdrawal from the practice of law pending disposition of the matter. Unlike the Member here, Mr. Fisher was not the subject of an interim suspension. He also self-reported a number of incidents which had not previously been known to the investigator. Thus, the Hearing Committee considers *Fisher* as also supportive of a longer period of suspension.

93. In *Law Society of Saskatchewan v Wilson*, a three-month suspension was imposed with respect to one instance of misappropriation. This is distinct from the lengthy practice of failing to properly maintain and utilize a trust fund demonstrated in the instant case. Therefore, a longer period of suspension is in order.

94. The final case cited by counsel, *Law Society of Upper Canada v Freeman*, does not appear to be in line with those decided in Saskatchewan. Thus, the Hearing Committee does not find it of assistance in the case at hand.

Length of Suspension

95. From the decision in *Law Society of Saskatchewan v Chetty*, there is clear precedent for the retroactive imposition of a suspension. This is effectively what counsel for the CIC sought in requesting over 18 months, from the imposition of the interim suspension to conclusion of the hearing, recognizing the "time served." On the other hand, counsel for the Member noted that he was not seeking credit for the period of the interim suspension, but considered the appropriate length of a suspension imposed by this Hearing Committee to be in the range of three to twelve months.

96. An interim suspension is not imposed lightly. The CIC is authorized to do so by section 45 of *The Legal Profession Act, 1990*. Such a measure is undertaken for the protection of the

public and by Rule 420 may be imposed without prior notice where "such action is necessary to protect the public or the member's clients, or both."

97. In this case the interim suspension and appointment of a Trustee was necessary. Without the protection of proper accounting procedures regarding trust monies, client money was at risk. Further, the Member was suffering from mental health issues exacerbated by family and financial stressors. This left him debilitated.

98. Paragraphs 3 and 4 of the Agreed Statement of Facts indicate the degree of debilitation:

> "The issues dealt with herein arose as a result of a review of the Member's practice conducted by the Law Society wherein accounting and bookkeeping issues were identified. The Practice Advisors report dated March I0, 2015 resulted in a referral of the matter to the Conduct Investigation Committee on or about April 27, 2015. The CIC struggled to obtain information from the Member in the context of their investigation. The Member alternated between partially responsive and non-responsive for several months. As a result of the bookkeeping issues identified, and the difficulty in obtaining information from the Member, the Conduct Investigation Committee determined that an Interim Suspension was warranted. The Interim Suspension commenced on October 5, 2015.
>
> The Member's practice was taken over by a Trustee. The member has not practiced law since October 5, 2015. After that date, the Member's mental health deteriorated to the point where he was unable to address these matters. This resulted in a somewhat protracted delay in advancing the prosecution."

99. It appears that it was only in December of 2016, with considerable assistance from Mr. Stooshinoff, who is not only his counsel but became his employer, that the Member was able to engage in the process, resume counselling, and obtain a referral to a psychologist. Thus, the interim suspension was vital not only for public protection, in keeping with the primary purpose of interim suspensions, but was also essential for the Member's own well-being. At the time it was imposed, he was languishing in his practice, earning well below the threshold for GST collection, as noted by the Trustee. His mental health also deteriorated after October 2015, as noted above. Indeed, without the herculean efforts of Mr. Stooshinoff, the Member would likely not be as far along in his recovery. Accordingly, it is difficult to consider the entire period of interim suspension as penalty. There was a significant period in which it was both necessary and beneficial for the Member to be away from the practice of law to even commence a rehabilitation regimen.

100. The Hearing Committee is, however, prepared to take into account at least a portion of the time away from practice already experienced by the Member. Without such a reduction, the Hearing Committee is of the view that a suspension in the range of eighteen to twenty-one months would be in order.

101. However, considering the length of the interim suspension, the principles of penalty assessment, additional aggravating and mitigating factors, and the caselaw, all noted above, the

Hearing Committee finds that a suspension of fourteen months is appropriate in the circumstances. Such suspension will run from December 1, 2016 through January 31, 2018. The failure to maintain and properly utilize a trust account in keeping with the Law Society requirements is a very serious matter. The Member was aware that the accounting arrangement with the third-party firm was not working. He knew he was accepting retainers from clients. Yet he disregarded the Rules that are fundamental in protecting clients' money.

102. While the Hearing Committee is sympathetic to the Member's difficult family circumstances and health issues, such does not excuse the conduct. Nor was such suggested by the Member or his counsel. Both they and his health-care providers, as indicated in Exhibit P-4, desire that he continue in recovery, endeavoring to prevent relapse. The Member has taken considerable measures, through counselling and exercise, to improve his physical and mental health. This is commendable. As well, employment with Mr. Stooshinoff has assisted in building his confidence, further preparing him for potential return to practice as a lawyer. These measures all mitigate against a longer term of suspension, such as was imposed in the Hagen and Chetty cases.

103. The Member also had no intention to steal from his clients and did not bill for work that had not been done. Indeed, he had trouble billing for work that was done. This absence of deceit is also a mitigating factor.

Conditions Upon Resumption of Practice

104. Section 53 of *The Legal Profession Act, 1990* authorizes the Hearing Committee to not only order suspensions, but also to impose conditions regarding resumption of practice. Both counsel agreed that stringent conditions are appropriate in this case and the Hearing Committee concurs.

105. While the wording of the full slate of conditions may be finalized between Mr. Huber and Mr. Stooshinoff, with the approval of the Chair of the Discipline Executive Committee, the necessary elements will include those set out in the Order section below.

Costs

106. The Hearing Committee, by section 53(3)(a)(v) of The Legal Profession Act, 1990, is authorized to order the payment of costs by the Member. The costs claimed in this case total $3,990.00, as set out in Exhibit P-3. $3,000.00 of this amount reflects Mr. Huber's time on the file, which involved 15 hours from July 15, 2015 on. The balance relates to the Hearing costs.

107. Counsel for the Member indicated no objection to these amounts. On behalf of the CIC, Mr. Huber indicated that some time could be provided to the Member to pay the costs.

ORDER

108. Having considered the range of penalties articulated in the cases, the principles of both specific and general deterrence, the particular circumstances of this case, including both aggravating and mitigating factors, the interim suspension imposed October 5, 2015, and the overriding concern to act in the public interest and maintain the public's confidence in the integrity of the profession, the Hearing Committee orders that:

a. the Member be suspended for a period of 14 months commencing December 1, 2016 and continuing through January 31, 2018;

b. thereafter the Member shall only engage in the practice of law pursuant to conditions approved by the Chair of the Law Society of Saskatchewan Discipline Executive Committee (the "Chair"), which conditions shall include the following elements:

i. the Member shall practice under the direct supervision of a Practice Supervisor for at least one year from the date of resumption of practice, with such direct supervision including regular meetings between the Member and Practice Supervisor, regular review of the Member's files, and regular review of the Member's attendance and compliance with the direction of his health care providers, the frequency of such meetings and reviews to be approved by the Chair;

ii. the Practice Supervisor shall provide regular reports to the Law Society of Saskatchewan;

iii. Mr. Stooshinoff is designated as the Member's Practice Supervisor, with the Member employed by the Stooshinoff Bitzer firm, and should Mr. Stooshinoff be unable or unwilling to act, or the employment relationship be terminated, the replacement supervisor shall be approved by the Chair;

iv. accounting and trust matters will be handled by the Stooshinoff Bitzer firm, with the Member having no authority over trust accounts;

v. the Member shall provide a written undertaking to the Law Society of Saskatchewan that he will not practice law as a sole practitioner and will not, without prior approval of the Chair and specific training regarding the handling of trust monies satisfactory to the Law Society, practice in association, partnership or other practice arrangement where he has authority over trust accounts;

vi. the Member shall continue treatment, attending regularly scheduled sessions, with a registered psychologist, psychiatrist and/or registered counsellor (Care Provider), providing confirmation to the Law Society of the identity of such individual(s) and providing written consent and authorization for reports to be provided from the Care Provider(s) to the Law Society regarding the Member's attendance, compliance, progress and prognosis;

vii. the condition set out in sub-paragraph b.vi. shall continue until such time as these regular sessions are, in the opinion of the Member's Care Provider(s), no longer necessary;

viii. in the event the Member changes his Care Provider(s), he shall forthwith advise the Law Society of the change, and provide the necessary written authorizations to ensure ongoing status reports to the Law Society.

c. regarding the matters set out in sub-paragraphs b(i) through b(iv), the Member may, after a period of one year of direction supervision has past, apply to the Chair of the Law Society of Saskatchewan Discipline Executive Committee, with supporting materials, for a variation or removal of conditions relating to direct supervision;

d. the Member shall pay the costs of these proceedings to the Law Society of Saskatchewan in the amount of $3,990.00 by June 30, 2018; and

e. the Member is granted leave to apply to the Chair of the Law Society of Saskatchewan Discipline Executive Committee, with supporting materials, prior to June 30, 2018, for an extension of the period to pay the costs.

"Brenda Hildebrandt, Q.C." (Chair)	"October 11, 2017"
"Judy McCuskee"	"October 11, 2017"
"Marcel St. Onge"	"October 11, 2017"