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| **Court of Appeal for Saskatchewan** | **Citation:** ***Phillips v Law Society of Saskatchewan*****, 2021 SKCA 16** |
| **Docket: CACV3354** | **Date: 2021-01-27** |

Between:

**Mervin C. Phillips**

*Appellant*

And

**Law Society of Saskatchewan**

*Respondent*

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| Before: | Ottenbreit, Barrington-Foote and Kalmakoff JJ.A |
| Disposition: | Appeal allowed |
| Written reasons by:<br>In concurrence: | The Honourable Mr. Justice Ottenbreit<br>The Honourable Mr. Justice Barrington-Foote<br>The Honourable Mr. Justice Kalmakoff |
| On appeal from:<br>Appeal heard: | 2018 SKLSS 7, Regina<br>September 8, 2020 |
| Counsel: | Merrilee Rasmussen, Q.C. for the Appellant<br>Timothy Huber for the Respondent |

## Ottenbreit J.A.

## I. INTRODUCTION

[1] Mervin C. Phillips, a lawyer in Regina, appeals three decisions of the Hearing Committee of the Law Society of Saskatchewan [Committee]. The first decision, dated September 2, 2016 [*Preliminary Decision*], is in relation to the admissibility of evidence. The second decision, dated April 17, 2018 [*Hearing Decision*], found Mr. Phillips guilty of conduct unbecoming a lawyer pursuant to *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, as amended [*LPA*]. He also appeals the penalty decision dated December 10, 2018 [*Penalty Decision*], which imposed a sentence of a suspension for 30 days and costs. All three decisions are published together at 2018 SKLSS 7.

[2] For the reasons set out herein the appeal is allowed.

## II. FACTS AND BACKGROUND

[3] Until his death in March of 2009, H.U. had been a client of Mr. Phillips for over 34 years. S.H. was the daughter of H.U. She first met with Mr. Phillips and H.U. about her family law issues on February 21, 2008.

[4] At that meeting, Mr. Phillips was engaged to act for S.H. in her family law matter. H.U. told Mr. Phillips in the presence of S.H. that he would assist with payment of her legal expenses. H.U. was aware at that time that Mr. Phillips's hourly rate was $350.00 because Mr. Phillips had in the past rendered accounts to him calculated at that rate.

[5] Mr. Phillips duly prepared a petition with respect to division of family property, child support and spousal support, and thereafter acted on behalf of S.H. S.H. first requested an account from Mr. Phillips for his legal services on August 8, 2008. Around November 6, 2008, he provided her with an interim bill dated October 31, 2008, for the period of February 21 to October 31, 2008, in the amount of $4,118.92, comprised of $3,000.00 in fees plus disbursements and taxes. The account was summary in nature and referred to all attendances and correspondence on S.H.'s behalf. An attachment to the account showed 49.8 hours expended. On October 27, 2008, S.H. had

provided a $5,000.00 retainer cheque from H.U. to Mr. Phillips, which was used to pay the account.

[6] Between October of 2008 and October of 2009, Mr. Phillips attempted to negotiate a resolution of S.H.'s family law matters. During this time, S.H. struggled with anxiety and depression and Mr. Phillips, who was aware of this, tried to take that and other medical issues into account in providing services to S.H.

[7] Following a request by S.H., on October 28, 2009, Mr. Phillips provided a sample account to her that indicated time recorded and disbursements but not the dollar amount. On October 30, 2009, S.H. asked Mr. Phillips about the hourly fee she was being charged. In a meeting at Mr. Phillips's office, he advised her that he had been charging H.U. $350.00 per hour for a number of years.

[8] Mr. Phillips was served with a notice of change of solicitors on November 16, 2009. On December 1, 2009, after S.H. had obtained another lawyer, Mr. Phillips rendered his final account, listing all services and the nature of the work performed on behalf of S.H. from the time he was first retained on February 21, 2008, to the date he had ceased to act for her. The value of the time recorded in the final bill was $49,595.00 (141.7 hours x $350.00). Mr. Phillips reduced the value of his work to $24,500.00 as a courtesy and, after crediting S.H. for the $3,000.00 in fees from the interim bill paid from the retainer funds, provided a total final bill of $24,349.04, which included disbursements and taxes.

[9] When S.H. did not pay Mr. Phillips's account, he sued her in the Provincial Court of Saskatchewan [Small Claims Action]. He abandoned his claim to the amount that the account exceeded the $20,000.00 limit of the court's jurisdiction at that time. S.H. contested the claim and counterclaimed for unnecessary expenses incurred. A trial took place and both S.H. and Mr. Phillips testified and called a number of witnesses.

[10] Pursuant to s. 73.1 of the *LPA*, the Provincial Court judge [PCJ] determined the value of the legal services provided by Mr. Phillips to S.H. was $10,000.00. The PCJ issued written reasons for his determination dated January 4, 2013: *Phillips Legal Professional Corporation v* [*S.H.*], 2013 SKPC 2, 411 Sask R 112 [*Small Claims Decision*].

[11] He arrived at his decision regarding Mr. Phillips's fee using the well-known factors set out in *Sandstrom & Scott and United Chemical Ltd., Re* (1989), 74 Sask R 59 (CA) [*Sandstrom*], to determine a fair and reasonable fee. He noted that the most significant factors of *Sandstrom* at play on the issue of quantum were the results obtained and the complexity and importance of the matter. He found that Mr. Phillips's hourly rate of $350.00 was reasonable but that the results were abysmal and the matter, although more difficult than the expert witnesses who testified believed, was relatively uncomplicated.

[12] After the deduction of $3,881.08, to account for the payment made by S.H. on the interim bill dated October 31, 2008, the PCJ calculated that the net balance owing by S.H. to Mr. Phillips was $6,817.96. He then considered the counterclaim.

[13] The PCJ found that S.H.'s counterclaim was implicitly in relation to negligence, breach of contract and breach of fiduciary duty. He held that Mr. Phillips was not negligent and there was no breach of the implied contractual term to carry out the provision of professional services in a good and proper manner. The PCJ went on to find that based on the law of restitution, Mr. Phillips was in breach of his fiduciary duty by putting his own monetary interest above that of S.H.

[14] The PCJ found that Mr. Phillips had breached his fiduciary duty in several ways: he failed to advise S.H. of his hourly rate and did not provide some range of what the total bill would be when he first met with her and H.U. on February 21, 2008; he rounded up time spent on telephone and other attendances; he engaged in unnecessary work; and he required S.H. to unnecessarily attend at his office in Regina numerous times. He found Mr. Phillips was also in breach of his fiduciary duty by providing a confusing interim account. The PCJ fixed S.H.'s damages on the counterclaim at $2,000.00 and further reduced the claim of Mr. Phillips to $4,817.96.

[15] Mr. Phillips did not appeal the *Small Claims Decision*. After the appeal period had expired, Mr. Phillips was notified by the Law Society of Saskatchewan [LSS] that it was investigating his dealings with S.H., although she had made no complaint to the LSS regarding the matter.

[16] By an amended formal complaint dated January 8, 2016 [Complaint], Mr. Phillips was charged with conduct unbecoming a lawyer in that he:

> 1. did fail to be frank and candid with S.H. in relation to the anticipated costs of S.H.'s legal matter [Charge #1];

> 2. did fail to serve his client, S.H., in a conscientious, diligent and efficient manner as follows:
>
> > a. he spent time unnecessarily in connection with issues S.H. had instructed him to abandon; and
> >
> > b. he required S.H. to make unnecessary and excessive personal attendances at his office [Charge #2];
>
> 3. did charge a fee to S.H. that was not fully disclosed, fair and reasonable [Charge #3].

## III. THE DECISIONS UNDER APPEAL

[17] As a preliminary observation, the Committee found that Charge #2 had not been proven. I need not therefore refer to it except as it relates to Charge #1 and #3. Nor is it necessary to refer to the *Penalty Decision* given the analysis that follows.

[18] The LSS, prior to the hearing of the Complaint, applied to admit the *Small Claims Decision* as prima facie proof of the charges contained therein. Mr. Phillips countered with an application that the *Small Claims Decision* could not be introduced into evidence. These applications were determined by the Committee in the *Preliminary Decision*.

[19] The Committee first reviewed the facts and germane law. It agreed with and adopted the approach set out in *Rosenbaum v Law Society of Manitoba* (1983), 150 DLR (3d) 352 (CanLII) (Man QB) [*Rosenbaum*] (aff'd (1983), 3 DLR (4th) 768 (CanLII) (Man CA) [*Rosenbaum CA*], leave to appeal to SCC refused, [1984] 1 SCR xii, and *Law Society of Upper Canada v Jonathan Howard Marler*, 2010 ONLSAP 29 (CanLII) [*Marler*], regarding the admission of previous civil proceedings as evidence in a professional discipline matter.

[20] The Committee concluded the *Small Claims Decision* could be admitted as evidence (*Preliminary Decision*):

> 24. In defending the conduct unbecoming charges, Mr. Phillips would be entitled to lead evidence to "displace" (to use the word from *Marler)* the findings of fact made by [the PCJ] that the Conduct Investigation Committee may rely on as prima facie proof of the discipline charges. Whether [the PCJ] made jurisdictional errors in his decision is not relevant for the purposes of the Hearing Committee and this discipline hearing. It is the findings of fact made by [the PCJ] that serve as prima facie proof. …
>
> 25. The application is dismissed and the decision of [the PCJ] dated June 4, 2013 may be introduced into evidence by the Investigation Committee as prima facie proof of the charges set out in the Amended Formal Complaint.

[21] At the hearing of the Complaint, the *Small Claims Decision* was admitted into evidence. The Committee, in its *Hearing Decision*, referred to its ruling in the *Preliminary Decision* to admit the evidence:

> 6. An interim application was made by way of Notice of Motion dated May 30, 2016 in which the Member sought an order that the decision of the Provincial Court of Saskatchewan not be admissible into evidence. Following argument in that matter and upon an analysis of relevant cases and authorities, *the Hearing Committee decided that the Provincial Court of Saskatchewan Small Claims Court decision could be introduced into evidence by the Conduct Investigation Committee as prima facie proof of the allegations set out in the Amended Formal Complaint* but that the Member would be entitled to lead evidence to "displace" the findings of fact made by the Provincial Court judge. Accordingly at the hearing of this matter the Small Claims Court decision was entered into evidence as Exhibit P-2. In that decision, the presiding judge found that the Member acted in his firm's monetary self-interest by:
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> > a. not expressly advising S.H. on February 21, 2008 or within a reasonable time thereafter of the Member's hourly fee, his billing procedure and some range of what his total bill might be;
> >
> > b. rounding up the time spent on telephone and other attendances; and,
> >
> > c. engaging in unnecessary work on S.H.'s family law file and requiring S.H. to attend at the Member's Regina law office on numerous occasions.
>
> (Emphasis added)

[22] At the hearing, the parties tendered an agreed statement of facts outlining the nature and circumstances of S.H.'s family law matter and the interactions between her and Mr. Phillips. The agreed statement of facts noted that H.U. had been aware of Mr. Phillips's hourly rate. Mr. Phillips acknowledged in testimony there had been no specific discussions with S.H. about an hourly rate, but testified he believed she knew his hourly rate was $350.00 because he had always charged her father that rate.

[23] Mr. Phillips testified that in August of 2008, S.H. provided a memo to him with instructions to seek help for her in the event she had suicidal thoughts. At around the same time, S.H. attended at Mr. Phillips's office and inquired about him providing some idea of what her account would be so she could put money aside for it. Mr. Phillips shortly thereafter spoke to H.U. about S.H.'s situation and the matter of costs and the steps to be taken on her behalf.

[24] Mr. Phillips testified that he believed H.U. was very much involved in S.H.'s matter and that he was handling the financial affairs. Mr. Phillips said that he spoke to H.U. again about S.H.'s

situation over a six-week period, just prior to S.H. bringing in the $5,000 cheque from H.U. on October 27, 2008, as a deposit toward the account.

[25] Mr. Phillips's testimony about his dealings with H.U. was ultimately rejected by the Committee:

> 16. It should be noted that the hearsay evidence proffered during the Member's testimony about discussions with S.H.'s father carries no probative value to this Committee and has not been considered in reaching its conclusion. While section 48(10), of *The Legal Profession Act, 1990* empowers the Hearing Committee to consider any evidence that it considers appropriate and does not bind the Committee to the evidentiary rules of law, this Committee does not consider the proffered hearsay evidence as appropriate. There is no way of corroborating statements in a situation such as this where the speaker has passed away, leaving the impugned evidence so prone to being self-serving that it carries no weight.

[26] On the day of the hearing, Mr. Phillips applied to call an expert witness, Derek Kendall, who had reviewed his files concerning S.H. Just prior to the hearing, Mr. Phillips had provided LSS's counsel with Mr. Kendall's curriculum vitae and a one-line explanation of the proposed testimony.

[27] During the hearing, members of the Committee engaged both counsel in a discussion about the proposed expert witness's testimony. Mr. Phillips's counsel indicated that Mr. Kendall was a family practitioner of many years' experience and his evidence would be about the general nature of the things that a family law lawyer had to do to properly handle a family law file. Counsel for Mr. Phillips then provided to the Committee more detail about the proposed expert testimony and the basis for it. At one point in the discussion, counsel for the LSS indicated that he would be prepared to settle for a verbal indication of the scope of the proposed testimony at that time.

[28] Counsel for Mr. Phillips indicated that she had not understood there would be an issue admitting the expert evidence based on lack of notice but believed that the LSS objected to the content of the expert testimony. Counsel for the LSS then questioned whether the proposed expert testimony passed the governing tests for admissibility of expert evidence in the sense that it was not relevant or necessary to assist the trier of fact. He also indicated that he objected on the basis that the proposed testimony attempted to displace the findings of the *Small Claims Decision* and that to allow the proposed testimony would amount to a relitigation of those findings.

[29] Counsel for the LSS reiterated that he would settle for disclosure of Mr. Kendall's evidence at that time. Counsel for Mr. Phillips indicated again that, because the Complaint talked about failing to serve a client conscientiously, diligently and efficiently by expending unnecessary time and making unnecessary and excessive personal attendances at his office, the expert evidence touching those issues was relevant. Counsel for the LSS countered that allowing the expert witness to give such evidence would be tantamount to determining the final issue by justifying the things that Mr. Phillips did on S.H.'s file as appropriate.

[30] After an adjournment, the LSS indicated it was objecting to the expert testimony based on lack of relevance and necessity.

[31] The Committee, after some consideration, declined to allow the expert testimony:

> 21. The Member intended to call an expert witness to give evidence on the factors to be taken into account in making a claim for spousal support, the process of four-way meetings, mediation in family law practice, to comment specifically on the number of meetings/attendances and the circumstance of having the parent pay for the child's divorce. The Committee declined to hear the expert evidence citing rules 432(9) & (10) of *The Law Society of Saskatchewan Law Society Rules* ….
>
> 22. The rule is mandatory dictating that the Hearing Committee shall not permit a witness to testify unless proper disclosure has been made. The three saving provisions in Rule 432(10) – that the failure to disclose arose through inadvertence; or that the information was not in the possession of the party at the time that disclosure was required; or that for any other compelling reason it would be manifestly unfair to exclude the evidence – do not apply in this case. [LSS] Counsel did not consent and the Hearing Committee had no choice but to disallow the proposed expert testimony.

[32] The Committee reviewed chapter XI of the LSS's *Code of Professional Conduct* (Regina: Law Society of Saskatchewan, 1991) [*Code*], as it read at the time, and the factors set out therein regarding the determination of a fair and reasonable fee and the commentary to the *Code*. The Committee noted that the spirit of the rule and of the commentary required fairness, candour and full disclosure surrounding the fee arrangement, based on the fiduciary relationship that exists between lawyer and client.

[33] The Committee turned to Charge #1. It acknowledged the argument of Mr. Phillips that the wording of Charge #1 in the Complaint imported an element of intention and that no evidence of intention had been proven. The Committee referred to *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at para 69, [2014] 6 WWR 643 [*Merchant 2014*], and determined that absent words in the charge such as *intentionally* or *knowingly* or similar words, conduct unbecoming was a strict

liability offence. The Committee determined that because such words were absent, Charge #1 was worded as a strict liability offence and therefore proof of intention was not required.

[34] After reviewing the testimony of S.H. and the admissible testimony of Mr. Phillips, the Committee determined that S.H. was not aware of Mr. Phillips's hourly rate of $350.00 until she saw the December 2009 final billing and did the math to calculate that rate. The Committee concluded as follows:

> 31. Not only was there no clear disclosure of the anticipated costs, but the information regarding costs was confusing. The October 31, 2008 interim account states a nil balance owing after application of the $5,000.00 payment made by S.H.'s father and yet the summary of services bearing the same date shows 49.8 hours expended. Dividing the October 31, 2008 fee total of $3,000.00 by that number of hours would lead to an hourly rate of just over $60.00. The October 28, 2009 "Sample Account" provided to S.H. by the Member in response to her request included hours, but with no corresponding monetary amounts and it was not until the December 1, 2009 final account was rendered, following termination of the solicitor-client relationship between S.H. and the Member, that the full story of the costs of the matter was revealed.
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> 32. On the evidence contained both in the Agreed Statement of Facts and given at the hearing of the matter, this Committee concludes that the Member's conduct in advising S.H. as to the anticipated costs of the legal matter fell short of the standard that would be expected and amounts to conduct unbecoming.

[35] The Committee then turned to Charge #3. It noted these allegations were focused on the actual fee charged rather than on the disclosure of the anticipated cost. The Committee again acknowledged Mr. Phillips's arguments that these allegations, as well, required *mens rea* but rejected it on the same basis as it had with regard to Charge #1.

[36] With respect to Charge #3, the Committee observed the following:

> 35. While the commentary to the *Code of Conduct* rule underpinning the first allegation anticipates fees so disproportionate to the services rendered as to introduce an element of fraud or dishonesty, that is not is what is alleged in this case. Rather, the wording in the Amended Formal Complaint before this Committee alleges conduct unbecoming because the Member did not fully disclose, to use the words of the underpinning rule, "a fee that was fair and reasonable".

[37] Counsel for the LSS proffered the findings in the *Small Claims Decision* as prima facie proof that Mr. Phillips's account was unreasonable. Counsel for Mr. Phillips submitted that the evidence tendered before the Committee, referable to the relevant factors set out in the commentaries to the *Code*, displaced that finding.

[38] The Committee noted in respect of Charge #3 that, while the expert testimony given at the small claims trial was arguably of less weight than if the experts had been given access to Mr. Phillips's files, the Committee was not satisfied that sufficient evidence had been given at the hearing to displace the findings in the *Small Claims Decision* regarding the reasonableness of his fees. The Committee noted that the *Small Claims Decision* stated that the results Mr. Phillips had obtained were abysmal and that he had made little progress on the file. Therefore, the Committee could come to no different conclusion on that point. The Committee found Charge #3 to be well-founded.

[39] The Committee then turned to Charge #2 and noted that both parts of it focused on time spent on the matter rather than fees. The Committee found that S.H. did not clearly or consistently instruct Mr. Phillips to abandon pursuing her claim for spousal support based on health issues that might have resulted in time spent unnecessarily. As a result, with respect to Charge #2, the Committee found there was no conduct unbecoming.

## IV. ISSUES

[40] Mr. Phillips raises a number of issues. I need not address all of them. This appeal can be determined based on the following issues:

(a) Did the Committee err in finding Charges #1 and #3 did not require proof of intention?

(b) Did the Committee err by accepting the *Small Claims Decision* as prima facie proof of Charges #1 and #3, thereby improperly placing the burden of proof on Mr. Phillips?

(c) Did the Committee err in finding Mr. Phillips's proposed expert evidence was inadmissible?

[41] Mr. Phillips also raised the issue of penalty; but, in view of the result in this appeal, it is not necessary to address that matter.

## V. STANDARD OF REVIEW

[42] Mr. Phillips's appeal is pursuant to s. 56(1) of the *LPA*. The parties were asked to provide the Court with argument about the applicable standard of review in light of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*], and *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 [*Abrametz*] (leave to appeal to SCC requested, 39340).

[43] Both *Vavilov* and *Abrametz* explain that, where a statute provides for a right of appeal from an administrative tribunal, the usual appellate standards of review set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, now apply rather than the reasonableness standard of review exemplified by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[44] In *Abrametz*, this Court noted the following:

> [74] The appellate standards are those specified in *Housen v Nikolaisen*, 2002 SCC 33 at para 37, [2002] 2 SCR 235. Questions of statutory interpretation and other questions of law – including as to the scope of the decision-maker's authority – are reviewed on the correctness standard. Where, as here, the right of appeal extends to questions of fact, the standard of review relating to those questions is palpable and overriding error. Absent an extricable error of law, that deferential standard applies to mixed questions of fact and law. A deferential standard also applies to discretionary decisions ….
>
> [75] The direction in *Vavilov* is unambiguous. If the legislature specifies the standard of review, the court must abide by that direction. However, the contextual approach to the search for a standard of review set by the legislature, which had appeared to be mortally wounded for some time, has been laid to rest. Similarly, the relative expertise of an administrative decision-maker such as the LSS is no longer relevant in determining the standard of review. The presence of a statutory appeal mechanism, in and of itself, signals that the legislature intended to subject the decision-maker to appellate oversight and the application of the appellate standard (see generally paras 36–54).

[45] The standard of review applicable to discretionary decisions was recently reviewed in *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at paras 60–63, [2020] 12 WWR 396 and *Kot v Kot*, 2021 SKCA 4 at paras 15–20. In those cases, this Court emphasized that, as stated in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 43, [2003] 3 SCR 371, "the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review". Similarly, as Cameron J.A. put the matter in *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119, discretionary powers

"fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise".

[46] While both parties acknowledged the new approach set forth in those cases, they differed on the actual standard of review applicable to the specific issues before this Court. Mr. Phillips submitted that all the issues were to be reviewed on a standard of correctness because all were either questions of law or of procedural fairness. The LSS argued the applicable standard of review for matters relating to the findings of the Committee on issues of conduct unbecoming (not involving questions of *Code* interpretation) was palpable and overriding error because the findings of fact related to conduct unbecoming are questions of mixed fact and law.

[47] As to the first issue identified above, whether the alleged misconduct requires proof of *mens rea* depends on the wording of the charge, see *Merchant 2014* at paras 68–70. Pre-*Vavilov*, that issue was reviewed on the standard of reasonableness: see *Merchant 2014* and *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, [2009] 5 WWR 478 [*Merchant 2009*]. However, post-*Vavilov*, it is to be reviewed on the basis it is a question of law.

[48] The *Abrametz* decision notes the status of the Law Society of Saskatchewan Rules [Rules] and *Code* as delegated legislation, and concludes that "the Hearing Committee's interpretation of the Rules and *Code* … are extricable questions of law and, as such, are subject to a review on a correctness standard" (at para 85; see also paras 78–85). The same is true of the interpretation of an allegation that a member has committed an offence pursuant to the Rules and the *Code* for the purpose of determining the elements of the offence as charged. In particular, whether such an allegation requires proof of *mens rea* is now reviewable on a correctness standard. This will be the standard of review applied to the determination of whether Charge #1 and Charge #3, as worded, required proof of intention.

[49] On the second issue identified above, the admissibility of the *Small Claims Decision*, is no longer an issue, as Mr. Phillips has conceded that point. Instead, that issue has evolved into the treatment accorded to the *Small Claims Decision* by the Committee. The evidentiary effect to be given to a previous proceeding, and whether the Committee erred by accepting the *Small Claims Decision* as prima facie proof of the charges in the Complaint, raises a question of law which is reviewable on the correctness standard. The same is true of the question of whether the Committee,

by erring in that fashion, also erred in law by improperly shifting the burden of proof to Mr. Phillips.

[50] The third issue identified above relates to the application of Rule 432(9) and Rule 432(10) and is reviewable on the discretionary standard.

## A. Did the Committee err in finding Charges #1 and # 3 did not require proof of intention?

[51] Mr. Phillips argues that his case is similar to *Merchant 2009*. He submits that, as in *Merchant 2009*, despite the fact that Charge #1 and Charge #3 do not explicitly contain words such as *knowingly* or *intentionally*, the conduct alleged therein required deliberate or conscious action by him and, therefore, required proof of intention. He submits that the Committee erred in determining proof of intention was not required. I turn to the Charges.

### 1. Charge #1 requires proof of intention

[52] Charge #1 is based on chapter XI of the *Code*, titled "Fees"; the relevant portion of which reads as follows (at 42):

> **Rule**
>
> The lawyer shall not:
>
> > (a) stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable … .

[53] The Complaint in Charge #1 states that Mr. Phillips "did fail to be frank and candid with S.H. in relation to the anticipated costs of S.H.'s legal matter".

[54] This part of the Complaint focuses on Mr. Phillips's dealings with S.H. at the start of and during his retainer. The LSS argues the words of Charge #1 import no intention and, as framed, constitute a strict liability offence. Mr. Phillips submits the words "frank and candid" connote a requirement of lack of honesty and sincerity and that proof of a failure to be frank and candid requires a finding that he was dishonest or insincere in his dealings with S.H.

[55] In support of his position, Mr. Phillips provides several definitions of *frank* and *candid* from the Merriam-Webster.com dictionary (online) as follows:

> "frank": marked by free, forthright, and **sincere** expression …

> "candid": marked by **honest sincere** expression, disposed to criticize severely, indicating or suggesting **sincere honesty** and **absence of deception**, free from bias, prejudice, or **malice** … .
>
> (Emphasis added by Mr. Phillips; footnotes omitted)

[56] The word *candid* has been judicially considered in relation to criminal matters. In *R v Levogiannis* (1990), 62 CCC (3d) 59 (WL) (Ont CA), the court, addressing the issue of a 12-year-old complainant speaking behind a screen, said as follows:

> [68] … Keeping this in mind, it is important to note the policy behind the rule which prevents face-to-face confrontation is, generally, the same – to create conditions designed to enhance the reliability of the evidence. In this regard, it is of interest to pay particular regard to the meaning of "candid". In the *Shorter Oxford English Dictionary*, 3d ed. (Oxford Clarendon Press, 1973) the following appears with respect to the word:
>
> > 1. [not relevant]. 2. Free from bias; impartial (Obs. or arch.) 1635. 3. *Free from malice*; favourably disposed, kindly--1800. 4. *Frank, ingenuous, sincere* in what one says 1675.
>
> [69] In *Webster's New World Dictionary*, 2d ed. (Markham, Ont. Thomas Allen & Sons Ltd.) the meanings of "candid" are:
>
> > 1. free from prejudice or bias; fair; just; impartial 2. very honest or frank in what one says or writes 3. unposed and informal [a candid photograph] 4. [not relevant]
>
> [70] … How could one complain about the absence of face-to-face confrontation if its purpose is to bring about a full and honest account? …
>
> (Underlined emphasis in original; italicized emphasis added)

[57] Although the above excerpt was in relation to a witness being able to give *candid* testimony, the gist of that word, as referred by the court, was that the witness be sincere and honest. Insincerity and dishonesty connote something more than negligence; they connote an element of intention, or deliberate action.

[58] The Committee, in finding that Charge #1 did not require intention, determined the case was similar to *Merchant 2014*, where words that obviously signified intention were absent from the charge and this Court had determined that the allegation did not require intention.

[59] However, the Committee misinterprets this case. It wrongly focused on the examples of such words used by this Court rather than on the general principle from *Merchant 2014*, which should have guided its analysis. The touchstone of such analysis is whether there was inserted into the charge *any words* that would indicate the conduct unbecoming hinged on a finding of intention. In *Merchant 2014*, this Court clarified that "the absence of such words [denoting intention] is not

determinative if the nature of the charge and the circumstances as a whole nevertheless lead to the conclusion *mens rea* is required" (at para 70).

[60] Based on the above analysis, I find the wording of Charge #1 requires proof of a deliberate or intentional failure to fully disclose the fee. The Committee erred in finding otherwise. On this basis, the Committee's conclusion that the allegations of Charge #1 had been made out must be set aside, as must its resulting conclusion that conduct unbecoming had been proven.

### 2. Charge #3 does not require proof of intention

[61] However, the same cannot be said of Charge #3, which is based on the same provisions of chapter XI of the *Code* as Charge #1. That the allegation is worded differently and reads as follows: "did charge a fee to S.H. that was not fully disclosed, fair and reasonable".

[62] The Committee stated that this allegation focuses on the actual fee charged rather than the disclosure of the anticipated cost. Paragraph 48 of the *Hearing Decision* referenced the following commentary to the *Code*:

> **Factors to be Considered**
>
> 1. A fair and reasonable fee will depend on and reflect such factors as:
>
> (a) the time and effort required and spent;
>
> (b) the difficulty and importance of the matter;
>
> (c) whether special skill or service has been required and provided;
>
> (d) the customary charges of other lawyers of equal standing in like matters and circumstances;
>
> (e) in civil cases the amount involved, or the value of the subject matter;
>
> (f) in criminal cases the exposure and risk to the client;
>
> (g) the results obtained;
>
> (h) tariffs or scales authorized by local law;
>
> (i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
>
> (j) any relevant agreement between the lawyer and the client.
>
> A fee will not be fair and reasonable and may subject the lawyer to disciplinary proceedings if it is one that cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit.

[63] The LSS took the position before the Committee that the fee charged was unreasonable when measured against the factors listed in the commentary to the *Code*. The LSS also relied on the *Small Claims Decision* as prima facie proof that the fees charged were unreasonable.

[64] The operative words of Charge #3 are "fully disclosed, fair and reasonable". The words *fully disclosed* do not necessarily import an intention. Whether a fee is fully disclosed will depend on the circumstances of the case and the level of detail provided by the lawyer to the client in the account. Failure to fully disclose a fee may, therefore, result from negligence or inadvertence and not necessarily because the lawyer was intentionally trying to hide something, be less than candid, deceptive or dishonest.

[65] The words *fair* and *reasonable* in the context of disciplinary proceedings have a meaning similar to that set out in the case law regarding the assessment of lawyer's fees. In that context, the words are well-known. This Court, in *Speers v Hagemeister* (1974), 52 DLR (3d) 109 (CanLII) (Sask CA), defined those terms:

> [17] The words "fair" and "reasonable" refer to distinct and separate tests. *"Fair" relates to the manner in which the agreement was brought about* and means that there can be no undue advantage taken of the client. …
>
> …
>
> [20] The term *"reasonable" relates to the quantum of remuneration* which the agreement provides the solicitor. In *Galbraith v. Murray, Robertson & Thomas*, [1930] 4 D.L.R. 1005, [1930] 3 W.W.R. 120, the contingent agreement was entered into pursuant to enabling legislation. Omitting the references to that legislation, I would adopt the views expressed by Kilgour, J., at pp. 125–6 and apply them here. At p. 125 he said:
>
> > Other considerations have to be borne in mind in estimating the reasonableness to the client of the contract. The contract might well have been fairly entered into without being wholly reasonable to the client, and if so, the Court, if called upon, cannot escape the duty of revising it. Reasonableness, as already noted, has to do with the amount. In determining whether the amount is reasonable, the actual work which the solicitor is called upon to do is undoubtedly a factor, though not the sole factor, to be taken into account (see *In re Stuart; Ex parte Cathcart*, [[1893] 2 Q.B. 201]).
>
> (Emphasis added)

[66] The words *fair* and *reasonable* do not necessarily connote an intention, although it is conceivable that a fee that is unfair and unreasonable can be deliberately charged. Nor do those words require proof of dishonesty or insincerity on the part of the lawyer. Rather, the inquiry will

concern the factors set out in the commentary to the *Code*. Mr. Phillips acknowledged this would be the appropriate approach.

[67] I find the Committee did not err in concluding Charge #3 as worded was a strict liability offence.

### B. Did the Committee err by accepting the *Small Claims Decision* as prima facie proof of Charges #1 and #3, thereby improperly placing the burden of proof on Mr. Phillips?

[68] The LSS submits that s. 48(10) of the *LPA* (as it read) allowed the Committee to accept any evidence that it considered appropriate, and it did so with regard to the findings in the *Small Claims Decision*. The LSS argues the Committee correctly applied the principles stated in *Rosenbaum* (at paras 13–15) and relied on the *Small Claims Decision* as prima facie proof of the findings therein, subject to the right of Mr. Phillips to displace those findings.

[69] Mr. Phillips acknowledges the *Small Claims Decision* is admissible but submits this is so only with respect to findings of fact properly made and not as prima facie *proof* of Charges #1 and #3 or of conduct unbecoming. He argues the Committee went beyond the findings of fact contained in the *Small Claims Decision* and applied that decision as if it were a determination that he was guilty of conduct unbecoming. Mr. Phillips submits the Committee's reliance on the findings in the *Small Claims Decision* as proof of the charges caused it to improperly ignore or disregard his testimony capable of displacing those findings and ultimately placed the burden of proof on him.

#### 1. The probative value of the *Small Claims Decision*

[70] The admission of the *Small Claims Decision* and its probative value must be seen in light of the relaxed evidentiary rules set forth in s. 48(10) of the *LPA* (now repealed by *The Legal Profession Amendment Act, 2019*, SS 2019, c 7, s 27):

> **Powers and duties of hearing committee**
>
> **48**(10) A hearing committee may accept any evidence that it considers appropriate and is not bound by the rules of law concerning evidence.

[71] However, the fact that the Committee proceeded on the basis of relaxed evidentiary rules does not determine whether it was entitled to use the *Small Claims Decision* in the manner it did.

[72] I preface the analysis that follows with the observation that it applies only to the use of previous civil decisions in disciplinary proceedings. Somewhat different considerations apply in the case of decisions in criminal matters. I need not address the distinction in these reasons.

[73] The use that may be made of evidence of prior civil proceedings in later proceedings is discussed in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018):

> **§19.202** … A judgment of a civil court, however, need only be based on proof to a balance of probabilities. A civil judgment is, therefore, worthy of less respect [than a criminal judgment] in a subsequent proceeding and should not, as a general rule, be admissible as prima facie proof of the commission of the relevant acts or the existence of negligent conduct. It cannot logically raise such a presumption of fact or law. It is not, however, logically irrelevant; it just has less weight.
>
> (Footnotes omitted)

[74] Gavin MacKenzie states the following in *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Rel 2020-4) (Toronto: Thomson Reuters, 2020) at 26.14.2–24.14.3 [*Lawyers & Ethics*]:

> **26.5 – Parallel Criminal and civil proceedings**
>
> … Now that it is established that the standard of proof imposed on the law society to prove professional misconduct is the same as the standard of proof in civil proceedings, *it is clear that the law society may also rely on judicial findings in civil proceedings as at least prima facie proof of the underlying evidence in support, if the lawyer is a party to the civil proceeding and actively participates in it*.
>
> *What remains to be authoritatively decided in the context of law society discipline proceedings is whether the findings of fact in parallel criminal or civil proceedings are conclusive proof of those facts, or whether the lawyer is entitled to relitigate the findings, bearing the evidentiary burden of tendering evidence to displace them*. The Supreme Court of Canada has held that when asked to decide whether a criminal conviction ought to be rebuttable or taken as conclusive in a grievance arbitration, courts should turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. In a 2013 decision, the Supreme Court of Canada declined to apply the doctrine of issue estoppel to prevent a complainant from pursuing a civil action for damages against the police on the basis that the complainant's complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal. The Court held that though the preconditions to establish issue estoppel had been met, the Court should exercise its discretion to refuse to apply the doctrine where to apply it would work an injustice based on the reasonable expectations of the parties about the effect of the proceedings on their broader legal rights. In a 2010 decision, the Appeal Panel of the Law Society of Upper Canada "left for another day" the circumstances in which a lawyer facing discipline proceedings may be precluded from relitigating adverse judicial or administrative findings.
>
> (Footnotes omitted; emphasis added)

[75] To determine the probative value of the *Small Claims Decision*, the Committee purported to apply *Rosenbaum.* The disciplinary proceeding in that case arose because of a finding by a judge in a previous proceeding that a lawyer had falsely denied making various fraudulent changes to certain corporate records. The lawyer then attempted to prohibit the Judicial Committee of the Law Society from accepting that judge's finding as conclusive proof of the fact he had lied to the court and was thereby guilty of perjury and professional misconduct. The ratio of *Rosenbaum* is found in the following excerpt:

> [14] However, the availability to the committee of the previous proceedings does not mean that the judgment of this court, any more than the judgment of any other tribunal, merits treatment as conclusive evidence …
>
> [15] … However, I do not take the decision of the House of Lords in [*General Council of Medical Education & Registration of United Kingdom v Spackman*, [1943] 2 All E.R. 337] to mean that a disciplinary body must in all cases treat as prima facie evidence every finding by a court in prior proceedings. Much will depend on the particular circumstances in which the proceedings were conducted; provided the lawyer is given fair opportunity to adduce further evidence and to submit argument to dispute the accuracy of specific solemn and considered findings, the committee is entitled to exercise its discretion to rely upon the civil proceedings as evidence in support of the charge.
>
> (Emphasis in original)

[76] On appeal in *Rosenbaum CA*, the court agreed with the trial judge but modified the formal order:

> [1] We are in agreement with the disposition of the case by Scollin, J.: see 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352, 5 W.W.R. 752.
>
> [2] We would modify para. 2 of the order dated July 22, 1983, by deleting every word after the words "Judicial Committee" and substituting therefor the following: "as prima facie evidence in support of the said charges".
>
> [3] The paragraph would therefore read in part: "… be received in evidence by the Judicial Committee as prima facie evidence in support of the said charges".

[77] On the basis of the above excerpts, *Rosenbaum* (properly understood) stands for the principle that a disciplinary tribunal *may* treat previous court findings as *prima facie evidence in support* of the disciplinary charge before it, at least where the lawyer was a party to and actively participated in the civil proceeding.

[78] *Rosenbaum* has been subsequently cited with approval: for example, *Del Core v College of Pharmacists (Ontario)* (1985), 10 OAC 57 (CA) [*Del Core*] (leave to appeal to SCC refused, [1986] 1 SCR viii); and *Law Society (British Columbia) v Ewachniuk*, 2003 BCCA 223, [2003] 6 WWR 459.

[79] Based on the foregoing authorities, I conclude that findings of fact made in a previous civil proceeding to which the lawyer was a party or has actively participated, such as the *Small Claims Decision*, may be admitted as *prima facie evidence* in support of disciplinary charges and not *proof* thereof.

[80] Once a previous decision is admitted as evidence, it must be accorded the evidentiary weight that is appropriate in the circumstances. That weight is for the trier of fact to assess, taking into account a number of factors including, among others, those identified in *British Columbia (Attorney General) v Malik*, 2011 SCC 18, [2011] 1 SCR 657 [*Malik*]:

> [42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §19.177).
>
> …
>
> [48] Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (*Del Core*, at p. 22 [para 61]).

[81] With this background, I turn to the Committee's treatment of the *Small Claims Decision* in its conclusion Mr. Phillips was guilty of conduct unbecoming. The LSS proffered the *Small Claims Decision* as prima facie *proof* that the fee of approximately $24,000.00 that Mr. Phillips charged S.H. was unreasonable. This characterization appears to have been accepted by the Committee based on several errors, including a misinterpretation of *Rosenbaum*.

[82] In its *Preliminary Decision*, the Committee stated that the *Small Claims Decision* "may be introduced into the evidence by the Investigation Committee as prima facie *proof of the charges*" (at para 25, emphasis added). In its *Hearing Decision*, the Committee described the *Preliminary Decision* in terms of allowing the *Small Claims Decision* to be introduced "as *prima facie proof of the allegations* set out" in the Complaint (at para 6).

[83] Several errors preceded the Committee's misinterpretation of *Rosenbaum* in the *Preliminary Decision*. First, the Committee adopted an excerpt from a legal text, Bryan Salte, *The*

*Law of Professional Regulation* (Markham, Ont: LexisNexis, 2015) [*Salte*], that stated recent decisions supported the position that not only was it unnecessary in administrative proceedings to relitigate findings of fact made by a court but it was an abuse of process to do so. The excerpt provided in the *Preliminary Decision* did not refer to any jurisprudence to provide a basis for such a statement. Unfortunately, this excerpt misstates the law.

[84] Whether it is necessary to relitigate findings of fact and whether it is an abuse of process to do so will depend on the circumstances: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 [*CUPE*]. This erroneous black and white approach to previous proceedings permeated the disciplinary hearing and contributed to the Committee's misinterpretation of *Rosenbaum*.

[85] The Committee also relied on another excerpt from *Salte.* This reference was to a prosecution by the Law Society of Upper Canada of Joseph Groia (*Preliminary Decision*):

> 12. At page 171 of *The Law of Professional Regulation*, Salte provides a good summary of the decision of the Law Society Appeal Panel:
>
> > The court's comments were of limited use in the discipline proceeding. The fact that a court has concluded that a lawyer's conduct in court was improper, unacceptable, irresponsible or unrestrained does not, standing alone, answer the question of whether that conduct is professional misconduct.
> >
> > There were fairness concerns in preventing Groia from challenging the court's findings and characterization of his conduct:
> >
> > 1. Groia was not a party to the prosecution and had no mechanism to appeal the 'findings' made against him in the two decisions.
> > 2. Groia was not a witness in those proceedings and his first opportunity to give evidence to explain his conduct took place during the discipline hearing.
> > 3. Defending Groia's conduct was not the primary focus of Felderhoff's legal team in the judicial review proceedings, which resulted in the court's comments about Groia's conduct.
>
> 13. Unlike Groia, Mr. Phillips through his legal corporation was a party to the Small Claims proceedings. He was an active participant in that litigation, testifying himself and calling other witnesses.

See: *Groia v Law Society of Upper Canada*, [2013] LSDD No 186 (QL).

[86] The Committee distinguished this case and appears to have implicitly and erroneously reasoned, in paragraph 13 set forth above, that – because Mr. Phillips was a party and witness in

the Small Claims Action – the general observation that a previous finding standing alone did not answer the question of conduct unbecoming did not apply to him. This positioned the Committee to erroneously rely on *Rosenbaum* for its conclusion that the *Small Claims Decision*, standing alone, could be proof of the charges, i.e., conduct unbecoming.

[87] Factors such as whether the lawyer was a party to or witness in the previous proceeding only inform the weight to be given to a previous decision, as stated in *Malik*. Those factors may well make the findings in the previous proceeding very cogent. However, cogency and weight is to be assessed in every case based on the issues involved and the circumstances of the case as indicated in *Malik*.

[88] What then does this assessment disclose in Mr. Phillips's case? A disciplinary proceeding against a lawyer based on an alleged breach of the Rule at issue here is a very different context for the assessment of a lawyer's conduct than a court proceeding such as the Small Claims Action where the focus was the value of his services. While there may be similarities in the analysis of both, they are, at root, different. The latter focuses on whether the lawyer's fee accords with the value of his services provided to the client. The former focuses on whether the lawyer's conduct is inimical to the best interests of the public or other lawyers or tends to harm the standing of the legal profession. For that reason, and regardless of the extent of Mr. Phillips's participation in the Small Claims Action, the conclusions reached in that proceeding could not, without more, be accepted as prima facie proof of the Charges.

[89] The Committee did little analysis of whether the findings of the *Small Claims Decision* differed from the potential findings it was required to make for the purpose of the charges. This resulted in the Committee giving short shrift to Mr. Phillips's attempts to displace those findings. For example, the Committee appears to have relied on the findings in the *Small Claims Decision* as proof in respect of Charge #1 (*Hearing Decision*):

> [6] … In that decision, the presiding judge found that the Member acted in his firm's monetary self-interest by:
>
> a. not expressly advising S.H. on February 21, 2008 or within a reasonable time thereafter of the Member's hourly fee, his billing procedure and some range of what his bill might be … .

[90] Taken at face value, this appears to be almost identical to Mr. Phillips's admission that, in his dealings with S.H., he never volunteered information about his hourly rate, the estimated expense or about his billing arrangement. However, Charge #1 was not based solely on whether S.H. had been explicitly told about fees but, rather, also on whether Mr. Phillips had been frank and candid. Because the Committee viewed Charge #1 as not requiring intention and the finding by the PCJ as *proof* of Charge #1, it discounted Mr. Phillips's testimony explaining why he did not plainly discuss fees with S.H.:

> 16. It should be noted that the hearsay evidence proffered during the Member's testimony about discussions with S.H.'s father carries no probative value to this Committee and *has not been considered in reaching its conclusion*. While section 48(10), of *The Legal Profession Act, 1990* empowers the Hearing Committee to consider any evidence that it considers appropriate and does not bind the Committee to the evidentiary rules of law, this Committee does not consider the proffered hearsay evidence as appropriate. *There is no way of corroborating statements in a situation such as this where the speaker has passed away, leaving the impugned evidence so prone to being self-serving that it carries no weight*.
>
> (Emphasis added)

[91] It is clear that the Committee disregarded Mr. Phillips's evidence discussed above. Mr. Phillips was attempting to tender evidence that touched on his argument that he believed H.U. had assumed responsibility for paying his fees. Such an explanation was clearly relevant to the issue of candour and frankness *vis-à-vis* S.H., even apart from Mr. Phillips's argument of a joint retainer with S.H. and H.U. rejected by the Committee.

[92] Surprisingly, the Committee refused to accept Mr. Phillips's hearsay evidence without corroboration, despite relaxed evidentiary rules. Pointedly, it had no difficulty applying those same relaxed rules in an opposite way when it accepted the hearsay evidence of S.H. By accepting the finding of the PCJ as *proof*, and ignoring or disregarding this aspect of Mr. Phillips's evidence, the Committee effectively and, as noted above, erroneously reduced the elements of Charge #1 to merely a lack of explanation of fees to S.H.

[93] The upshot of this is that, had *Rosenbaum* been properly applied, the Committee would have conducted the analysis detailed in *Malik* regarding the weight to be given to the PCJ's findings above and to the various other findings contained in the *Small Claims Decision* on which it relied. It would have considered whether those findings, together with all other relevant evidence, proved the elements of the offences with which Mr. Phillips was charged, taking due

account of the difference between the matters at issue in the Small Claims Action and the elements of those offences. Its failure to undertake this analysis was an error.

### 2. The burden of proof

[94] It is common ground that the burden of proof in this matter was always on the LSS. Once the *Small Claims Decision* was admitted as evidence, Mr. Phillips had the evidentiary burden of trying to displace such of the findings therein as may have been germane. However, the Committee's use of it as *prima facie proof* rather than *prima facie evidence* established a starting point for Mr. Phillips's defence that placed on him a burden greater than merely an evidentiary burden.

[95] Mr. Phillips was entitled under s. 38 of the *LPA* to *present evidence in defence and reply*. That entitlement is robust. This is because the requirements of procedural fairness depend, in part, on the potential impact of the decision at issue and a solicitor's livelihood and reputation is in jeopardy in a disciplinary hearing.

[96] The Committee acknowledged that Mr. Phillips had an entitlement to call evidence in defence and reply to displace the findings in the previous proceeding. However, that right and the opportunity to do so was attenuated by the approach of the Committee that the *Small Claims Decision* was almost immune to challenge on the crucial issues underpinning the allegations of conduct unbecoming of both Charge #1 and Charge #3.

[97] For example, with respect to Charge #3, the Committee relied on some of the reasons of the PCJ made in the course of his determination of the proper amount of the fee as proof of unreasonableness. The Committee referred to paragraph 61 of the *Small Claims Decision*, where the PCJ stated that the results obtained were "abysmal" and Mr. Phillips had "made little progress on the file". The Committee seems to have interpreted these comments, together with the fee reduction, as tantamount to a finding that the original fee charged by Mr. Phillips was unreasonable or unfair – although the PCJ did not explicitly make such a finding. It then, as pointed out above, used that inferential finding as *proof* of conduct unbecoming, stating that it was "not satisfied that sufficient evidence was given in this hearing to displace the Small Claims Court *on the issue of the reasonableness* of the Member's fees" (at para 39, emphasis added). Once these findings were accepted as proof, it became very difficult for Mr. Phillips to dislodge them.

[98] Unfortunately, and as noted above, the Committee did not consider that the determination of a reasonable fee as between lawyer and client is not the same issue as whether the original fee was so unfair or unreasonable to constitute conduct unbecoming. I say this because, if that were not so, then any reduction of a lawyer's fee by a court or assessment officer would necessarily be virtually conclusive that the original fee was not fair and reasonable for the purposes of disciplinary proceedings. If that were the case, every lawyer whose account has ever been assessed lower than charged would stand in jeopardy of disciplinary proceedings.

[99] Not every case – or even most cases – where a fee has been reduced raises questions about the fairness and reasonableness of the fee and rises to the level of conduct unbecoming. The author in *Lawyers & Ethics* states the following regarding excessive fees:

> **25.5 – Fees**
>
> Lawyers are rarely disciplined for charging excessive fees. Fee disputes are generally resolved by way of assessment by a court officer. Disciplinary proceedings are generally initiated only if the fee charged is so grossly excessive as to give rise to an inference that the lawyer has taken advantage of a vulnerable client, or if the lawyer has accepted a hidden fee or otherwise concealed the basis of the lawyer's charges from the client.

[100] The reliance by the Committee on the *Small Claims Decision* as *prima facie proof* of unreasonableness of the fee shifted the overall burden of proof from the LSS to Mr. Phillips. Accordingly, the findings of conduct unbecoming in Charge #1 and Charge #3 must be set aside on this basis as well.

## C. Did the Committee err in finding Mr. Phillips's proposed expert evidence was inadmissible?

[101] Mr. Phillips submits the Committee erred in its interpretation and application of Rule 432(9) and Rule 432(10) by not allowing his expert witness to testify.

[102] The relevant portions of Rule 432(9) and Rule 432(10) are as follows:

> **Disclosure of Evidence**
>
> **432**(9) The Hearing Committee shall not permit a witness to testify unless the name of that witness, a summary of that witness' evidence, and, if the witness is called to give expert evidence, a summary of that witness' qualifications has been disclosed in accordance with subrule (2) or (8) of this Rule. The Hearing Committee shall not permit a document to be entered into evidence unless the information respecting that document has been disclosed in accordance with subrule (1) or (8).

> (10) Notwithstanding subrules (1) and (2), if the Hearing Committee is satisfied that the failure to disclose the required information arose through inadvertence, or that the information was not in the possession of the party at the time that disclosure was required, or that for any other compelling reason it would be manifestly unfair to exclude evidence or documents not disclosed as required, or if the opposing party consents, the Hearing Committee may permit such evidence to be given, or such documents to be introduced into evidence. This may be done on such terms or conditions as the Hearing Committee may determine, including the following:
>
> (a) the Committee may adjourn the hearing for such time as the Committee considers reasonable to permit the other party the opportunity to respond to such evidence;
>
> (b) the Committee may require the party who requests the introduction of such evidence to agree to pay an amount of costs, as estimated by the Committee, which may be incurred by the member or the Society as a result of the failure to disclose such evidence in accordance with subrule (1) or (2) or (8).

[103] The Committee's primary reason for declining to allow the testimony of Mr. Phillips's expert witness was that Mr. Phillips had not complied with Rule 432(9) and that the saving provision of Rule 432(10) did not apply. The secondary reason was that, based on what the Committee had heard regarding the "sort of evidence he would be giving", it was not satisfied it met the criteria for allowing the admission of expert evidence.

[104] I conclude that the submissions of Mr. Phillips on this issue have merit. The Committee failed to properly interpret and apply the saving provision in Rule 432(10). I will explain.

[105] As a preliminary point, the interpretation and application of Rule 432(9) and Rule 432(10) must be seen in the context of the more relaxed evidentiary approach allowed by s. 48(10) of the *LPA* mentioned above. This context compels a liberal and generous, rather than a technical, interpretation and application of these Rules.

[106] Additionally, as alluded to above, such factors as (a) the different context of the proceedings as compared to the small claims trial, (b) the consideration of the professional interests of Mr. Phillips at stake and (c) the acknowledgment of Mr. Phillips's entitlement to call evidence in defence and reply under s. 38 of the *LPA*, suggest a generous and liberal approach to these provisions. Put simply, a rigid application of the technical requirements of these Rules will usually be inappropriate.

[107] There was substantial discussion between counsel and then members of the Committee about whether the expert witness would be allowed to testify. During that discussion, counsel for the LSS indicated a number of times that he was not insisting on the strict application of the notice provision of Rule 432(2) but would be content if he got some immediate disclosure from Mr. Phillips. That notice provision provides, in part:

> (2) Not less than two weeks prior to the date set for the commencement of a hearing before the Hearing Committee, the member and Counsel to the Conduct Investigation Committee shall provide to each other the following:
>
> > (a) the names of each of the witnesses which that party intends to call to give evidence at the hearing;
> >
> > (b) copies of any written statements, or where no written statements exist, a summary of the evidence which that party expects will be given by that witness;
> >
> > (c) if a witness will be called to give expert evidence, a summary of the qualifications of that witness[.]

[108] Counsel for Mr. Phillips had, prior to the hearing, provided LSS counsel with the name and curriculum vitae of the proposed expert witness as well as a short statement as to the content of the proposed testimony.

[109] Although it was common ground the technical requirements of the above Rule had not been met, that did not end the matter. It was necessary for the Committee to undertake an analysis of whether the saving provision of Rule 432(10) should be utilized, given all the circumstances. Unfortunately, there was only a conclusory statement that subsection did not apply. There were ample reasons to address whether the saving provision applied.

[110] Counsel for the LSS indicated several times to the Committee that he would be prepared to settle for a verbal indication of the scope of the proposed testimony. This makes sense because he already knew who the witness would be and had received a very short explanation of his proposed testimony. There was no issue regarding his qualifications as an expert. Indeed, by the time the Committee had finished discussing the issue with both counsel, the name of the expert witness, the focused subject matter of his proposed testimony and his qualifications were well known.

[111] Looking at the Committee's discussion with counsel and the comments of the LSS counsel as to what he was prepared to accept regarding notice, it is fair to say the LSS waived the notice of expert testimony required and consented to the form and substance of the oral notice given at the hearing by counsel for Mr. Phillips. Lack of the two-week notice should therefore not have been an impediment to admission of the expert testimony.

[112] There was also no explanation of why the proposed testimony did not meet the criteria for expert evidence.

[113] The crux of Rule 432(10) is the Committee's wide latitude to allow expert testimony for "any other compelling reason [where] it would be manifestly unfair to exclude evidence or documents not disclosed". Even if it cannot be said that the LSS consented to the waiver of strict notice, there was no analysis by the Committee of whether this provision might otherwise have permitted Mr. Phillips to call his expert witness and properly exercise his entitlement to present a defence and reply.

[114] As mentioned above, a finding of what is a reasonable fee as between lawyer and client in a civil action is a different matter and issue than a finding that a fee charged was unreasonable for the purposes of the *Code*. Disciplinary proceedings provide a different context for the assessment of unreasonableness and unfairness of the fee.

[115] The Committee did almost no analysis of whether the issues in the *Small Claims Decision* being challenged by Mr. Phillips's evidence as a whole and the expert evidence in particular were similar or identical to the ones in play in the hearing before it. This was a prerequisite to a proper determination of whether the proposed testimony met the criteria for expert evidence.

[116] The attempt to tender the expert evidence was an appropriate exercise of Mr. Phillips's entitlement to defend and reply to the findings of the *Small Claims Decision* as they related to Charge #3, especially since the proposed expert had reviewed his files, which the Committee noted the PCJ had not done. This observation of the Committee clearly suggests that the expert testimony proffered was relevant to Charge #3 and potentially of greater assistance to the Committee than any of the findings in the *Small Claims Decision* grounded on expert testimony.

[117] In short, there was a sufficient basis for the Committee to undertake an analysis of whether there was a compelling reason to find it manifestly unfair to not allow Mr. Phillips to call his expert, Mr. Kendall, notwithstanding the absence of the two-week notice under Rule 432(2).

[118] Based on all the foregoing, I conclude that the Committee failed to properly apply Rule 432(9) and Rule 432(10). In this, it erred. Its finding that Charge #3 was well-founded must be set aside on that basis as well.

## VI. CONCLUSION

[119] The appeal of Mr. Phillips is allowed. The finding of the Committee that Mr. Phillips is guilty of charges of conduct unbecoming in relation to Charge #1 and Charge #3 is set aside.

[120] There will be no order for costs.

"Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Barrington-Foote J.A."

Barrington-Foote J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.