STERLING MCLEAN
HEARING DATE: October 26, 2021
HEARING DECISION DATE: November 10, 2021
***Law Society of Saskatchewan v. McLean,* 2021 SKLSS 6**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF STERLING MCLEAN,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Hearing Committee:	John Morrall, Chair Sharon Martin Cliff Wheatley
Counsel:	Tim Huber: Law Society of Saskatchewan Sterling McLean: on his own behalf

INTRODUCTION

1. The Hearing Committee of the Law Society of Saskatchewan comprised of John Morrall as Chair, Sharon Martin, and Cliff Wheatley (the "Committee") convened by teleconference on October 26, 2021 to hear this matter. Counsel for the Law Society was Tim Huber and the Member, Sterling McLean, appeared on his own behalf (the "Member").

2. Neither counsel had any objections to the composition or jurisdiction of the Committee.

3. There were two amended formal complaints dated September 27, 2021 that were filed against the Member. On the hearing date, all conduct allegations were stayed except for the following allegation:

"In relation to the amended formal complaint dated September 27, 2021 alleging that Sterling McLean, of the city of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

> 3. did fail to, within a reasonable time, fulfill an undertaking given to fellow member, D.F., to discharge a Builder's lien registered against property being sold by his client, B.N. to clients of D.F.;"

4. The Member entered a guilty plea to this allegation and this Hearing proceeded as a penalty hearing.

5. An Agreed Statement of Facts and Admissions dated October 14, 2021 produced by counsel for the Law Society and consented to on the same date by the Member was filed and marked as Exhibit P-2 in relation to this proceeding. It is appended to this Decision.

6. The parties proposed a joint submission on penalty which included the following sanctions:

> a) Reprimand;
>
> b) The Member will complete up to four remedial CPD hours on the topic of trust conditions as approved by the Law Society by December 31, 2021;
>
> c) Costs in the amount of $2000.00 to be paid by December 31, 2021.

7. As noted in the reasons and order set out below, the Hearing Committee accepts the joint submission.

FACTS

8. The facts are set out in the Agreed Statement of Facts and Admissions. In summary, they are as follows.

9. On June 21, 2011, as a result of a real estate transaction, the Member undertook to discharge an interest on title. In the interim, the Member held $5000.00 in a trust as a holdback on the mortgage advance. He then withdrew as solicitor of record on May 29, 2012. The discharge of the Builder's lien was not attended to until September of 2016 as a result of a letter written by counsel on April 7, 2016 that requested the Member attend to the discharge.

REASONS FOR PENALTY

10. The relevant section of the Code of Professional Conduct that was applicable during the dilatory time period in question was the Code of Professional Conduct adopted on February 10, 2012, effective on July 1, 2012, and thereafter subsequently amended. It stated as follows under paragraph 6.02(11):

> "A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted."

11. The pertinent commentary to that subsection states as follows:

> "[3] The lawyer should not impose or accept trust conditions that are unreasonable, not accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.
>
> [4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis."

12. It is clear that the five-year time period to fulfill the Undertaking was an unreasonable delay and therefore conduct unbecoming.

13. In considering an appropriate penalty for the Member as a result of his admission of guilt, it is interesting to note that many of the analogous decisions with respect to breaches of this nature are the Member's own decisions from prior discipline hearings. We note the decisions of *LSS v Sterling McLean* found at *2006 SKLS 8, 2009 SKLSS 3* (subsequently appealed see *2012 SKCA 7*), and *2013 SKLSS 6*. The impact of these decisions will be subsequently considered when determining the appropriateness of the joint submission proffered by the parties.

14. At this point, it is appropriate to review the purposes and principles behind sentencing a Member for conduct unbecoming. While the following decision is being appealed on other grounds, the decision of *Law Society of Saskatchewan vs Evatt Anthony Merchant, 2020 SKLSS 6* provides a general guideline for the determination of penalty in professional disciplinary proceedings as follows:

> "57. In Saskatchewan, as in other Canadian jurisdictions, professional regulation of lawyers is carried out through a provincial law society. The primary objective of that regulation is the protection of the public by cultivating, certifying and maintaining standards of competence and probity for those who wish to engage in the practice of law. This mandate is carried out in a number of ways, though, for example, providing practice advice and educational opportunities. It is also carried out through maintaining a process for the adjudication of complaints about the conduct of lawyers, and for sanctioning conduct found to be unacceptable. The overarching importance of the principle of protecting the public and ensuring public confidence in the profession means that hearing bodies under the *Rules* of the Law Society have a somewhat different role than other adjudicative tribunals, for example, a judge sentencing a criminal defendant. In *Bolton v. Law Society*, [1994] 1 W.L.R. 512 (C.A.), the English Court of Appeal made this point in the following terms:

> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again...and [he] may also be able to point to real efforts to...redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness...The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

58. Thus, the protection of the welfare of members of the public, and the maintenance of public confidence in the profession are critical factors in deciding on an appropriate penalty when a member of a profession behaves in a way that undermines those important considerations.

59. Deterrence is another consideration this Hearing Committee must keep in mind. The idea of specific deterrence speaks to the effort that must be made to arrive at a penalty that will bring home to the member that the impugned conduct should not be repeated, and that will induce the member to reflect on the expectations of the legislature, the judiciary, the profession and the public of how lawyers should conduct themselves. The concept of general deterrence calls on a disciplinary tribunal to consider what signal a particular penalty will send to other lawyers, and how it might influence their adherence to the *Code of Professional Conduct*.

60. Though the *Bolton* decision, quoted above at paragraph 11, places the reputation of the profession above the fortunes of individual members as a consideration in imposing a penalty, an adjudicative body must nonetheless ensure that they conduct fair proceedings, and give adequate consideration to the interests of the lawyer against whom a complaint has been made. In the case of penalty determinations, one of the important mechanisms for this is to look carefully at how comparator cases have been dealt with in the past."

15. It is through this lens that we must examine the mitigating and aggravating factors relating to the Member and his conduct in this matter. The primary mitigating factors are the guilty plea that was entered along with the minor nature of the conduct unbecoming in that it was related to dilatory practice rather than specific intentional malfeasance.

16. The aggravating factor in this matter is clearly the Member's prior discipline record. Of note, he has been disciplined on three occasions by the Law Society for conduct that

is similar in nature to the facts presently before this Committee. These decisions must be reviewed in order to determine their relevance and weight to the sentencing on the present charge.

17. The Law Society complaints of June 14, 2006 involved four separate charges and two counts of conduct unbecoming relating to failure to provide an adequate level of service to a client and breach of an undertaking provided to a fellow member. The matters largely involved failure to return phone calls and letters along with one matter where the Member failed to immediately discharge a Builder's lien, much like the facts in this matter, although the time period in which the Builder's lien was discharged occurred sooner. The discipline the Member received included a reprimand, a requirement to practice under supervision of another Member for one year as well as being ordered to pay costs in the amount of $1616.67.

18. In the Hearing Decision against the Member rendered by the Law Society on June 12, 2009, the Member pled guilty to five separate charges of conduct unbecoming a lawyer relating to failure to comply with a trust condition, breaching an undertaking, two counts of failing to act in a conscientious, diligent, and efficient manner in relation to an estate matter, and attempting to mislead a member of the public by misrepresenting the status of an estate matter. The Member was initially suspended from practicing for four months, required to practice under the supervision of another law society member and ordered to pay costs in the amount of $3396.25. Subsequently, on appeal to the Saskatchewan Court of Appeal the decision was set aside except with respect to the payment of costs and the Court of Appeal substituted a 25-day suspension in addition to the time between when the decision of the discipline committee was rendered and the date on which the suspension was stayed by the Court of Appeal which was a period of 7 days.

19. The following comments by the Court of Appeal in that decision are instructive in relation to the present matter:

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

McLean. The one exception is *Law Society of Saskatchewan v. Stinson*, order dated December 12, 2008.

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

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

20. With respect to the Decision of the Law Society on April 26, 2013 against the Member, he pled guilty to four allegations of conduct unbecoming a member relating to failure to respond to communications within a reasonable time, failure to provide prompt service, failure to complete tasks necessary to ensure the administration of the estate was completed within a reasonable time and failing to keep an individual reasonably informed as to the status of the administration of the estate. For these matters he was ordered to pay a fine of $5000.00, costs in the amount of $2000.00 and directed that he would practice under the supervision of a practice supervisor chosen by the Chair of the Discipline Committee until February 28, 2014.

21. It is within this context that we must now consider the joint submission on penalty proffered by both parties. The law with respect to joint submissions in a regulatory context has been reviewed by the Law Society and the courts on many occasions including in the decisions of *LSS v. Rault, 2009 SKCA 81* at paragraphs 17 through 30, *LSS v Martens 2016 SKLSS 12* at paragraphs 41 and 42, and *LSS v Buitenhuis 2020 SKLSS 2* at paragraph 15. The *R. v. Anthony-Cook 2016 SCC* 43 decision wherein the Supreme Court confirmed a rather stringent public interest test to be applied by a trial judge when deciding whether to reject a joint submission on sentence in the criminal context is a very important decision in this area of the law as well.

22. The various pronouncements by the Courts and Law Society Committees relating to joint submissions are informed by the fact that agreements as to pleas and sentence are essential to the proper functioning and efficiency of the administration of justice. Negotiating compromise agreements that result in just resolutions are of great benefit to the legal system as they reduce the need for complicated and protracted hearings. A process that results in specified outcomes also clearly benefits the parties involved by providing certainty which is not guaranteed by the vagaries of the trial and penalty processes. While trials and sentencing are not quite like Forrest Gump's proverbial "box of chocolates" in that "you never know what you're gonna get", the interpretation of evidence and the imposition of an appropriate penalty is a very subjective exercise. There is no guarantee that a trier of fact will interpret submissions that are presented in a manner favourable to a particular party. As well, the meaning initially ascribed to certain pieces of evidence can be modified over time by a multitude of other factors that cause or demand re-evaluation and re-interpretation. Trials and steps towards the trial process are fluid and experience has long since taught most lawyers that many unforeseen things can happen during a trial. For example, witnesses can disappear, change their story or be unavailable for a variety of reasons, intentional or unintentional. The previous factors are simply some of the reasons why legal practitioners attempt to reach joint accords. In order for the system to function as directed, it is important for counsel to be able to rely on a process which recognizes and respects the importance of these realities.

23. However, the above noted comments do not mean that a committee or trier of fact should rubber stamp a joint recommendation. Obviously, in the regulatory process, recommendations or sentences that are "unhinged" and not in the public interest should not be followed. One of the greatest responsibilities for committees is to consider the public interest and not to impose penalties that fall outside established ranges, having regard to the factual background. However, in order for a trier of fact to make a just determination, it is important to understand as much as possible regarding the contextual background in any matter, including a joint submission. While a blow by blow account is not always possible and may violate certain legal privileges, triers of fact should be able to understand the subtle submissions of counsel regarding the contextual basis that results in the determination to proceed with a joint submission.

24. In this matter, given the concern the Committee had as a result of the Member's prior discipline history involving similar misconduct, we asked counsel for the Law Society to provide some additional comments regarding the joint submission. In that regard, Counsel emphasized that all the other undertakings related to this particular file were completed quickly and efficiently and that a precautionary holdback was obtained and therefore no loss was occasioned by any client as a result of the dilatory behaviour. He also mentioned that no one requested compliance with the Undertaking until five years after the fact and argued this particular violation of conduct had less to do with integrity but was more of a practice management problem. Therefore, the fact that the member had no further issues since that time was an important factor to consider in determining an appropriate penalty. Another comment that was implicit in his argument on sentence was that the delay in proceeding expeditiously with this matter fell on the Law Society as they dealt with multiple other allegations that they ultimately determined should not proceed. The Committee felt that this was an important factor to consider given the

dilatory behavior occurred between 2012 and 2016 and another five years passed before a hearing date was fixed. In *Wachtler v College of Physicians and Surgeons 2009 ABCA 130*, the Alberta Court of Appeal noted that delay could be taken into account with respect to sentencing where a stay was not appropriate. We find it appropriate to consider the delay as a factor impacting penalty in this case. Normally, penalties for repeated misconduct should increase so that "The Price goes up" and an offender is deterred by increasingly serious consequences. It is clear from the Member's discipline history that in the past he had a problem with complying with trust conditions and undertakings as well as dilatory service. However, in each matter we must also be mindful of and balance the present individual circumstances of the offender and the specific transgression.

25. In light of these submissions and the decisions of the Alberta Court of Appeal in *Wachtler* and the Saskatchewan Court of Appeal in *LSS v Sterling McLean*, and despite the fact that we did not believe the Member to be particularly remorseful, we find the joint submission proffered to be an appropriate penalty and within the range of penalties given these particular circumstances. The breach was minor and did not have the aggravating features mentioned at paragraph 54 of the *Sterling McLean* decision and therefore a significant penalty is not appropriate. There was no loss to any member of the public and the conduct occurred between approximately nine to five years ago. Further, there was nothing filed by the Law Society indicating there have been any further issues with the Member's conduct as a lawyer and they indicate he was "cooperative" with the investigation. We also note the case law with respect to the importance of respecting joint submissions. However, we issue the following caution. Had the conduct had a closer temporal connection to the present, given the Member's discipline history, this joint submission would not have been sanctioned. The Member should govern himself accordingly.

ORDER

26. Therefore, pursuant to section 1131(3) of the Rules of the Law Society of Saskatchewan, the Hearing Committee makes the following Orders:

1. The Member shall be reprimanded;

2. The Member will complete up to 4 remedial CPD hours on the topic of trust conditions as approved by the Law Society by December 31, 2021;

3. The Member will pay costs in the amount of $2000.00 by December 31, 2021

	"John Morrall", Chair	November 10, 2021
I concur	"Sharon Martin"	November 10, 2021
I concur	"Cliff Wheatley"	November 10, 2021

AGREED STATEMENT OF FACTS AND ADMISSIONS
BETWEEN STERLING MCLEAN AND
THE LAW SOCIETY OF SASKATCHEWAN

In relation to the Amended Formal Complaint dated September 27, 2021 alleging that Sterling McLean, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

1. did, fail to advance the administration of the Estate of E.R. by his client K.R. (Executor) in a conscientious, diligent and efficient manner, and with due attention to the interests of the beneficiaries; and **STAYED**

2. did fail to represent his client, B.N., in a conscientious, diligent and efficient manner by falling to pay out and/or discharge, or seek instructions to pay out or discharge, an outstanding Builders' Lien within a reasonable time after his client's liability in the matter had been determined and all appeals exhausted; **STAYED**

3. did fail to, within a reasonable time, fulfill an undertaking given to fellow Member D.F., to discharge a Builders' Lien registered against property being sold by his client, B.N., to clients of D.F.; and

4. did fail to respond to the communications of a fellow Member, D.F., dated March 16, 2016, April 7, 2016 and July 21, 2016 in a timely manner. **STAYED**

and

In relation to the Amended Formal Complaint dated August 10, 2020 alleging that Sterling McLean, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

1. did, in the context of a transaction between Canadian Western Bank and his client, Corporation X, fail to comply with trust conditions by which he was bound. **STAYED**

JURISDICTION

27. Sterling McLean (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (hereinafter the "Law Society"), and accordingly is subject to the provisions of *The Legal Profession Act*, 1990 (hereinafter the "Act") as well as the *Rules of the Law Society of Saskatchewan* (the "Rules"). Attached at **Tab 1** is a Certificate of the Executive Director confirming the Member's status.

28. The Member is currently the subject of two sets of allegations.

29. The first set of allegations are set out in an Amended Formal Complaint dated September 27, 2021. The original Formal Complaint relating to those matters is dated March 15, 2018. Attached at **Tab 2** is a copy of the September 27, 2021, Amended

Formal Complaint, the original version of that Formal Complaint along with proof of service related to both. The Member intends to plead guilty to allegation #3 as set out in the amended Formal Complaint dated September 27, 2021. On the basis of that guilty plea, allegations 1, 2, and 4 will be stayed by the Conduct Investigation Committee.

30. The second Formal Complaint, attached at **Tab 3** along with proof of service, is dated August 10, 2020. The sole allegation in the second Formal Complaint dated August 10, 2020 will also be stayed by the Conduct Investigation Committee.

PARTICULARS OF CONDUCT

Allegation #3

31. This matter came to the attention of the Law Society in June of 2016, when another member of the Law Society, D.F., provided us with a letter he received from the Member, dated June 21, 2011 **[Tab 4],** where the Member undertook to discharge an interest on title. Despite this undertaking, the Member failed to discharge the interest for five years. D.F. had written on April 7, 2016 and requested that the Member attend to the discharge, but received no response from the Member **[Tab 5].**

32. The Member responded to the complaint indicating that he notified his client to seek other legal representation. He requested further time to respond as he would have to locate the file and attempt to have to reach his former client.

33. The Member responded on August 25, 2016 **[Tab 6]** indicating that this matter was more complicated than a simple discharge of a builders' lien. He had discharged other interests in a timely manner. The lien that remained became the subject of litigation that did not resolve until February 9, 2012. At that point, the Member was about to commence an unrelated discipline suspension. Once his suspension was finished, the Member withdrew as solicitor of record on May 29, 2012.

34. Professional Responsibility Counsel sought additional information and supporting documentation from the Member.

35. The Member responded indicating the dates he was advised that title was transferred; received the purchase price balance; paid out the mortgage and his fees; and paid out the balance to the client. The Member confirmed that he had never been released from the undertaking to discharge the interest in question. The Member further indicated that he currently held $5,000.00 in trust, despite the fact that he had withdrawn as counsel **[Tab 7].**

36. Complaints Counsel sought clarification as to why he would continue to hold funds in trust on a file from which he had withdrawn four years prior.

37. The Member responded on September 20, 2016 indicating that he had held the $5,000.00 in trust as a holdback on a Bank of Montreal mortgage advance until the builders' lien claim in favor of S.E. had been discharged. He had not released it to the client as a result of his obligation and undertaking. He indicated that he was making

arrangements with the client to pay out the amount. The Member also advised that the builders' lien claim had finally been discharged **[Tab 8].**

38. The Member recognizes that the length of time (5 years) taken to discharge the builders' lien in compliance with his undertaking, even in the particular circumstances of this case, was not reasonable.

PRIOR HISTORY

39. The Member has been the subject of prior Professional Standards Committee interventions and has been prosecuted for delay and breach of undertaking related offences on previous occasions. See, 2006 SKLS 8; 2009 SKLSS 3; 2012 SKCA 7; and 2013 SKLSS 6 attached at **Tab 9**.