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Ethical vs. Unethical: The Troubling Tales of Tony Merchant

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Introduction

Last week the Saskatchewan Court of Appeal upheld the Law Society of Saskatchewan's three month suspension of E.F. Anthony (Tony) Merchant for conduct unbecoming. The Court did so unanimously and without evident hesitation, rejecting clearly and unequivocally each of the many objections raised by Merchant to the Law Society's decision.

I have previously written about Merchant's negative interactions with courts and law societies in the conduct of his practice (here). My argument there was that the interesting aspect of Merchant's history was that the actions that led to criticism by courts or the law societies were not wholly distinct from the proper conduct by lawyers. Rather, they were unethical extensions of behaviour that would otherwise be considered ethical and proper. This was most obvious in respect to resolute advocacy. An unwavering commitment to your client's cause in some manifestations and circumstances accomplishes the very highest professional ideals. Taken too far, however, that commitment becomes dysfunctional and – ultimately – both unethical and unlawful.

The Saskatchewan Court of Appeal's detailed description of the conduct by Merchant giving rise to the suspension, a description that has not previously been available, reinforces the position taken in that paper. In essence, as described in the judgment, Merchant engaged in clever manipulations of legal forms in order to avoid the effect of a court order. He did not ignore the court order, and he did not outright defy it. Instead, he tried to use technical schemes to work around it for the benefit of his client. As it turned out, the Law Society (and the Court) characterized those schemes as constituting a breach of the court order and as assisting his client to breach the court order. That characterization was warranted and fair. Yet it is important to recognize that the – hugely important – distinction between a technical scheme that constitutes a wrongful breach of a court order, and a technical scheme that constitutes a clever bit of zealous advocacy, may be more subtle than we like to think.

This post reviews and analyzes this and other aspects of the Saskatchewan Court of Appeal's decision, noting in particular its approach to reasonableness review, the decision's publication of privileged information in relation to Merchant's client, the lawyer's duty of loyalty and strict liability offences.

The decision

Merchant represented MH in two matters – Indian residential school litigation and a family law matter. In the family case MH's former spouse, VW, obtained a court order requiring payment into court of the first $50,000 of any funds received by MH or by the Merchant Law Group (MLG) on the residential schools litigation, "after payment of reasonable solicitor fees and disbursements" (at para 4). MLG had not been made a party to the application for the court order, and Merchant was "concerned and upset" about its application to his firm (at para 5). In his view the order created a "solicitor/client conflict" and in his March 2004 arguments seeking to overturn it he suggested that "This kind of court order requires lawyers to work around an order of the court" (at para 6).

In April 2004 one of Merchant's associates settled MH's residential school claim for $100,000, with a release that "provided the funds would be forwarded to MLG in trust for MH" (at para 7). After the settlement was signed Merchant and MLG realized that "no contingency fee agreement had been signed by MH and MLG" and that "MH did not appear to understand that MLG had a right to be paid first" (at para 8). MH also did not understand the impact of the court order obtained by his former spouse, all of which left Merchant's associate "at a loss" as to how to proceed (at para 8).

In May 2004, Merchant took over carriage of the file. He arranged for the settlement cheque to be made payable to the client, rather than to the law firm (at para 10). He also arranged for MH to sign a 30% contingency fee agreement (at para 11). Merchant also discussed payment options with his client. When MLG received the cheques from the government for MH, Merchant "kept them and held them in his desk drawer until July 14, 2004" (at para 13). MH asked for the funds but MLG would not release them. Eventually MH showed up at the MLG offices; at that point Merchant, his office manager and the firm lawyer "concluded that MLG had a duty to provide MH with the settlement cheques" but that they also needed to ensure that they were paid and that MLG did not breach the court order (at para 14).

To accomplish these objectives MLG provided MH with "a loan advance" covering the amounts of the settlement owing to MH after payment of his fees and other obligations to MLG. They wrote MH a cheque for this amount and included it as a disbursement on his account, with the result that "the legal account and indebtedness of MH to MLG… equaled the entire settlement amount" (at para 16). MLG then cashed the settlement cheque and applied it to MH's account with the firm, thereby settling MH's "debt" to the firm.

Two days later, on July 16 2004, MLG received the judgment of the Court of Appeal overturning the court order's application to the MLG (at para 19). In November MH's former spouse complained about Merchant to the Law Society of Saskatchewan, and in the spring of 2005 she brought contempt applications against MH. Those were "successfully defended although the court observed that it was clear MH set out to and did frustrate the order of June 4, 2003" (at para 21).

The Law Society began its investigation of Merchant. In the first instance, however, that investigation was frustrated by MH's claims of privilege, and his refusal to waive that privilege in relation to the Law Society's investigation. The Law Society claimed that it had legal authority to breach the privilege, a claim with which the Saskatchewan Court of Appeal ultimately agreed (*Law Society of Saskatchewan v Merchant*, 2008 SKCA 128). As a result of that dispute, however, its initial decision did not include any of the factual details supplied by the Saskatchewan Court of Appeal and summarized here.

In its decision the Law Society determined that Merchant "proceeded purposefully with full knowledge of what he was doing and was the directing mind and will" of the steps that were taken (at para 27). His actions were taken to "avoid a boldfaced breach" of the court order (at para 27(5)) but he nonetheless did "willfully" breach that order (at para 27(9)). Based on the nature of that conduct, a review of other disciplinary decisions and other relevant mitigating and aggravating factors, they ordered that Merchant be suspended for three months and that he pay $28,869.30 in costs.

The Saskatchewan Court of Appeal held that the applicable standard of review was reasonableness (at para 38). From that starting point it considered and rejected each of the many arguments raised by Merchant to challenge the decision's reasonableness. The Court held that the reasons given by the Law Society were sufficient and set out the necessary evidentiary basis for its conclusions. It was unpersuaded by Merchant's claim that the Law Society's description of Merchant's behaviour as "circumventing" a court order did not justifying holding that he "breached" that order ("This argument relies on nothing more than semantics and is devoid of merit" (at para 89)). It did not view the conviction of Merchant on both counts as violating the *Kienapple* principle against multiple convictions since the counts were distinct (at para 92). It held that the delay in the proceeding was not unreasonable (at paras 95-97), that there was no issue with proceeding on different counts concurrently (at paras 98-107) and that the Law Society did not lose jurisdiction by failing to issue its decision within 45 days (at paras 108-112) or by not having the Hearing Committee sign the decision (at paras 113-117).

More significantly the Court applied its earlier judgment in *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, in which it had held that a lawyer may be prosecuted on a strict liability basis. In that earlier decision the Court had stated that, generally speaking, professional discipline did not require the law society to demonstrate knowledge or intentionality on the part of the lawyer; however, in that earlier case the law society was required to establish *mens rea* because it had charged Merchant with acting intentionally.

Here, Merchant similarly argued that "the offences as they are worded in the complaint require *mens rea* and that this element has not been established" (at para 59). The Court rejected this position. It noted that "the degree of fault required to be established in any case will vary depending on the particulars of the allegation and its context" (at para 62) and that the law societies "implicitly have the discretion to determine the requisite mental element needed to prove… misconduct" (at para 67). Here the law society did not charge Merchant as having acted deliberately, and as such "conduct unbecoming can be established through negligence or total insensibility to the requirements of acceptable practice" (at para 68).

The Court went on to state that strict liability was particularly appropriate here given the nature of the allegation – breach of a court order. "Strict adherence to the terms of a court order is among the most important duties and responsibilities of a lawyer. Breaching a court order is harmful to the public and the profession, *regardless of the subjective state of mind of the lawyer*" (at para 72, emphasis added).

Finally, the Court rejected Merchant's argument that his actions were simply his fulfillment of his duties under the "Code of Professional Conduct and his common law duty of loyalty" to his client (at para 82). As the Court noted, it is absurd to suggest that a lawyer's duty of loyalty to his client extends to the point of requiring the lawyer to violate the law or assist the client to do so:

> [86] Merchant had a duty to obey the law such as it was. The duty cannot be supplanted by perceived ethical duties to the client. If client instructions conflict with a lawyer's ethical duties or duties to the court, the lawyer must withdraw.

The lawyer's duty to her client cannot be "completely unfettered" or "the administration of justice would fail" (at para 87).

Analysis

A few points are worth noting from this decision.

First, while the Court does correctly identify reasonableness as the applicable standard of review, and appropriately notes the deferential attitude that that standard requires, the various grounds of argument advanced by Merchant to some extent force the court to review the Law Society's decision closely. The Court has to review the evidentiary basis for the decision, the relationship between the two counts with which Merchant was charged and the legitimacy of the Law Society's approach to *mens rea*. After that review the overarching impression of the Court's decision is that the Law Society's decision was correct, not just that it was within the range of acceptable outcomes.

This sort of close review and assessment raises the possibility that, in addressing a vigorously contested regulatory decision a court may, practically speaking, have difficulty maintaining an attitude of deference, in which it does not reconsider the issues before the regulator. Simply by virtue of addressing each substantive objection, it may end up engaging in more searching review. It is not obvious, though, what a court can do when faced with this problem. If it had simply declined to consider Merchant's various arguments, noting that the Law Society decision appears justifiable, transparent and intelligible, all things considered, the court's own decision would be vulnerable to review. What this may show is only the innate complexity that plagues administrative law concepts of standard of review, and makes articulating a consistent approach to the accomplishment of deference so elusive.

Second, the Court's decision to engage in a detailed summary of the facts of the case, including the advice provided by Merchant to his client MH, is surprising. In its 2008 decision holding that the Law Society had the legislative authority to violate the privilege, the Court noted that the Law Society's obtaining of the information would not necessarily lead to information being available to MH's former spouse. Indeed, the Court suggested that the Law Society ought not to disclose privileged information in its decision:

> [65] I am unable to see how any of these requirements would reveal privileged information to Ms. Wolfe [MH's former spouse]. The date, time and place of a hearing self-evidently disclose nothing of any sort

> about communications between Hunter [MH] and Merchant or members of his firm. Notification of the penalty assessed against Merchant, should it come to pass that a penalty is imposed, would likewise reveal no privileged information. ***This is because, to the extent the Law Society might have the option of providing a detailed notice including privileged information or a more succinct one which does not contain such information, it would be obliged to choose the latter alternative*** (2008 SKCA 128, emphasis added).

Following that direction the Law Society did not reveal any factual information about the dispute between MH and his former spouse in its decision. Yet in the Court's own decision reviewing that of the Law Society, significant amounts of confidential and privileged information is revealed, including advice given by Merchant to his client in relation to the court order, and about the decisions made by Merchant in relation to the management of the file and the proceeds. The Court may have had a reason for making that sort of disclosure, but in the face of its own 2008 judgment, the stringent protection usually afforded to solicitor-client privilege, and the Law Society's decision not to disclose, it certainly should have explained why it was doing so.

Third, on the question of strict liability, the Court is again to be commended for its clear expression of the regulatory function of the law societies, and the difference between professional discipline and criminal sanction. The legislative function of the law societies is the protection of the public interest; prosecution of conduct deleterious to the administration of justice is necessary for that protection, even if the lawyer in question did not do so knowingly or willfully.

The final matter is Merchant's assertion of loyalty, that all he did was in protection of his client's interests, and should not have resulted in his censure and sanction. The Court of Appeal treated this argument with all the contempt it deserved, legally speaking. An ethical duty of unfettered loyalty would legitimize every sort of lawyer wrongdoing, and encourage it too. Yet it is not wholly surprising that Merchant saw loyalty to his client as his governing impulse. After all, at least in this instance nothing Merchant did was necessary for his own ends. The Court Order allowed for payment of his fees, and only covered the first $50,000 of the settlement, either of which exception would have allowed the MLG to be paid for the work it had done for MH. There was nothing for Merchant or his firm to gain by not complying with the court order and simply paying the funds they received into court. Their motives appear, therefore, to have been motivated by concern for their client.

While clearly wrongful – the Law Society quite reasonably concluded that he had both deliberately violated the court order and assisted his client to do so – Merchant's behaviour was not oppositional to proper lawyer behaviour. It was rather proper lawyer behaviour taken beyond where it ought to go.

Being aware of that possibility is crucially important for both lawyers and regulators. Bad lawyers are, as often as not, lawyers doing the things that good lawyers do but in the wrong way, or too much. We need to educate lawyers, and structure and regulate the legal profession, with awareness that that is the complicated problem we need to address. Lawyers need to understand where the lines are, practice in circumstances that encourage them to stay on the right side of the line, and to face regulatory consequences (whether private or public) when they fail to do so.