Court of Appeal for Saskatchewan
Docket: CACV3721

Citation: *Merchant v Law Society of Saskatchewan*, 2022 SKCA 2
Date: 2022-01-05

Between:

Evatt Anthony Merchant, Q.C.

Appellant

And

Law Society of Saskatchewan

Respondent

Before:	Ryan-Froslie, Schwann and Kalmakoff JJ.A.
Disposition:	Appeal Allowed
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Madam Justice Schwann The Honourable Mr. Justice Kalmakoff
On appeal from:	Law Society of Saskatchewan Hearing Committee, Regina
Appeal heard:	September 28, 2020
Counsel:	Gordon Kuski, Q.C., and Amanda Quayle, Q.C., for the Appellant Timothy F. Huber for the Respondent

Ryan-Froslie J.A.

I. INTRODUCTION

[1] On September 26, 2019, a Hearing Committee of the Law Society of Saskatchewan found the appellant, Evatt Francis Anthony Merchant, Q.C., guilty of conduct unbecoming of a lawyer (*Conduct Decision*). The Hearing Committee suspended him from practicing law for a period of eight months (*Penalty Decision*).

[2] Mr. Merchant had both obtained and acted upon a Direction to Pay signed by J.S., a residential school survivor, whom Mr. Merchant had represented. The Direction to Pay provided that outstanding accounts owed by J.S. and her son to the Merchant Law Group [MLG], which were unrelated to the settlement of J.S.'s residential school claim, would be paid from funds received by her from the Independent Assessment Process [IAP funds]. Those funds had been paid to MLG in trust for her. The Hearing Committee found this to be conduct unbecoming because Mr. Merchant had intentionally breached Article 18.01 of the *Indian Residential School Settlement Agreement* [*IRSSA*], which provides that no amount payable to a residential school survivor can be assigned, and that any such assignment is null and void.

[3] Mr. Merchant appeals both the Hearing Committee's decision pertaining to his conduct and the penalty imposed. It is Mr. Merchant's position, with respect to the *Conduct Decision*, that the Hearing Committee erred as the evidence established that: (a) he had an honest but mistaken belief that a direction to pay is not the same as an assignment; (b) that he had acted in a transparent manner; (c) that he had previously sought advice from the Ethics Committee of the Law Society with respect to the direction to pay issue; and (d) that he had, in accordance with the terms of the *IRSSA*, sought directions from the Court.

[4] With respect to the *Penalty Decision*, Mr. Merchant argues that an eight-month suspension was demonstrably unfit given the factual context, the mitigating factors at play, and the penalties imposed on other lawyers found guilty of similar conduct.

[5] In my view, Mr. Merchant's appeal against the *Conduct Decision* should be allowed. The Hearing Committee erred in finding Mr. Merchant guilty of conduct unbecoming of a lawyer. It

misapprehended the law by concluding that directions to pay are assignments; that the pre-2014 jurisprudence is clear that directions to pay fall within the purview of Article 18.01 of the *IRSSA*; and that Mr. Merchant's specialized knowledge of the Indian Residential School Settlement process meant that he could not have possessed an honest but mistaken belief to the contrary. This conclusion renders Mr. Merchant's appeal of the *Penalty Decision* moot. As such, these reasons shall focus on the Hearing Committee's *Conduct Decision*.

II. BACKGROUND

[6] Mr. Merchant and the Law Society proceeded before the Hearing Committee on the basis of an Agreed Statement of Facts. No oral testimony was presented. Accordingly, the facts are not in dispute.

[7] J.S. is a residential school survivor. Mr. Merchant acted for her with respect to her residential school claim. In addition, MLG performed other unrelated legal services for her and her son, which Mr. Merchant alleges she agreed would be paid from her residential school settlement.

[8] In May of 2006, the *IRSSA* was entered into by the negotiating parties. It was subsequently approved by the courts and implemented on September 19, 2007.

[9] The *IRSSA* provides for a common experience payment to be made to all individuals who had resided at an Indian Residential School. In addition, the *IRSSA* sets out an Independent Assessment Process (the IAP) which was intended to compensate persons who qualified, for harm arising from sexual and serious physical and psychological abuse.

[10] Article 18.01 of the *IRSSA* prohibits the assignment of settlement proceeds paid in accordance with the agreement:

> No amount payable under this Agreement can be assigned and such assignment is null and void except as provided for in this Agreement.

The *IRSSA* does not define what is meant by an "assignment".

[11] The *IRSSA* provides that legal fees pertaining to residential school settlements can be deducted from settlement proceeds. The agreement, however, is silent as to whether other legal

work done for an *IRSSA* claimant, on matters unrelated to their residential school claim can also be paid from the settlement funds.

[12] On March 28, 2014, J.S. was awarded damages as a result of her IAP claim. Those funds were paid to MLG and placed in its trust account. After receipt of the settlement funds, J.S. was asked by a lawyer from MLG if she would agree to pay her and her son's outstanding legal accounts from those proceeds. J.S. indicated that she understood her son had his own IAP claim from which his legal accounts could be paid. That was not the case as her son's IAP claim had not been successful.

[13] On April 7, 2014, Mr. Merchant wrote to J.S. requesting permission to use some of the IAP settlement proceeds held in trust by his firm to pay the unrelated legal accounts. The letter stated:

> You agreed to pay accounts for C.S. in connection with criminal charges that he faced and on the basis of your having promised to pay those accounts, we provided legal services to C. S. and you.
>
> In the case of two of those accounts, one regarding a criminal matter and the other regarding a family law matter, these were really your accounts where you were the client. Those accounts were for $754.30 and $442.77. We could legally withhold that money because those are your debts but we are not prepared over $1,200 to get into a fight if you instruct me that you will not even pay these debts.
>
> Regarding 5 other debts that you also owe in amounts of $1,545.30, $972.75, $6,787.64, $6,840.44, and $3,967.63, we have no legal right to enforce assignments against you, notwithstanding the fact that for these 5 other criminal defence matters on behalf of C.S., you agreed and promised that you would pay the accounts out of the money that we expected you would receive from your IAP claim.
>
> Those 5 criminal defence debts on behalf of C.S. as well as the criminal defence debt of $754.30 where you were the client with C.S. and the $442.77 where you were the client in connection with a family law matter, totals $21,310.83.
>
> You owe the money. You agreed to pay the money. That should not be confused with the fact that we do not have legally enforceable assignments by which we may legally hold back the money from the funds. Do not confuse your obligation both morally and legally with the fact that the assignments are not legally enforceable. We could sue you for the $21,310.83. My expectation is we would succeed with that law suit and obtain a judgment against you. We could then seize your assets, your car, your bank account , or whatever, in order to collect these debts that you owe.
>
> I understand that you told Mr. Alberts that you are not prepared to have these debts paid out of the IAP money that you have received. You said that C.S. can pay his own debts because he had a claim. He did not have a claim. He was not truthful. He was not believed. He did not get an award. When the legal work was done for him based on your agreeing to pay, we relied on your word and your promise to pay and we did not rely on the prospect of being paid out of money going to C.S.

> In fairness and acting honestly, you should instruct us to pay the $21,310.83 out of the money that we are going to send to you or instruct us to pay a part of that money if you decide that you will not pay it all, even though it is all owing , and decide that you will instruct us to pay $15,000 or $10,000 out of the money that you owe.
>
> However, if you contact me and instruct me not to deduct any of the money, we will follow those instructions and pay $76,260.00 without deduction.
>
> Incidentally not just with debts like this that are owed to our law firm, but with debts owing by others who have IAP claims where money is owing to other law firms, to suppliers of good or services, for funeral services, cars, loans or whatever, we regularly contact our clients, in a manner similar to my contact with you, and remind our clients that they owe the money even if the assignments are not legally enforceable, and seek instructions.
>
> Tell us what you want us to do. We will pay $76,260.00 to you or keep $21,310.83 or keep some lesser sum if you instruct us to keep some amount to pay your debts.

[14] On April 7, 2014, after receiving that letter, J.S. confirmed in a telephone conversation with a legal assistant at MLG that she wanted to apply her IAP funds in satisfaction of the outstanding accounts. That same day, she attended the offices of MLG and met with the legal assistant she had spoken to. During that meeting, J.S. signed written instructions directing MLG to pay the unrelated outstanding legal accounts for her and her son from her IAP settlement monies. The instruction read as follows:

> I, J.S., instruct Merchant Law Group to pay criminal accounts of C.S. [J.S.'s son] and my family law account out of my IAP settlement money.

[15] MLG acted upon the Direction to Pay and gave J.S. the balance of the settlement proceeds.

[16] The fact that J.S. had signed a document agreeing to pay a portion of her settlement proceeds to MLG to satisfy outstanding accounts for legal work unrelated to her residential school claim came to the attention of the Chief Adjudicator for the IAP. On May 28, 2014, he confronted Mr. Merchant about the propriety of that payment.

[17] On October 1, 2014, the Independent Special Advisor to the Court Monitor informed legal counsel for Mr. Merchant that the Chief Adjudicator had forwarded to him a complaint by J.S. concerning the application of her IAP payment to MLG's unrelated outstanding accounts. He directed Mr. Merchant to pay J.S. the sum deducted because: (a) there was no evidence that J.S. was a party to any enforceable obligation to pay her son's account; (b) that she had not been provided with independent legal advice prior to accepting any such obligation; and (c) that there was no consideration for the handwritten directive she had allegedly signed.

[18] On October 23, 2014, MLG brought an application in the British Columbia Supreme Court for a direction that it was entitled to retain the amount paid to it in accordance with J.S.'s written instructions.

[19] On July 13, 2016, the British Columbia Supreme Court ruled that the money paid to satisfy MLG's outstanding accounts was impermissibly withheld from J.S. as the Direction to Pay constituted an assignment which was prohibited by Article 18.01 of the *IRSSA*: *Fontaine v Canada (Attorney General)*, 2016 BCSC 1306 [*Merchant 2016*]. The Court ordered Mr. Merchant to pay to J.S. the amount withheld plus interest. Mr. Merchant immediately complied with that order. He also filed an appeal with respect to that decision with the British Columbia Court of Appeal.

[20] J.S. had also laid a complaint with the Law Society with respect to Mr. Merchant's conduct. The formal amended complaint, dated October 12, 2016, alleged conduct unbecoming on the basis that Mr. Merchant:

> 1. did in relation to a client of his firm, J.S., induce J.S. to provide a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement when such conduct was prohibited; and
>
> 2. did in relation to a client of his firm, J.S., cause a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement to be acted upon when such conduct was prohibited.

[21] The proceedings pertaining to this complaint were, by agreement of the Law Society and Mr. Merchant, held in abeyance pending the completion of the court proceedings in British Columbia.

[22] Mr. Merchant's appeal was heard on May 3, 2017. On May 24, 2017, the British Columbia Court of Appeal rendered its decision dismissing the appeal: *Canada (Attorney General) v Merchant Law Group LLP*, 2017 BCCA 198 [*Merchant 2017*]. Mr. Merchant's application for leave to appeal that decision to the Supreme Court of Canada was denied: *Merchant Law Group LLP v Attorney General of Canada, et al.*, 2018 CanLII 71043.

[23] Following the conclusion of the court proceedings in British Columbia, the Law Society pursued J.S.'s complaint against Mr. Merchant and a hearing was held.

[24] At the hearing, in addition to the Agreed Statement of Facts, Mr. Merchant filed a series of communications between him and the Law Society pertaining to requests by him for an opinion

with respect to applying *IRSSA* funds to outstanding, unrelated legal accounts. The requests did not relate specifically to J.S. The first request was made on December 10, 2012. Mr. Merchant raised the suggestion of using interpleader proceedings with the money in issue being paid into court and the court then determining whether an outstanding, unrelated legal account could be paid from the *IRSSA* settlement. The Law Society provided an informal ethics opinion. It assumed the legal accounts to be paid related to the IAP claim and accordingly, did not address payment of non-IAP legal accounts from IAP funds held in trust on behalf of the client.

[25] On January 15, 2013, Mr. Merchant made a further request to the Law Society, noting that no court under the *IRSSA* had adjudicated the specific question of whether legal fees for matters unrelated to an IAP claim could be paid with IAP funds. Mr. Merchant also asked how a lawyer could have the matter dealt with if interpleader proceedings were not available.

[26] On April 2, 2013, the Law Society advised Mr. Merchant that his request raised a "legal issue" not an "ethical" one:

> The Committee considered the material filed. The Committee discussed the request and determined that any ruling would require the Committee to engage in legal analysis and interpretation of the Indian Residential Schools Settlement Agreement. This is not the function of the Committee, which is convened to consider matters of ethics, not contract interpretation or application. The Ethics Committee determined that your question was primarily a legal one and that it was not within its jurisdiction to provide a legal opinion.

[27] On September 26, 2019, the Hearing Committee rendered its *Conduct Decision*. It found Mr. Merchant guilty of conduct unbecoming of a lawyer on both counts of the complaint, namely, that he had "induced J.S. to provide an assignment prohibited under Section 18.01 of the IRSSA, and that he [had] acted on that improper assignment" (*Conduct Decision* at para 46).

III. THE HEARING COMMITTEE'S CONDUCT DECISION

[28] The Hearing Committee found that Mr. Merchant's actions in obtaining and acting on a direction from J.S. to deduct an amount from her IAP payment at the time those funds were in his trust account constituted conduct unbecoming of a lawyer because:

(a) Mr. Merchant had "extensive involvement" with the process for determining the claims of residential school survivors and, in particular, he had been at least an

observer and often a party where cases of the payment of legal fees and the meaning of s.18.01 had been at issue (*Conduct Decision* at para 35).

(b) "The intention of the protection in Section 18.01 is that – save for an amount of legal fees related to pursuing the process under the agreement itself found to be reasonable – the full amount obtained under the IRSSA is to be placed in the hands of the claimant without additional deductions" (*Conduct Decision* at para 36).

(c) The jurisprudence from the supervising courts was clear "that the term "assignment" in Section 18.01 would include a direction to pay". It found that "[i]t is not credible to us that the Member could have had any lingering doubt that the proper course for dealing with the IAP funds in his trust account was to turn them over to the claimant J.S., or that he could have held a sincere believe that there was still some remaining mechanism that would be seen as a permissible method of deducting money from the IAP payment when mechanisms virtually indistinguishable from this one had been rejected" (at para 36).

[29] Mr. Merchant appeals against the *Conduct Decision* pursuant to s. 56 of *The Legal Profession Act, 1990*, SS 1990-91 c L-10.1. It is now well settled that the normal appellate standard of review applies to such appeals: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1; *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 72, leave to appeal to SCC granted, 2021 CanLII 13273; *MacKay v Law Society of Saskatchewan*, 2021 SKCA 99 at para 22. As set out in *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10 and 37, [2002] 2 SCR 235, questions of law are subject to a correctness standard; questions of fact are reviewable for palpable and overriding error and questions of mixed fact and law are also reviewed for palpable and overriding error, unless there is an extricable question of law. It is a question of law whether a Hearing Committee made findings of fact that are not supported by any evidence, that are directly contrary to the evidence, that reflect a misapprehension of the evidence or that ignore relevant evidence.

IV. THE LAW

[30] The determination of this appeal tuns on whether the Hearing Committee made a reversible error in finding that Mr. Merchant had knowledge, at the time of obtaining the Direction to Pay from J.S., that he was not legally permitted to do so, by virtue of Article 18.01 of the *IRSSA*.

[31] The Hearing Committee reached its decision based on what Mr. Merchant argues are three errors of law, namely:

(a) that a mere direction to pay is an assignment;

(b) that the pre-2014 jurisprudence was "clear" that directions to pay fall within the purview of Article 18.01 and;

(c) that Mr. Merchant had special knowledge of the *IRSSA* and its implementation and, as such, knew that directions to pay were forbidden by Article 18.01, despite the absence of evidence to support such a conclusion.

[32] I agree with Mr. Merchant that the Hearing Committee made the errors as alleged and accordingly both its conduct and penalty decisions must be set aside. I will address each of the alleged errors of law in turn.

A. Is a direction to pay an assignment?

[33] In my view, a direction to pay is not synonymous with an assignment. While such a direction may, depending on its terms, constitute an assignment, there are also situations where it will not. I turn first to consider what is meant by an assignment.

[34] In *Minister of National Revenue v Parsons*, [1984] 1 FC 804 (TD) the Federal Court discussed the meaning of the words "assignee" and "assignment":

> [102] An assignee is a person to whom an assignment is made and assignment means that property is transferred to another. The assignee is the recipient of that property.
>
> (Emphasis added)

[35] More recently, in *Bjornsson et al v Smith et al*, 2016 MBCA 91, 330 Man R (2d) 314, the Court of Appeal for Manitoba provided a brief survey of how assignments have been described by the courts:

> [58] Stated in its simplest sense, an assignment is often described as a transfer of rights. In *Vladescu v CTVglobemedia Inc et al*, 2013 ONCA 448, 307 OAC 131, leave to appeal refused, [2013] SCCA No 369 (QL), Gillese JA concisely described assignment as follows (at para 62):
>
> > [Assignment's] ordinary legal meaning is the act of transferring, to another, all or part of one's property, interest, or rights: B. Garner, ed., Black's Law Dictionary, 8th ed. (St. Paul, MN: Thomson West, 2004), at p. 128.
>
> [59] Later, Gillese JA had occasion to note that: "the fundamental nature of an assignment … is the transfer of rights to the assignee" (at para 85).
>
> [60] As well, in *Makar v Master of the Motor Vessel "Rivtow Lion" et al* (1982), 43 NR 245 (FCA), Thurlow CJ wrote (at para 34):
>
> > An assignment is a transfer of a right from one person to another. The Shorter Oxford Dictionary gives as a meaning of assignment: "Legal transference of a right, etc." An assignment transfers to the assignee the right to the thing transferred and in the case of a chose in action the right to sue for its recovery.
>
> [61] The foregoing authorities are but two of many which stand for the similar proposition that an assignment is fundamentally a transfer of rights from one person to another….
>
> (Emphasis added)

[36] In *Country Holdings and Development Ltd. v Roth* (1980), 14 Alta LR (2d) 217 (WL) (QB), Master Funduk considered what is meant by the term "assignment". He stated that "the common meaning of "assign" is, in law, to transfer or make over to another the right one has to any object as in an estate, chose in action or reversion" (at para 13).

[37] Finally, the British Columbia Court of Appeal in *Merchant 2017* stated:

> [39] However, the meaning of "assignment" is not limited, even in the legal context, to the type of three-party transaction I have described. *Black's Law Dictionary* (6th ed., 1993) provides a much broader definition of the term:
>
> > The act of transferring to another all or part of one's property, interest, or rights. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all kinds of property including negotiable instruments. The transfer by a party of all of its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or a partnership. Tangible property is more often

> transferred by possession and by instruments conveying title such as a deed or a bill of sale. [At 79–80; emphasis added.]
>
> (Emphasis added)

[38] The authorities referenced in the preceding paragraphs serve to underscore that the ordinary meaning of an assignment is the transfer to another of one's property, interests or rights. There does not appear from the jurisprudence to be a clear limit on the types of rights, interests or property that may be subject to an assignment.

[39] In contradistinction, a direction to pay is simply an instruction to pay and, for that reason, it is often considered to be distinct from an assignment. While an assignment involves the transfer of rights or interests in property such that the assignor no longer controls the property, a person who signs a mere direction to pay that has no conditions or terms attached to it, continues to control the funds subject to the direction until the money is paid in accordance with the direction. That person could withdraw the direction at any time prior to the payment.

[40] A direction to pay may contain terms or conditions that have the effect of transforming it into an assignment. An example of this can be found in *Fontaine v Canada (Attorney General)*, 2007 BCSC 1841, [2008] 4 WWR 724 [*Fontaine 2007*].

[41] In *Fontaine 2007*, the British Columbia Supreme Court was asked to determine whether certain documents, directed to the federal government, and purporting to assign or attach common experience payments due under the *IRSSA* to various claimants, were prohibited under Article 18.01 of the *IRSSA* or s. 67 of the *Financial Administration Act*, RSC 1985, c F-11. The documents in issue were entitled "Directions to Pay", "Assignments of Proceeds of Claim", or "Irrevocable Assignments of Proceeds". The documents included: (a) assignments and directions to pay in connection with commercial transactions; (b) directions or requests from lawyers to pay funds to the law firm in trust; and (c) outright assignments to the law firms to fund legal fees and disbursements with no further details.

[42] The Court found that the issue of whether a document was a mere direction to pay could be resolved by asking the following question: "does the CEP [common experience payment] claimant still retain the right to deal with the proceeds in an unrestricted manner?" The Court noted that if the individual had the ability to deal with the proceeds "there would arguably be no

assignment" (at para 25). Conversely, where an individual lacks the ability to deal with the proceeds in an unrestricted manner as a result of the direction to pay, the direction to pay constitutes an assignment. The Court concluded that the documents in that case were assignments.

> [30] The essence of the respondent's argument is that if one separates the direction to pay from any assignments or other pending instructions, the payment is directed by the CEP claimant to a party other than solely him or herself cannot be impugned. I disagree. To sanction such a procedure where the CEP monies are subject to a pre-existing "assignment" or "assignment of proceeds of claim" would be to elevate form over substance. It would contravene the clear intention of the Settlement Agreement as well as the [*Financial Administration Act*].

[43] *Fontaine 2007* was upheld by the British Columbia Court of Appeal in *Fontaine v Canada (Attorney General)*, 2008 BCCA 329, [2008] 12 WWR 621 [*Fontaine 2008*]. There, the Court concluded that the lower court was fundamentally concerned with the effect of the transactions in issue, which it noted were to "assign wholly the amounts in question" (at para 36). The Court described the nature of the transactions as follows:

> [37] That this is more than a mere Direction to Pay is apparent by asking whether the class member has an interest, legal or beneficial, in the funds were they to be paid "In Trust" according to the Direction to Pay. The answer is "no" because they have been irrevocably assigned to the lenders.

[44] *Fontaine 2007* and *Fontaine 2008* make it clear that determining whether a particular transaction amounts to an assignment will depend on the nature of the transaction. While both Courts accepted that a direction to pay may be part of a transaction that constitutes an assignment, they also recognized that directions to pay are not necessarily synonymous with assignments. The deciding factor is the effect of the transaction in question, not how the document is labelled.

[45] The jurisprudence provides examples of where a direction to pay was found not to be an assignment. One such case is *Weber v D5 Enterprises Ltd.* (1983), 51 BCLR 172 (SC) [*Weber*]. In *Weber*, the British Columbia Supreme Court considered a situation where a party had executed a document providing that funds, from a particular transaction, were to be forwarded to their lawyers in trust. Later, there was a dispute as to whether the funds should be subject to a garnishee order. It was argued that the direction to pay constituted an assignment that had priority over the garnishee order. The Court concluded that the document was "nothing more than a Direction to Pay funds" and that it "falls short of and is not in fact an outright assignment of the funds" (at para 3). The Court's conclusion appears to have been heavily influenced by the fact that another

document that it considered to be a "formal assignment" had been executed shortly after the garnishee order had come into effect (at para 3).

[46] In *Re: Glasgow*, 2018 ONSC 4608, Master Mills of the Ontario Supreme Court of Justice in Bankruptcy and Insolvency, noted that an agreement concerning a GST refund that had been characterized as an assignment was, in fact, a direction to pay. Master Mills observed that "[t]he agreement does not assign all rights and interests in the GST refund to the trustee but rather directs how the funds are to be used" and, accordingly, could not be considered an assignment (*Glasgow* at para 3).

[47] In *Winnipeg Enterprises Corp. v 4133854 Manitoba Ltd.*, 2008 MBCA 23, [2008] 3 WWR 579 [*Winnipeg Enterprises*], the Court of Appeal for Manitoba provided some useful discourse on the nature of absolute and irrevocable assignments as well as directions to pay. In that case, a company had provided documents to a lender that were entitled "Irrevocable Order to Pay". A dispute arose as to how those documents should be interpreted. The Court was faced with two competing viewpoints – one suggesting that the documents constituted an absolute assignment and one suggesting that the documents merely created a security interest. The Court was of the view that the documents in question were not assignments and only served to create a security interest:

> [33] Despite the fact that there is one reference in each document which describes it as an irrevocable assignment, in my opinion, the motions judge was well justified in finding that the IOPs were not absolute assignments. Indeed, it is questionable whether they were assignments at all. They were described as orders to pay, not assignments, and the truly operative provisions were that Select-A-Seat, after deducting its own fees and disbursements, was irrevocably authorized and directed to pay [the appellant] in full ahead of the holder of any other irrevocable order to pay.

[48] The Court's analysis in *Winnipeg Enterprises* highlights the need to focus on the substance of the particular document or transaction rather than on its form.

[49] In conclusion, a direction to pay is not necessarily synonymous with an assignment. It may, as its name suggests, merely be a direction to pay. On the other hand, some directions to pay may include terms or conditions that bear the hallmarks of an assignment. The true nature of the document depends on what the transaction is meant to accomplish. If it has the effect of transferring rights, interests or property from one individual to another, the transaction is properly characterized as an assignment. If the document merely serves to authorize payment, it is likely to be characterized as a direction to pay. Additionally, where a transferor retains the ability to deal

with the property, it will be questionable whether the document can properly be characterized as an assignment.

[50] In my view, the Hearing Committee erred in law by failing to recognize that a direction to pay is not necessarily an assignment. J.S.'s written instructions contained no terms or conditions. It was a mere direction to pay MLG and, accordingly, there was a legitimate legal question as to whether it fell within the purview of Article 18.01 of the *IRSSA*. The Hearing Committee erred in law by concluding otherwise.

B. Did the Hearing Committee err in finding the pre-2014 jurisprudence was "clear"?

[51] It is Mr. Merchant's position that the case law interpreting Article 18.01 of the *IRSSA* is relevant to this appeal because, whether obtaining and acting on J.S.'s Direction to Pay amounted to conduct unbecoming must be determined against the legal landscape interpreting that provision as it existed in 2014.

[52] It is common ground that the jurisprudence with respect to the *IRSSA* has its genesis in *Baxter et al. v Attorney General of Canada* (2006), 83 OR (3d) 481 (Sup Ct) [*Baxter*].

[53] *Baxter* involved the certification of the residential school survivors class action and an application to approve the *IRSSA*. In that context, the certifying court found that there had to be a process to regulate the legal fees charged to claimants. *Baxter* did not involve the interpretation of Article 18.01. Rather, it addressed the question of how legal fees pertaining to the settlement of claims should be dealt with.

[54] The first cases to specifically address Article 18.01 were *Fontaine 2007* and *Fontaine 2008*.

[55] As already indicated herein, those decisions dealt with the question of whether documents, including some that were entitled "Direction to Pay", fell within the purview of Article 18.01 of the *IRSSA*. The Courts found the documents were inextricably linked to assignments and thus were prohibited by Article 18.01. Importantly, they did not determine that all directions to pay would be caught by that provision. As stated by Saunders J.A. writing for the Court in *Fontaine 2008*:

> [31] Chief Justice Brenner reached his conclusion by first finding that a Direction to Pay was part of a transaction that was, at its core, an assignment. …

[56] Later, at paragraph 37, Saunders J.A. concluded:

> That this is more than a mere Direction to Pay is apparent by asking whether the class member has an interest, legal or beneficial, in the funds were they to be paid "In Trust" according to the Direction to Pay. The answer is "no" because they have been irrevocably assigned to the lenders.

[57] Further, *Fontaine 2007* and *Fontaine 2008* dealt with a situation that is factually distinct from that underpinning this appeal. In those cases, not only were the directions to pay found to be inextricably linked to assignments, but all the documents in issue were directed to Canada and related to funds not yet paid to claimants. In this appeal, the Direction to Pay signed by J.S. related to monies held in trust by MLG *for J.S.* In short, the money subject to the Direction to Pay was under J.S.'s as opposed to Canada's control. As such, Crown immunity (which was one of the issues in those cases) does not apply in the context of this appeal.

[58] In *Daniels v Daniels*, 2011 MBCA 94, 270 Man R (2d) 262 [*Daniels*], the Manitoba Court of Appeal dealt with the issue of whether monies payable pursuant to the *IRSSA* could be subject to an order appointing a receiver under *The Family Maintenance Act*, RSM 1987, c F20, CCSM c F20. The Court found that it was clear that funds in the hands of the Federal Crown could not be attached unless there was specific federal legislation permitting it. However, the Court went on to conclude that in the circumstances of that case, the order was not precluded by Article 18.01 of the *IRSSA*. In doing so, the Court distinguished *Fontaine 2007* on its facts and found that the appointment of a receiver is not an assignment.

[59] None of the Courts in *Baxter*, *Fontaine 2007*, *Fontaine 2008* or *Daniels* dealt with the narrow issue of whether a residential school claimant could give a simple direction to pay to a lawyer with respect to monies received by that lawyer in trust for the claimant. Importantly, all of those cases are distinguishable on their facts from the situation Mr. Merchant found himself in. In Mr. Merchant's scenario the money was not in his control, but rather was in the control of J.S. and the Direction to Pay contained no terms or conditions other than an instruction to pay MLG's outstanding accounts from J.S.'s IAP settlement.

[60] Further, the Court in *Fontaine 2007* seems to suggest that once funds are paid to residential school claimants, those claimants are free to use or dispose of the funds as they see fit:

> [31] Both the law (s. 67 of the FAA) and the Settlement Agreement (s. 18.01) are clear. The CEP payments must be paid by Canada to the CEP recipients. Once received, the CEP

> recipients are of course free to use or dispose of the funds in any manner they consider appropriate. But until 100% of the CEP monies are placed in their hands, the Crown debt will not have been discharged.

[61] In my view, the Hearing Committee misapprehended the reach of the pre-2014 jurisprudence. In particular, while *Fontaine 2007* and *Fontaine 2008* dealt with documents entitled "Directions to Pay", the Court found that those documents could not be distinguished from assignments. The jurisprudence prior to 2014 was not clear with respect to the question of whether a simple direction to pay fell within the purview of Article 18.01 of the *IRSSA* and the Hearing Committee erred in law in finding otherwise.

[62] Mr. Merchant further argues that his position with respect to the unsettled nature of the jurisprudence is exemplified by two Saskatchewan cases: *Merchant Law Group v Compushare Ltd.*, 2008 SKCA 173, 306 DLR (4th) 536 [*Compushare*], and *Saskatchewan Government Insurance v Merchant*, 2011 SKQB 174, 373 Sask R 221 [*SGI*]. It is Mr. Merchant's position that those two cases are inconsistent with each other and underscore the ambiguity surrounding the use of the term "assignment" in Article 18.01 of the *IRSSA*.

[63] In my view, it is unnecessary to consider those authorities. They are distinguishable on their facts from the situation under appeal; and at least one of those cases–*Compushare*–did not deal with Article 18.01 of the *IRSSA*.

[64] In summary, in my view, the pre-2014 jurisprudence with respect to the interpretation of Article 18.01 of the *IRSSA* did not deal with the situation presented by J.S.'s Direction to Pay. The question of whether such a direction was caught by that provision was a legitimate legal question for determination by the courts. This view is reinforced by the British Columbia Court of Appeal's decision in *Merchant 2017*. Justice Newbury, writing for the Court, referred to the "ambiguity" pertaining to the term "assignment" as used in Article 18.01. That "ambiguity" led her to examine the factual background underpinning the drafting of that provision:

> [40] Given the 'ambiguity', we may refer to the context surrounding Article 18.01 of the Settlement Agreement to determine what was intended by the parties. In my view, there can be little doubt that informed by this legal context, the prohibition against "assignments" of awards payable under the Settlement Agreement was intended in its very widest sense, and would therefore include any transfer of funds.

[65] It is clear from the above paragraph, and indeed from the Court of Appeal's judgment as a whole, that whether J.S.'s Direction to Pay was caught by Article 18.01 was a proper legal question and an arguable issue. The Hearing Committee erred in law in finding otherwise.

C. Did Mr. Merchant have an honest but mistaken belief that the Direction to Pay was enforceable?

[66] In its *Conduct Decision*, the Hearing Committee did not accept that Mr. Merchant had an honest but mistaken belief that Article 18.01 of the *IRSSA* did not apply to J.S.'s Direction to Pay:

> [25] The point we are making here is that, at the foundation of the regime established to administer the IRSSA, the courts were characterizing the claimants as a special and vulnerable population in need of judicial vigilance to protect their interests, and that they were concerned about ensuring that the payments under the agreement, aside from an amount determined to constitute reasonable fees for their legal representation in the IAP, should get into the hands of the claimants without further deductions.
>
> …
>
> [45] The Hearing Committee acknowledges that a lawyer who advances an incorrect legal proposition based on a sincerely-held belief should not be held to have committed an infraction of professional obligations for this reason alone. As we stated above, however, we are not persuaded that this is an accurate description of the circumstances here. The Member has been immersed in the IAP and the system under which the IRSSA was administered, and has had many opportunities to digest the message of the courts and the administrators of the system that the IAP payments determined through adjudication were to be kept intact except for legal fees also assessed under the scheme. We do not dispute that lawyers are entitled to be paid for the work that they do, and that the legal system has sanctioned a number of mechanisms for pursuing these debts. Under this regime, however, the funds awarded to residential schools claimants through the IAP have been characterized as having special status, and it is not believable that the Member had any basis for believing that an assignment according to a particular limited meaning was the only mechanism he was not entitled to use to obtain the fees he claimed were owed. We are also of the view that the way he extracted from J.S. her instruction to pay the legal fees was not in keeping with the clear intention of the IRSSA regime to protect a vulnerable group.

[67] Mr. Merchant argues that he had an honest belief that J.S.'s Direction to Pay was not an assignment within the meaning of Article 18.01. He says that the fact the British Columbia Supreme Court and the British Columbia Court of Appeal both ultimately determined it did amount to an assignment does not diminish the sincerity with which he held that belief. Further, Mr. Merchant submits that he responded to the concerns raised with respect to the legality of the Direction to Pay by applying to the Court for directions and, in all respects, acting in an open and professional manner. He asserts the Hearing Committee's decision runs contrary to the judgment of the Supreme Court of Canada in *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018]

1 SCR 772 [*Groia*], and that in reaching its decision, the Hearing Committee made findings of fact and drew inferences in the absence of any evidence to support them.

[68] I find that Mr. Merchant's argument on this point is persuasive.

[69] While *Groia* was raised before the Hearing Committee in support of Mr. Merchant's position, the Hearing Committee did not refer to it in its decision.

[70] In *Groia* a lawyer hired to defend an individual against charges brought by the Ontario Securities Commission [OSC] was found guilty by the Law Society of Upper Canada's Hearing Committee of professional misconduct. The conduct in issue related to the lawyer's behaviour during a trial which included personal attacks, sarcastic outbursts and allegations of professional impropriety against the OSC prosecutor. Much of the lawyer's behaviour stemmed from disclosure issues and, from his honest but mistaken understanding of the law of evidence and the role of the prosecutor. The trial judge eventually directed the lawyer to stop making the allegations in issue and the lawyer largely followed that direction. The Law Society of Upper Canada's appeal panel upheld the Hearing Committee's decision, and the Ontario Court of Appeal dismissed the lawyer's appeal. On further appeal to the Supreme Court of Canada, a majority of that Court allowed Mr. Groia's appeal.

[71] Justice Moldaver, writing for the majority in *Groia*, quoted with approval the appeal panel's statement that a "fundamentally contextual and fact specific analysis" is required when determining whether a lawyer's behaviour amounts to professional misconduct (*Groia* at para 82).

[72] Further, Moldaver J. stated:

> [85] I share the intervenors' concern that law societies should not sanction lawyers for sincerely held but mistaken legal positions or questionable litigation strategies …

[73] Moldaver J. set out a subjective/objective test for determining whether a lawyer had an honest but mistaken belief in the correctness of a legal position being advanced:

> [94] I pause here to note that there is good reason why a law society can look to the reasonableness of a legal mistake when assessing whether allegations of impropriety are made in good faith, but not when assessing whether they are reasonably based. The "good faith" inquiry asks what the lawyer actually believed when making the allegations. The reasonableness of the lawyer's legal mistake is one piece of circumstantial evidence that may help a law society in this exercise. However, it is not determinative. Even the most unreasonable mistakes can be sincerely held.

> [95] In contrast, the "reasonable basis" inquiry requires a law society to look beyond what the lawyer believed, and examine the foundation underpinning the allegations. Looking at the reasonableness of a lawyer's legal position at this stage would, in effect, impose a mandatory minimum standard of legal competence in the incivility context. In other words, it would allow a law society to find a lawyer guilty of professional misconduct on the basis of incivility for something the lawyer, in the law society's opinion, ought to have known or ought to have done. And, as I have already explained, this would risk unjustifiably tarnishing a lawyer's reputation and chilling resolute advocacy.
>
> (Emphasis added)

[74] Here, the Hearing Committee acknowledged that a lawyer who advances an incorrect legal proposition based on a sincerely held belief should not, for that reason alone, be held to have committed an infraction of their professional obligations. However, it went on to find that Mr. Merchant did not have a sincerely held belief that J.S.'s Direction to Pay may not fall within Article 18.01 of the *IRSSA*. That conclusion was based on the Hearing Committee's finding that Mr. Merchant had "extensive involvement … with the process for determining the claims of residential school survivors" (*Conduct Decision* at para 35).

[75] Mr. Merchant contends that there was no evidence of his involvement in the negotiations pertaining to the *IRSSA* or that he had special knowledge that made his belief that J.S.'s Direction to Pay was not an assignment insincere. He submits that, if evidence of his involvement in the *IRSSA* settlement had been presented that suggested such a conclusion, he would have led evidence to refute it.

[76] There is no question that the Hearing Committee had no evidence of Mr. Merchant's involvement in the *IRSSA* settlement and, in particular, that he had any "special knowledge" of what was meant in Article 18.01 by the use of the term "assignment". The Hearing Committee's conclusion in this regard is thus unsupported by the evidence. Further, as already pointed out, there was a reasonable basis for Mr. Merchant to believe that directions to pay were not covered by Article 18.01, which is circumstantial evidence that supports the sincerity of his belief. Neither of the Courts that dealt with Mr. Merchant's application for directions suggested his position was frivolous or unreasonable. On the contrary, Newbury J.A. writing for the Court of Appeal in *Merchant 2017* stated "[w]e are indebted to all counsel for their helpful submissions" (at para 45). It is not conduct unbecoming of a lawyer to raise a legitimate question of law, despite the fact the issue raised is ultimately decided against them.

[77] Further, even if Mr. Merchant was subjectively of the opinion that the Direction to Pay would be caught by Article 18.01 (which was not evident from the Agreed Statement of Facts) his actions, in light of the unsettled state of the law, could not constitute conduct unbecoming. This is so because there was a legitimate legal question to be determined and when Mr. Merchant's belief was challenged, he took appropriate steps, including applying to the supervising court for directions.

V. CONCLUSION

[78] For the reasons set out herein, Mr. Merchant's appeal of the Hearing Committee's conduct decision is allowed and that decision is set aside. As a consequence, the Hearing Committee's sentencing and costs decisions must also be set aside.

[79] Mr. Merchant is entitled to the costs of his appeal assessed in the usual way.

"Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur.

"Schwann J.A."

Schwann J.A.

I concur.

"Kalmakoff J.A."

Kalmakoff J.A.