Citation: Histed v Law Society of Manitoba, 2021 MBCA 70
Date: 20210812
Docket: AI20-30-09454

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Christopher J. Mainella
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***P. F. B. Cramer***
	)	*for the Appellant*
ROBERT IAN HISTED	)	*(via videoconference)*
	)	
Appellant	)	***R. H. Kravetsky***
	)	*for the Respondent*
- and -	)	*(via videoconference)*
	)	
THE LAW SOCIETY OF MANITOBA	)	*Appeal heard:*
	)	***February 22, 2021***
Respondent	)	
	)	*Judgment delivered:*
	)	***August 12, 2021***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

SPIVAK JA

Introduction

[1] This appeal engages a consideration of the interplay between a lawyer's professional obligation to act with civility and the lawyer's duty of resolute advocacy and expressive rights.

[2] The appellant, a lawyer, appeals his conviction by a Discipline Panel (the Panel) of the respondent (the Law Society) of four counts of professional misconduct.

[3] The charges arise from the appellant's representation of a client, B.J., on a domestic assault charge. B.J. was subject to a no contact order with the victim K.F., as a condition of his judicial interim release (the NCO). The impugned conduct relates to allegations of prosecutorial misconduct that the appellant made about a Crown attorney (the Crown) and the Assistant Deputy Attorney General (the Assistant Deputy) in correspondence with the Crown and the Law Society, and in court documents and oral submissions before the court. The appellant alleged (i) that the Crown caused the suicide of K.F. by refusing to vary the NCO, (ii) that the Crown committed extortion in the course of an offer to plea bargain and by allegedly threatening to charge B.J. with obstruction of justice, and (iii) that the Assistant Deputy complained to the Law Society to defeat the course of justice in B.J.'s trial (the allegations). Key to the Panel's decision was that the allegations were not founded on a reasonable and honest assessment of the evidence by the appellant.

[4] While the appellant challenges the Panel's decision on numerous grounds, his central contentions are that the citation was an abuse of process and that the Panel erred in its determination that his conduct was uncivil and constituted professional misconduct.

[5] For the reasons that follow, I would dismiss the appeal. In my view, there is no basis for appellate intervention.

Background

[6] In April 2014, the appellant was representing B.J., who was charged with assault causing bodily harm in relation to his girlfriend, K.F. A condition of B.J.'s judicial interim release was the NCO.

[7] The appellant's allegations were based on the following email exchanges between the Crown and the appellant on September 5 and 10, 2014.

[8] On September 5, 2014, the Crown wrote to the appellant expressing that, while the medical evidence supported a charge of aggravated assault, she was prepared to accept a guilty plea to the lesser charge of assault cause bodily harm. The Crown also indicated that K.F. had told her that she was having contact with B.J., who was telling K.F. to go to Victim Services to get the charge dropped. The Crown requested that the appellant advise B.J. about the inappropriateness of these contacts, as such behaviour amounted to a possible obstruction charge and needed to stop.

[9] On September 10, 2014, the appellant wrote to the Crown asking for her consent to an application to vary the NCO. The appellant indicated that K.F. was continuing to contact B.J., who was concerned that K.F. was imminently going to commit suicide. The appellant expressed that he felt "there may be some validity to this". In reply on the same day, the Crown advised that she spoke to Victim Services and had given the matter substantial thought, but was not prepared to relax the NCO. She advised that Victim Services would keep in good contact with K.F. The appellant responded that he had communicated this information to B.J. who was convinced that K.F. would commit suicide. He requested that the Crown ask Victim Services to take all possible measures to protect her.

[10] There was no further communication between the appellant and the Crown regarding K.F. or the NCO until late October 2014, nor did the appellant apply to vary the NCO.

[11] K.F. broke off contact with Victim Services in September 2014, but maintained contact with B.J. Tragically, on October 23, 2014, she took her own life.

[12] Following that time, the appellant advanced the allegations in correspondence with the Crown and, when the Assistant Deputy complained to the Law Society, the appellant asserted misconduct on his part as well and expanded the allegations against the Crown. The appellant also advanced the allegations in court documents and oral submissions in court during the course of his representation of B.J. Since the content and context of these communications formed the particulars of the counts of professional misconduct in the citation, it is necessary to review them in some detail.

[13] The appellant first raised the allegations in an email to the Crown dated December 22, 2014, replying to her advice that B.J.'s charges would be proceeding. The appellant wrote that he had warned her that K.F. was suicidal as a result of the NCO that she "refused to vary" and that "[K.F.] committed suicide as a direct, foreseeable result of [that] decision". He told the Crown that she should be contacting her insurer rather than proceeding with a preliminary inquiry.

[14] In March 2015, the Assistant Deputy complained to the Law Society regarding the appellant's email to the Crown (the March complaint). In response to the March complaint, the appellant asserted that "[K.F.'s] death was the preventable result of the negligent conduct of [the Crown]", that the Crown was "completely unreasonable", that "she has zealously prosecuted cases with no hope of conviction", that "[h]er lack of objectivity was obvious" and that "she should be prosecuted for criminal negligence causing death".

He also accused the Crown of extortion in threatening to upgrade the charges to aggravated assault.

[15] The March complaint was resolved by a letter from the Law Society dated June 2, 2015, reminding the appellant of his professional obligation to treat a fellow lawyer with courtesy and good faith and of his duty of candour to the court and his client (the reminder letter). The Law Society conveyed its concern that the appellant had expressed his "non-medically substantiated personal opinion regarding the cause of [K.F.'s] death". The appellant responded by letter querying, "Am I correct in concluding that the Law Society does not consider extortion by Crown Attorneys to be within [its] jurisdiction?"

[16] The appellant first made the allegations in court in a pre-trial brief dated June 4, 2015, wherein he submitted that K.F.'s suicide was attributable to the Crown who was "repeatedly warned" and "implored . . . again and again to relax the [NCO]". In December 2015, the Assistant Deputy filed a further complaint to the Law Society about the appellant's conduct which included the content of this pre-trial brief (the December complaint).

[17] At the time of filing the June 4, 2015 brief, and thus, before he responded to the December complaint, the appellant received the police report regarding K.F.'s death (the report). This revealed that K.F. had mental health issues, substance abuse problems and had attempted suicide in the past. The report also indicated that, prior to her suicide, K.F. had argued with her mother and was told by B.J. that he "did not want to get back together".

[18] In the appellant's responses to the Law Society regarding the December complaint, he repeated that the Crown's "refusal to vary the

[NCO]" caused K.F.'s death and called it "heartless, negligent and reprehensible." He expanded the allegations against the Crown by asserting that she recklessly caused K.F.'s death by committing extortion against both B.J. and K.F. He stated that the Assistant Deputy's conduct was "deplorable" and "[condoned] the extortion", which the Law Society "saw fit to ignore." He accused the Assistant Deputy of filing the December complaint to prevent the exposure of misconduct and defeat the course of justice. He advised the Law Society that he was moving for a judicial stay of B.J.'s charges as an abuse of process (the stay motion) and was duty bound to raise these matters in B.J.'s defence.

[19] In January 2016, the appellant filed the stay motion, asserting in the motion brief that the Crown committed extortion by threatening to upgrade B.J.'s charges and charge B.J. with obstruction of justice, and that K.F.'s suicide was the foreseeable result of the Crown's refusal to vary the NCO.

[20] Prior to the hearing of the stay motion, the appellant came into possession of the Victim Services records (the records) related to K.F. following an order for their production in March 2016. The records showed that, although K.F. was suicidal in August 2014, she in fact met with the Crown and a Victim Services worker on September 5, 2014, at which point she was doing well.

[21] At the hearing of the stay motion on June 6, 2016, the appellant argued that the Crown's threat of obstruction charges was not only a threat to B.J., but also a threat to K.F. that deterred her from maintaining further contact with Victim Services. He asserted that the Crown's "criminal act" of extortion led to K.F.'s death.

[22] B.J.'s stay motion was dismissed by the trial judge in August 2016, who rejected the claims of prosecutorial misconduct. The trial judge concluded that the Crown was entitled to withhold her consent to the variance of the NCO, and did not commit extortion (see *R v Johnston*, 2016 MBQB 166 at paras 25, 42). The appellant then brought an unsuccessful motion to dismiss B.J.'s charges for unreasonable delay, repeating that the Crown caused K.F.'s suicide by her decision to maintain the NCO during the "Crown delay". The appellant also filed a statement of claim on behalf of B.J. against the Crown and the Government of Manitoba for wrongful death on the basis of the allegations.

[23] B.J. was convicted of assault cause bodily harm in October 2016. He appealed his conviction to this Court in April 2017, one of the grounds being that the trial judge erred in dismissing the stay motion. By a decision dated February 9, 2018 (see *R v Johnston*, 2018 MBCA 8), this Court dismissed the appeal, concluding that the claim that K.F.'s suicide resulted from the Crown's actions was "highly speculative" (at para 39) and that the allegations of prosecutorial misconduct "have no substance" (at para 43).

Law Society Proceedings

[24] By citation dated July 12, 2017, the Law Society charged the appellant with four counts of professional misconduct. The citation particularized that his conduct, as detailed above, violated the Law Society's *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011 (the *Code*), as follows:

- by failing to provide his client with advice that was honest, candid, based on sufficient knowledge of the relevant facts independent of his personal views and an adequate consideration of the applicable law (rr 3.2-2, 3.2-2C);

- by failing to treat the court with candour, fairness, courtesy and respect (rr 5.1-1, 5.1-2);

- by failing to be courteous and civil and to act in good faith towards persons with whom he had dealings (r 7.2-1);

- by sending correspondence and making communications that were offensive or otherwise inconsistent with the proper tone of professional communication from a lawyer (r 7.2-4).

The Abuse of Process Motion

[25] The appellant brought a motion before the Panel for a stay of the citation as an abuse of process. He argued that the citation interfered with and prejudiced B.J.'s right to advance positions in his ongoing criminal and civil proceedings and that the court was the proper forum to adjudicate the merits of the allegations.

[26] The Panel dismissed the appellant's motion, noting the Law Society's parallel and complementary role with that of the court in overseeing a lawyer's conduct, and concluding that no abuse or prejudice was shown to justify a stay.

The Panel's Discipline Decision

[27] The Panel found the appellant guilty of the four counts of professional misconduct in the manner alleged by the Law Society.

[28] The Panel reviewed the statements made by the appellant in advancing the allegations in the context of all the evidence, and the applicable *Code* provisions and commentaries. The Panel found that the appellant embellished and misrepresented his communications with the Crown.

[29] The Panel assessed whether there was a factual foundation for the allegations.

[30] As for the claim that the Crown caused K.F.'s death, the Panel noted that the appellant had minimal communication with the Crown, limited information about K.F., and conducted no investigation. The Panel also considered that the appellant came into possession of the report and records, which revealed that K.F. had a myriad of mental health challenges. The Panel was satisfied that the appellant at no time had an adequate evidentiary basis for this claim. In regards to the allegations of Crown extortion, the Panel examined the September 5, 2014 email which formed the basis for these claims. The Panel similarly held that there was no evidentiary foundation for the extortion allegations and that the appellant completely misrepresented the content of that email.

[31] Given these pivotal underlying findings, the Panel determined that the appellant breached his duty of civility, his duty to his client, and his duty to the court by misrepresenting facts in his briefs and oral argument. In concluding that the appellant was guilty of professional misconduct, the Panel

found that his conduct was not based on a reasonable and honest assessment of the evidence and could not be justified by the duty of resolute advocacy. The Panel also found that the appellant's responses to the Law Society contained irrelevant personal attacks and were "peppered with statements insulting to . . . the character and motivation of both [the Assistant Deputy] and of [the Crown]" and were "prima facie breaches of the Code." The Panel considered it significant that the appellant did not modify his behaviour after receiving the Law Society's reminder letter, but rather "continued to advance a suite of baseless allegations."

[32] Following a joint recommendation, the Panel imposed a penalty of a six-month suspension and costs of $34,000.

Issues

[33] The appellant's notice of appeal contains 16 grounds of appeal which, reframed, raises the following issues:

a. Did the Panel err in refusing to stay the citation against the appellant on the basis of abuse of process?

b. Did the Panel err in law in its approach to the question of whether the appellant's conduct was uncivil such that it amounted to professional misconduct?

c. Did the Panel err in concluding that the appellant's conduct was uncivil such that it amounted to professional misconduct?

d. Did the Panel err in providing inadequate reasons for the finding that the appellant's statements were insulting to the degree of professional misconduct?

Standard of Review

[34] This is a statutory appeal pursuant to section 76(1)(a)(i) of *The Legal Profession Act*, CCSM c L107 (the *Act*), which provides a right of appeal from the Panel's findings of professional misconduct to the Court of Appeal. Therefore, as determined by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37, the appellate standards of review as set out in *Housen v Nikolaisen*, 2002 SCC 33, apply.

[35] The applicable standard of review depends on the nature of the question in issue. Questions of law, which include questions of statutory interpretation, are reviewed on the correctness standard. Findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error. Absent an extricable error of law, the standard of palpable and overriding error also applies to mixed questions of fact and law. Whether a set of facts satisfies a legal test is a question of mixed fact and law reviewable on that deferential standard (see *Housen* at paras 8, 10, 26-27, 37).

[36] In *Al-Ghamdi v College of Physicians and Surgeons of Alberta*, 2020 ABCA 71, the Alberta Court of Appeal provided a helpful explanation of the nature of professional self-regulation and the applicable standards of review in professional disciplinary appeals following *Vavilov* (at paras 10-11):

> . . . The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession, and the profession is well-positioned to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest. On the other hand, professionals subjected to discipline are entitled to have disciplinary decisions reviewed externally on appeal to this Court.
>
> In professional disciplinarily appeals, interpretation of the governing statute is reviewed for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subjected to discipline has met that standard.

[37] Other appellate courts have similarly characterized a discipline tribunal's ultimate finding of professional misconduct as a question of mixed fact and law (see *Hughes v Law Society of New Brunswick*, 2020 NBCA 68 at paras 19, 21; and *Law Society of Ontario v Diamond*, 2021 ONCA 255 at para 39).

[38] As for discretionary decisions, such as the Panel's refusal to stay the citation for abuse of process, the standard of review is that an appellate court should only intervene where there is a misdirection or the decision is so clearly wrong as to amount to an injustice (see *R v Babos*, 2014 SCC 16 at para 48).

[39] I will address the applicable standard of review when I discuss the issues raised on appeal in turn.

Analysis and Decision

The Statutory Framework

[40] The *Act* and the Law Society Rules, enacted pursuant to the *Act*, comprise a comprehensive scheme under which the legal profession in Manitoba is entrusted to regulate itself through its governing body, the Law Society. As articulated in the *Act*, the purpose of the Law Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence (see section 3(1)). To that end, the Law Society is required to establish standards for professional responsibility and competence of persons practising law in Manitoba (see section 3(2)). The *Code*, adopted by the Law Society, sets out an array of obligations that comprise the overarching duty of professionalism that informs the privilege of practising law.

[41] The *Code* provides that the essence of professional responsibility is that the lawyer must act at all times with utmost good faith to the court, to the client, to other lawyers and to members of the public (see pp 6-7). It establishes Rules that govern the professional conduct and ethical obligations of lawyers both inside and outside the courtroom. Extensive commentaries about those requirements are included in the *Code*.

[42] There are several rules relevant to the issues on appeal. A lawyer's conduct is to be characterized by courtesy, civility and good faith in dealing with the courts and all participants in the justice system (see r 7.2-1). This includes avoiding ill-considered or uninformed criticism of other lawyers (see r 7.2-1, commentary 3). A lawyer has a duty of honesty and candour to the

client and must provide informed and independent advice (see rr 3.2-2, 3.2-2C). The *Code* affirms the duty of an advocate to resolutely and honourably advance the client's cause, the importance of which has been recognized as the cornerstone of our adversarial system (see r 5.1-1; see also *R v Felderhof* (2003), 180 CCC (3d) 498 at para 84 (Ont CA)). However, the duty of resolute advocacy has limits. It does not permit an advocate to act with incivility (see *Felderhof* at paras 83-84). It must also be discharged honourably by treating the tribunal with candour, fairness, courtesy and respect (see r 5.1-1 of the *Code*). Further, a lawyer must not knowingly misstate facts or law, the contents of a document or assert as true a fact when its truth cannot reasonably be supported by the evidence. The duty of resolute advocacy coexists with the lawyer's responsibilities to the court, to other lawyers, and to the administration of justice (see *Felderhof* at para 83; and *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 76).

[43] Against this backdrop, I turn to the specific issues raised in this appeal.

Did the Panel Err in Refusing a Stay of the Citation on the Basis of Abuse of Process?

[44] The appellant argues that the Panel erred by failing to consider that the Law Society was interfering with B.J.'s right to advance a defence in a criminal proceeding and that this interference undermined the integrity of the judicial process.

[45] The Panel's decision refusing a stay of the citation as an abuse of process was a discretionary decision attracting a high degree of deference. As

previously noted, appellate intervention is warranted only if there has been a misdirection in law, a reviewable error of fact or if the decision is so clearly wrong as to amount to an injustice.

[46] The Panel correctly identified the legal principles applicable to a stay for abuse of process as enunciated in *Babos*. A stay of proceeding for an abuse of process is generally warranted where the state conduct compromises the fairness of a trial (the main category) or risks undermining the integrity of the judicial process (the residual category) (see *Babos* at para 31). Where the residual category is invoked, as here, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with the trial would be harmful to the integrity of the justice system (see para 35). The Panel appreciated these principles when it stated, "A stay of proceedings may be granted as a remedy only in the clearest of cases . . . where there has been an abuse of process such as to contravene the community's sense of fair play and decency, which calls into question the integrity of the adjudicative system". In accordance with *Babos*, the Panel addressed the issue of prejudice and the integrity of the justice system and recognized that a stay is a remedy to be granted in the clearest of cases with the onus being on the moving party (see paras 37, 44).

[47] In exercising its discretion, the Panel appropriately considered the following relevant factors.

[48] To begin with, the Panel found no improper motive on the part of the Law Society. The Panel took into account the Law Society's role in regulating standards of professional conduct and that the appellant's behaviour was subject to the Law Society's scrutiny and constraints of the

Code. This is consistent with case law that has affirmed the statutory responsibility of law societies to regulate and ensure standards of courtroom behaviour (see *Groia* at para 55; see also *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham*, 2000 CarswellOnt 4362 at para 148 (CA); and *Goldberg v Law Society of British Columbia*, 2009 BCCA 147 at para 52). As part of its public interest mandate, the Law Society has the duty to enforce compliance with the *Code* (see *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 889-90).

[49] Furthermore, in addressing the issue of whether the citation was an abuse because it prejudiced B.J.'s defence, the Panel aptly noted that "[n]o client is entitled to representation that is not in compliance with the Code". It also considered that a significant portion of the citation particulars did not relate to B.J.'s ongoing criminal or civil proceedings, but involved the manner in which the appellant advanced the allegations in correspondence with the Law Society.

[50] An additional relevant factor was the timing of the citation in relation to B.J.'s ongoing matters. The Law Society's discipline proceedings did not commence until after B.J.'s criminal trial was completed. At the time of the abuse of process motion, the only outstanding criminal matter was B.J.'s appeal. Whatever conduct giving rise to the charges of professional misconduct from the appellant's representation of B.J. had already occurred.

[51] The Panel did not accept that this was the clearest of cases where a stay of proceedings for abuse of process was called for and was satisfied that no prejudice or abuse was shown to justify that relief. In so concluding, I have not been persuaded that the Panel misdirected itself in law, committed a

reviewable error of fact or rendered a decision so clearly wrong that it amounts to an injustice. I would not accede to this ground of appeal.

Did the Panel Err in Law in Its Approach to the Question of Whether the Appellant's Conduct Was Uncivil and Amounted to Professional Misconduct?

[52] The appellant submits that the Panel erred in law in its approach to the determination of whether his conduct was uncivil and amounted to professional misconduct by disregarding decisive factors such as B.J.'s right to zealous advocacy, the appellant's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and the lack of reaction by the trial judge. Essentially, the appellant argues that the test for incivility should be whether the lawyer's behaviour was dishonest, in bad faith or ruled inappropriate by the trial judge.

[53] The Panel's approach to determining when incivility amounts to professional misconduct involves an interpretation of the *Act* and the rules in the *Code* (see *Groia* at para 47). Questions of statutory interpretation, including a tribunal's interpretation of its rules, are reviewed for correctness. As such, the Panel's identification of its approach is a question of law, which will be reviewed for correctness (see *Al-Ghamdi* at para 37; *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at paras 81-85; and *Diamond* at para 37).

[54] Before the Panel, the Law Society relied on the decision of the Supreme Court of Canada in *Groia,* as to the approach to be applied in determining whether the appellant's conduct was uncivil and amounted to

professional misconduct (the *Groia* approach). As I will now explain, the Panel adopted the *Groia* approach and was, in my view, correct to do so.

The *Groia* Approach

[55] *Groia* concerned charges of incivility by the Law Society of Upper Canada against a defence lawyer who advanced allegations of prosecutorial misconduct in defending his client in court. The Supreme Court of Canada approved a multifactorial, context-specific approach for assessing when a lawyer's uncivil in-court behaviour amounts to professional misconduct. Fundamental to this analysis is whether the prosecutorial misconduct allegations or other challenges to a lawyer's integrity were made in good faith and have a reasonable basis (see paras 59, 81-97). Other non-exhaustive contextual factors relevant to the overall inquiry include the manner and frequency in which the allegations were made and the trial judge's reaction to the lawyer's behaviour (see para 59).

[56] The appellant's argument, that the correct approach requires the presence of dishonesty/bad faith or sanction by the trial judge, was considered and rejected in *Groia*. In *Groia*, the Court endorsed the requirement that allegations of prosecutorial misconduct must both be made in good faith and have a reasonable basis. A bona fide belief or absence of bad faith is insufficient to insulate the lawyer from a finding of misconduct. The reason being that requiring anything less than a reasonable foundation "gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions" (at para 86). The consequences for the opposing lawyer's reputation are simply too severe (*ibid*; see also *Goldberg* at para 44).

[57] As well, the notion that the Law Society should not discipline advocates for uncivil courtroom behaviour, absent sanction by the trial judge, was properly rejected in *Groia* as restrictive and inappropriate (see para 104). Such a test fails to recognize the Law Society's distinct and unconstrained statutory mandate to enforce standards of professional conduct in the public interest both inside and outside the courtroom. The *Groia* approach provides that a trial judge's reaction, while a relevant contextual factor, is not dispositive of whether the advocate engaged in professional misconduct. A lawyer can still be disciplined for uncivil courtroom conduct even in the absence of judicial admonition (see paras 102-10.)

[58] Furthermore, the *Groia* approach, as determined by the Court, properly addresses the right to resolute advocacy and freedom of expression.

[59] Moreover, the *Groia* approach appropriately accounts for the relationship between civility and resolute advocacy, which are not incompatible and form part of a lawyer's obligation of professionalism (see paras 70, 76). It recognizes the importance of civility in the legal profession and the need to target uncivil behaviour that could negatively affect the administration of justice and trial fairness. Incivility can prejudice a client's cause, is distracting, adversely impacts justice system participants and erodes public confidence in the administration of justice (see paras 63-67; and *Felderhof* at para 83). At the same time, the duty to practice with civility must be understood in light of the duty of resolute advocacy, a crucial component of our justice system. This is especially so in the criminal context where the constitutional right to full answer and defence has to be respected. The *Groia* approach is sufficiently protective of zealous advocacy. As *Groia* confirms, "Unreasonable allegations . . . do nothing to advance the client's case [and an]

ethical standard prohibiting [these do] not impair resolute advocacy" (at para 87).

[60] Likewise, the *Groia* approach allows for a proportionate balancing of the lawyer's expressive rights with the Law Society's statutory objective (see paras 118-19; and *Doré v Barreau du Québec*, 2012 SCC 12 at para 57). The statutory objective in *Groia*, as here, is advancing the cause of justice and the rule of law by setting and enforcing standards of civility (see *Groia* at para 140). And to be sure, allowing lawyers to freely express themselves serves an important function in our legal system. Lawyers play an integral part in ensuring accountability and transparency (see para 115). But speech is not sacrosanct simply because it is uttered by a lawyer (see para 117). As *Doré* instructs, while "[p]roper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism", this is not an "unlimited right [for] lawyers to breach the legitimate public expectation that they will behave with civility" (at para 65). Certain communications, including those that lack a reasonable basis, lie far from the core values underpinning lawyers' expressive rights (see *Groia* at paras 117, 119). *Groia* establishes that a reasonable basis standard allows for a proportionate balancing between expressive freedom and the Law Society's statutory mandate (see para 119). As well, a flexible context-specific approach enables disciplinary tribunals to accurately gauge the value of the impugned speech (see para 118).

The Panel Adopted the *Groia* Approach

[61] It is apparent from the Panel's reasons that it adopted the *Groia* approach in assessing whether the appellant's conduct was uncivil. As

mentioned earlier, this was the approach advocated by the Law Society and the Panel referenced *Groia* in its decision. In accordance with *Groia*, the Panel considered the panoply of contextual factors particular to the appellant's case. It focussed on whether there was an evidentiary basis for the allegations as well as the credibility of the appellant's beliefs. The Panel was alive to the duty of resolute advocacy, but consistent with *Groia*, noted that "advocacy, no matter how zealous, must nevertheless be founded on an honest and reasonable assessment of the evidence." The Panel concluded that, with respect to the appellant's conduct, this was not the case. The Panel's contextual analysis also considered the manner and frequency of the allegations and the circumstances in which they were made. It took into account that the impugned conduct occurred both inside and outside the courtroom, and in response to a complaint. A significant factor also noted by the Panel was that, unlike in *Groia* where the lawyer modified his conduct after it was called into question by the trial judge, the appellant's allegations continued and escalated following the reminder letter.

[62] In the end, I have not been convinced that appellate intervention is warranted. In my view, the Panel was correct in choosing the *Groia* approach to determine whether the appellant's conduct was uncivil and amounted to professional misconduct.

Did the Panel Err in Concluding That the Appellant's Conduct Was Uncivil Such That It Amounted to Professional Misconduct? Did the Panel Err in Its Application of the Groia Approach?

[63] The nature of this question relates to the Panel's application of the law (i.e., the *Groia* approach), to the facts and determination of whether the

appellant's conduct met the expected ethical standard. This is a question of mixed fact and law which is reviewed for palpable and overriding error unless an extricable error of law can be found in which case the standard of correctness applies to that extricable legal question (see *Housen* at para 26; *Al-Ghamdi* at paras 11, 20; and *Diamond* at para 39). In other words, the Panel's determination that the appellant's conduct was uncivil and amounted to professional misconduct is to be reviewed on a deferential standard, absent an extricable legal error.

[64] Before this Court, the appellant essentially argues that the Panel erred in the application of the *Groia* approach in several respects. In particular, he reiterates his submission that the Panel erred in law by failing to give due or any regard to the importance of the lawyer's duty of resolute advocacy and freedom of expression and to the lack of admonition from the trial judge. The appellant also asserts that the Panel erred in finding that he lacked a reasonable basis for the allegations advanced and that they were not founded on an honest assessment of the evidence. As I will elaborate in my discussion of these issues, in my view, the appellant has not identified any extricable errors of law or palpable and overriding errors with respect to the facts in the Panel's determination.

Freedom of Expression and Resolute Advocacy

[65] As previously indicated, *Groia* provides that it is vital that both resolute advocacy and freedom of expression are appropriately taken into account when determining whether a lawyer's uncivil conduct amounts to professional misconduct. Although the failure to give due or any regard to these factors would raise an extricable question of law, no such error of law

has been revealed in this case. This is because the Panel applied the *Groia* approach which, as I have already explained, inherently in its application, gives due regard for the relationship between civility and resolute advocacy, and proportionately balances the lawyer's freedom of expression with the Law Society's statutory objectives (see *Groia* at paras 60-62).

[66] That said, I offer a few additional comments that reinforce my view that the Panel did not so err.

[67] As previously mentioned, the Panel was mindful of the duty of resolute advocacy, but recognized that this did not require the appellant to make baseless allegations nor justify his attacks on the integrity of opposing counsel. An important contextual factor the Panel considered, relevant to the appellant's arguments about zealous advocacy, was that many of the particulars of incivility involved no advocacy on behalf of B.J., but rather the insulting nature of the appellant's communications with the Law Society.

[68] As for expressive rights, *Groia* provides that a decision finding a lawyer guilty of professional misconduct for launching unreasonable allegations would likely represent a proportionate balancing of the Law Society's statutory mandate and the lawyer's expressive rights (see para 119). Here, in gauging the value of the impugned speech, the Panel considered that the unfounded allegations personally attacked the integrity and bona fides of both the Crown and the Assistant Deputy in a fundamental way, and did so unabated with derogatory and gratuitous comments. Further, unlike a courtroom, where a lawyer's expressive rights take on additional significance, many of the impugned statements were in response to the appellant's governing body (see *Groia* at para 116). The Panel's decision reflects a

proportionate balancing of its statutory mandate to ensure that lawyers behave with civility and the lawyer's expressive rights.

The Trial Judge's Reaction

[69] The appellant argues that the Panel failed to give sufficient weight to the absence of admonition by the trial judge. At best, this is a question of mixed fact and law, reviewable on a standard of palpable and overriding error, as the issue is how much weight the Panel was required to give to the trial judge's reaction in the circumstances of this case.

[70] In *Groia*, the Court explained why a judge's response to a lawyer's in-court incivility is relevant. Unlike the Law Society, the presiding judge observes the lawyer's behaviour first-hand and has a comparatively advantageous position to evaluate the conduct relative to the Law Society which enters the equation once all is said and done (see para 102). Even so, *Groia* is clear that the judge's reaction is not conclusive of the propriety of the lawyer's conduct and is simply one piece of the contextual analysis. Its weight will vary depending on the circumstances of the case (see para 109). And it is not the role of this Court to assign more or less weight to a factor the Panel took into consideration. Further, as recognized in *Groia*, there may be many reasons why a trial judge chooses to remain relatively passive in the face of a lawyer's courtroom incivility, the appearance of impartiality being but one. The point is that sanction by the trial judge is not a precondition to discipline nor is inaction approval of uncivil conduct.

[71] The Panel was alive to the trial judge's reaction in this case. In its reasons, it reviewed the trial judge's decision on the motion for the stay that

clearly rejected the appellant's allegations. As well, the trial judge's response was addressed during counsel's submissions. The Panel's decision compared the appellant's conduct, which did not change after the reminder letter, with that of the lawyer in *Groia* who modified his behaviour after being criticized by the trial judge. In this respect, I digress to reject the appellant's argument that "the [Panel] erred in law in equating the opinion of one of its investigators with the direction of a court". As it was entitled to do, the Panel simply considered the appellant's failure to alter his behaviour in response to the reminder letter, as a noteworthy contextual factor to be taken into account.

[72] Moreover and importantly in this case, the vast majority of the appellant's alleged uncivil conduct was in written form, mostly contained in correspondence with the Law Society. Furthermore, the conduct under scrutiny concerned both the substance of the allegations and the manner in which they were advanced. The appellant's correspondence with the Law Society, while asserting similar allegations to those made in court, did so with increasing intensity, a harsher tone, and included serious accusations of wrongdoing against the Assistant Deputy. None of these were before the trial judge. As well, the fact that the appellant's courtroom comments were made in the course of a pre-trial motion was also an important contextual factor, as any incivility would not be such as to threaten trial fairness, necessarily requiring the trial judge to intervene.

[73] All this to say that the circumstances are quite different than those described in *Groia*, where the judge would have the advantage of hearing and observing the lawyer's spoken comments first-hand. Since most of the appellant's impugned conduct occurred out-of-court and concerned both the substance and manner of the communications, and the courtroom behaviour

was primarily in written form in the context of a discrete pre-trial motion, it was, in my view, open to the Panel to give the trial judge's lack of response limited weight.

No Reasonable Basis for the Allegations and Conduct Not Founded on an Honest Assessment of the Evidence

[74] The appellant argues that the Panel erred in law by finding that he had no reasonable basis for the allegations and that this question attracts a correctness standard. He acknowledges that whether his conduct was founded on an honest assessment of the evidence is a question of fact reviewable for palpable and overriding error, but argues that there were errors in this factual finding.

[75] In my view, the determination of whether or not there was a reasonable basis for the allegations is also a question of fact reviewable on the standard of palpable and overriding error. In *Groia*, the Court specifically referenced the Law Society Appeal Panel's finding that the allegations were not reasonably based as "findings of fact" (at para 201) and that this inquiry was part of the "'fundamentally contextual and fact specific' analysis for determining whether a lawyer's behaviour amounts to professional misconduct" (at para 82; see also para 122).

[76] In my opinion, the Panel made no palpable and overriding errors in its factual findings nor are there any extricable legal errors underpinning these findings. The Panel thoroughly reviewed the appellant's allegations as contained in numerous communications and considered his justifications in the context of all the evidence. The record amply supports the Panel's

conclusion that there was no reasonable basis for the allegations and they were not founded on an honest assessment of the evidence.

[77] As for the claim that the Crown caused K.F.'s suicide, the Panel justifiably considered that the appellant's communications with the Crown regarding a bail variation and K.F.'s potential suicide only consisted of two emails on September 10, 2014, with no other relevant exchange until after K.F.'s death some six weeks later. Since this was contrary to the appellant's assertion that the Crown was "repeatedly warned" about K.F.'s suicidal tendency and was "implored . . . again and again" to permit contact, the Panel viewed this as an embellishment and misrepresentation of his communications with the Crown and an admission that he lacked an evidentiary foundation for this claim. The Panel also considered the appellant's explanation that he did not seek to vary the NCO because it was "futile" and "a waste of money" to be a similar admission, as, if the appellant truly believed that K.F. was at risk, he would have so moved. In my view, the Panel did not err in law in treating these matters as "formal admissions" as the appellant suggests. Rather, as it was entitled to do, the Panel inferred that this reflected the appellant's acknowledgement that his claim lacked a sufficient factual foundation, which also called into question the honesty of his beliefs.

[78] Additionally, the Panel noted that the report and records "paint a picture of a vulnerable young woman deeply troubled by a myriad of factors, some in the present and some in the past, some reaching back into her childhood" and that the appellant made no investigations, but relied primarily on B.J. as his source of knowledge about K.F. It was therefore open to the Panel to conclude that it was self-evident that only an expert, if anyone, could opine about the cause of K.F.'s suicide; that the appellant had no special

medical expertise; and that B.J.'s evidence (as a person standing to benefit from the claim) was an unreliable source of dubious value. Finally, the Panel was entitled to view the appellant's failure to reference the report, which indicated that B.J. broke up with K.F., as inconsistent with his assertion that he was unaware of any "evidence to the contrary" regarding the cause of K.F.'s suicide.

[79] Regarding the allegations that the Crown committed extortion, the Panel appropriately noted that these claims were based on only one communication, the email of September 5, 2014. The Panel examined that email in detail and considered that it did not contain a threat to B.J. and K.F., as the appellant contended. In fact, no comments were addressed to K.F. in the email and the appellant had no knowledge of any communications between K.F. and the Crown. It was available to the Panel to find that the appellant's assertions were a "complete misdescription" and "misrepresentation" of the contents of this email in the circumstances.

[80] Overall, therefore, and as already stated, I am of the view that the appellant has failed to identify any error in the Panel's application of the *Groia* approach and its determination that the appellant's conduct was uncivil and amounted to professional misconduct. I would not give effect to this ground.

Did the Panel Err in Providing Inadequate Reasons for the Finding That the Appellant's Statements Were Insulting to the Degree of Professional Misconduct?

[81] With respect to the final ground of appeal, the appellant argues that his statements were factual for the most part and that the Panel's reasons fail

to demonstrate any logical path to the conclusion that the statements were insulting to the degree of professional misconduct. I disagree.

[82] Inadequate reasons are not a free-standing right of appeal entitling appellate intervention. To find an error of law, an appellant must establish that the reasons are inadequate and that they prevent appellate review (see *R v Sheppard*, 2002 SCC 26 at para 28; *R v REM*, 2008 SCC 51 at paras 54-57; and *R v Ramos*, 2020 MBCA 111 at para 48). Reasons must meaningfully account for the central issues and concerns raised by the parties, be justifiable, transparent and intelligible and support the conclusions reached (see *Vavilov* at paras 79, 81 127). Reasonable inferences need not be spelled out (see *REM* at para 56).

[83] In my view, the Panel's reasons are sufficient and permit appellate review.

[84] *Groia* establishes that misconduct allegations or other challenges to a lawyer's integrity will cross the line into professional misconduct unless they are made in good faith and with a reasonable basis taking all the circumstances into account. As also acknowledged in *Groia*, a lawyer can be found guilty of professional misconduct for challenging opposing counsel's integrity in an inappropriate manner (see para 156). While a single outburst would not usually attract sanction, repetitive personal attacks on opposing counsel using demeaning, sarcastic or otherwise inappropriate language are more likely to warrant disciplinary action (see para 98). As expressed in *Doré*, lawyers "have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint" (at para 68).

[85] The Panel recognized in its decision that the conduct under scrutiny concerned not only what the appellant said, but also how he said it. It therefore considered the substance of the allegations, as well as the manner and frequency in which they occurred. It found that the allegations were not reasonably and honestly based and that the appellant's responses to the Law Society were filled with statements insulting to both the Crown and the Assistant Deputy and were prima facie breaches of the *Code*. The content and biting tenor of the appellant's statements on their face certainly explains this finding. The Panel was not required to spell out this reasonable inference any further than it did and the failure to do so does not preclude effective appellate review.

[86] The allegations directly impugned the integrity of the Crown and the Assistant Deputy, and struck at the core of their professional obligations as ministers of justice. The Panel considered that these attacks were personal and disparaging of their character. The communications included gratuitous comments, such as the appellant's personal opinion about the Crown's handling of other cases and irrelevant aspersions regarding the Assistant Deputy's intention in filing the complaint. The Panel was particularly critical of the appellant for targeting the character and motivation of the Crown and the Assistant Deputy when he knew that their actions, in relation to the NCO, were in accordance with longstanding Manitoba Justice domestic violence policy. The Panel also took note that the allegations were repeated multiple times in stronger language as time went on through to and including the hearing.

[87] It is apparent from a review of the Panel's decision, the evidentiary record and the submissions of counsel, why the Panel concluded that the

cumulative impact of repetitive, unfounded, serious personal attacks using unnecessary invective and a disrespectful tone, was uncivil and amounted to professional misconduct. I would not accede to this ground.

Conclusion

[88] For the reasons set out above, there is no basis to interfere with the Panel's decision. The Panel made no underlying error in its discretionary decision that there was no abuse of process. Further, its determination that the appellant's conduct amounted to professional misconduct does not disclose any reversible error and is justified on the evidence.

[89] I would dismiss the appeal with costs to the Law Society.

Spivak JA

I agree: Chartier CJM

I agree: Mainella JA