IN THE MATTER OF PART 3 OF THE
***LEGAL PROFESSION ACT*, RSA 2000, c. L-8**

AND

IN THE MATTER OF AN APPEAL
REGARDING NAVDEEP VIRK
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel
Ken Warren, QC - Chair
Ryan Anderson, QC - Bencher
Bill Hendsbee, QC – Bencher
Jim Lutz, QC – Bencher
Walter Pavlic, QC – Bencher
Lou Pesta, QC – Bencher
Cora Voyageur – Public Bencher

Appearances
Karen Hansen – Counsel for the Law Society of Alberta (LSA)
Shanna Hunka – Counsel for the LSA
Navdeep Virk – Self-represented

Hearing Date
July 22, 2020 and November 23, 2020

Hearing Location
Virtual Hearing

APPEAL PANEL DECISION

(Reasons for the majority, Ken Warren, QC; Ryan Anderson, QC, Bill Hendsbee, QC, Walter Pavlic, QC, and Lou Pesta, QC concurring)

Overview

1. Navdeep Virk was admitted as a member of the LSA in 2007. His practice included family law and civil litigation. The LSA brought twenty citations against Mr. Virk arising from seven complaints. A hearing into the conduct of Mr. Virk in relation to those citations eventually resulted in an Order for his disbarment. Pursuant to section 75(1) of the *Legal Profession Act*, RSA 2000, c. L-8 (the "*Act*"), Mr. Virk appeals the decisions of the Hearing Committee both with respect to the merits of the findings of the citations and the sanction ordered.

2. The Hearing Committee (the "Committee") convened a hearing respecting the conduct of Mr. Virk that proceeded on June 17, 18, 19, 25, 26, 27, and 28, 2019 (the "Merits Hearing"). The citations considered by the Committee are as follows:

C020152037

1) It is alleged that Navdeep Virk acted in a conflict of interest and that such conduct is deserving of sanction;

2) It is alleged that Navdeep Virk failed to be candid with his client, JK, and that such conduct is deserving of sanction;

3) It is alleged that Navdeep Virk misled another lawyer, NW, and that such conduct is deserving of sanction;

4) It is alleged that Navdeep Virk failed to be candid with the Court and that such conduct is deserving of sanction;

5) It is alleged that Navdeep Virk failed to be candid with the Law Society and that such conduct is deserving of sanction;

6) It is alleged that Navdeep Virk failed to cooperate with the Law Society Investigation and that such conduct is deserving of sanction;

7) It is alleged that Navdeep Virk failed to serve his client, JK, and that such conduct is deserving of sanction;

C020152645

8) It is alleged that Navdeep Virk acted in a conflict of interest and that such conduct is deserving of sanction;

9) It is alleged that Navdeep Virk misled another lawyer, CP, and that such conduct is deserving of sanction;

10) It is alleged that Navdeep Virk failed to be candid with the Law Society and that such conduct is deserving of sanction;

C020162461

11) It is alleged that Navdeep Virk failed to serve his client, GC, and that such conduct is deserving of sanction;

12) It is alleged that Navdeep Virk failed to attend to the finalization of a Court Order in a timely manner and that such conduct is deserving of sanction;

13) It is alleged that Navdeep Virk failed to properly account to his client, GC, and that such conduct is deserving of sanction;

C020170377

14) It is alleged that Navdeep Virk failed to fulfill and undertaking and that such conduct is deserving of sanction;

15) It is alleged that Navdeep Virk failed to be candid with the Court and that such conduct is deserving of sanction;

16) It is alleged that Navdeep Virk failed to attend to the finalization of a Court Order in a timely manner and that such conduct is deserving of sanction;

<u>C020162785 and C020163049</u>

17) It is alleged that Navdeep Virk failed to serve his client, HS, and that such conduct is deserving of sanction;

18) It is alleged that Navdeep Virk failed to attend to the finalization of court orders in a timely manner and that such conduct is deserving of sanction;

<u>C020171398</u>

19) It is alleged that Navdeep Virk failed to comply with an undertaking to, or a condition imposed on him by, the Law Society and that such conduct is deserving of sanction; and

20) It is alleged that Navdeep Virk failed to be candid with the Law Society and that such conduct is deserving of sanction.

3. At the start of the Hearing, the parties sought approval to consolidate Citations 11 and 13 into a revised Citation 11, which reads as follows:

> 11. It is alleged that Navdeep Virk failed to serve his client, GC, and failed to properly account to his client, GC, and that such conduct is deserving of sanction.

4. Mr. Virk submitted to the Committee several statements of admitted facts and admissions of guilt that were found by the Committee to be in a form acceptable to it. Mr. Virk admitted guilt with respect to Citations 6, 11 (as consolidated), 12, 17 and 18. Pursuant to section 60(4) of the *Act*, each such admission of guilt is deemed to be a finding of the Committee that the conduct is deserving of sanction.

5. The Committee considered the remaining 14 citations. It dismissed Citations 7, 8, 16 and 20 on the basis they had not been proven. The remaining citations were found to have been proven on a balance of probabilities and were deserving of sanction. In summary, fifteen of the nineteen citations were either admitted or proven on a balance of probabilities and four citations were dismissed. The Committee's report reflecting those decisions, with detailed reasons, was issued on September 9, 2019 (the "Merits Decision").

6. The Committee convened for a hearing on sanction on December 17, 2019 (the "Sanction Hearing"). Two witnesses were called on behalf of Mr. Virk, Dr. CE, a psychiatrist, and Mr. Virk's wife. Mr. Virk did not testify at the Sanction Hearing.

7. LSA counsel submitted that the appropriate sanction was disbarment while Mr. Virk's counsel argued that the appropriate sanction should be a lengthy suspension in the range of twelve to twenty-four months.

8. The Committee issued its report dealing with the sanction phase on January 31, 2020 (the "Sanction Decision"). It ordered that Mr. Virk be disbarred and that he forthwith pay costs in the sum of $82,500.

9. Mr. Virk brought an application to have the proceedings against him discontinued or, alternatively, the Order of Disbarment stayed pending the resolution of his appeal (the Stay Application). The Committee held an oral hearing on February 20, 2020 to consider the Stay Application and on February 24, 2020, the Committee issued an Order granting the Stay Application, for a limited time and on conditions. The Committee found that it had no jurisdiction to discontinue the proceedings, even if it were so inclined. The Committee issued written reasons dated February 28, 2020 for its decision. It granted a stay from February 24, 2020 until noon on March 6, 2020, to allow Mr. Virk to access certain files in his office unrelated to his legal practice. Other conditions were attached to the Order.

10. Mr. Virk filed a Notice of Appeal dated February 3, 2020 that was superseded by an Amended Notice of Appeal dated September 14, 2020. Mr. Virk sought the dismissal of Citations 1, 3, 9, 10, 15 and 19 and sought the substitution of a suspension in the place of disbarment as a sanction.

11. On November 23, 2020, a panel of benchers (the "Appeal Panel") conducted a hearing on the appeal of Mr. Virk. After reviewing the hearing record, the Merits Decision, the Sanction Decision, and considering the written and oral submissions of counsel for the LSA and Mr. Virk, who was self-represented, for the reasons set out below, the Appeal Panel confirms the Committee's findings of guilt, with one exception. The Appeal Panel dismisses Citation 19. The Appeal Panel also confirms the Committee's determination on sanction.

12. In addition, the Appeal Panel orders costs of the appeal to be paid by Mr. Virk within three months of the written decision.

Preliminary Matters

13. There were no objections to the constitution of the Appeal Panel or its jurisdiction. A private hearing was not requested so a public hearing on Mr. Virk's appeal proceeded.

The Fresh Evidence Application

14. On June 12, 2020, Mr. Virk brought an application to introduce fresh evidence and quash the decisions of the Committee (Application). The Application was heard by the Appeal Panel on July 22, 2020. The Appeal Panel dismissed Mr. Virk's Application on that date and indicated that its reasons would be delivered as part of the decision following the hearing on the merits of the appeal. The reasons of the Appeal Panel's decision on the Application follow.

15. The Appeal Panel has jurisdiction to hear an application for leave to receive fresh evidence pursuant to section 76(6) of the *Act*. The parties agreed that the test enunciated in *Palmer v. the Queen*[1], as cited recently in *LSA v. Burgener*[2], applies:

    1) The evidence could not have been adduced by due diligence at the hearing;

    2) The evidence is relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

[1] *Palmer v. the Queen*, [1980] 1 SCR 759.
[2] *LSA v. Burgener,* 2020 ABLS 13, paragraph 12.

3) The evidence is credible in the sense that it is reasonably capable of belief; and

4) The evidence is such that if believed, it could reasonably, if taken with other evidence adduced at the hearing, be expected to affect the result.

16. As set out in the Application, the fresh evidence sought to be admitted by Mr. Virk fell into three categories:

    1) Medical evidence concerning an undiagnosed psychiatric illness and neurological conditions affecting Mr. Virk;

    2) Evidence related to the credibility of a material, adverse witness; and

    3) The pleadings, briefs and transcripts of the proceedings of the Stay Application.

    This Appeal Panel will consider those categories in turn.

Medical Evidence

17. Between the Merits Hearing and the Sanction Hearing, Mr. Virk was seen by a forensic psychiatrist for a medical examination. Dr. CE's report dated November 18, 2019 (Exhibit L) diagnosed Mr. Virk as being afflicted with [mental health issue]. The Committee heard testimony from Dr. CE during the Sanction Hearing and received his report. He testified that there existed reasonable support for a link, at least in part, between the alleged conduct and the diagnosis of [mental health issue]. He expressed the view that the [mental health issue] may have materially contributed to the conduct under review.

18. With respect to the *Palmer* criteria, Mr. Virk submitted:

    1) Although Mr. Virk saw mental health professionals for individual therapy in 2014 and throughout 2018, and saw Dr. H and Dr. S, a registered psychologist, commencing in 2019, Dr. CE was the first to diagnose [mental health issue]. As such, the medical evidence could not have been tendered at the Merits Hearing;

    2) The evidence is relevant to the causation of Mr. Virk's misconduct;

    3) Dr. CE is a credible expert who has testified in LSA proceedings previously; and

    4) The evidence supports a finding of an unknown disability that would likely lead a new hearing committee to a different result.

19. The LSA's submissions with respect to the *Palmer* test were as follows:

    1) With due diligence, Mr. Virk could have gathered additional medical evidence before the Merits Hearing. Mr. Virk could have arranged a medical examination by a psychiatrist before the Merits Hearing. Mr. Virk chose not to do so for tactical reasons. He tendered into evidence for information purposes only the opinions of Dr. H and Dr. S. When questioned by a member of the Committee

about the potential repercussions of not entering the reports for the truth of their contents, Mr. Virk's counsel replied[3]:

> Mr. Virk will use the diagnosis in the report, his understanding of the diagnosis and his understanding of some of the descriptors in the report and talk about his own insight and his reflections on his conduct and personality in retrospect. So insofar as they inform his description of his own conduct and his explanation of his conduct, that is the use that will be made of them. There is no expert who will speak about his conduct in relation to any of these files, so on the non-sanctioning phase of the hearing where you are being asked to make fact findings, it's my position that the actual evidence of any anticipated experts is not informative.

The LSA submitted that Mr. Virk made a tactical decision not to pursue a mental illness defence at the Merits Hearing and changed his strategy only after receiving the Merits Decision;

2) Not addressed;

3) Not addressed; and

4) The evidence of Dr. CE, if heard at the Merits Hearing, would not have affected the result. As set out in the Committee's summary of Dr. CE's opinion and testimony during the Sanction Hearing in the Sanction Decision:

- The diagnosis did not provide an exhaustive or complete explanation for Mr. Virk's conduct (paragraph 12);
- Dr. CE was unable to suggest that Mr. Virk lacked the capacity to change his behaviour if he chose (paragraph 12);
- Dr. CE could not support the notion that but for the mental illness Mr. Virk would not have engaged in the conduct under discussion (paragraph 12);
- Dr. CE did not find sufficient evidence to suggest that Mr. Virk's symptoms were impairing to a degree that he could not appreciate the nature and quality of his conduct or his omission or that he could not appreciate that such conduct might fall outside the required professional code of conduct (paragraph 13);
- Dr. CE did not find evidence to suggest that Mr. Virk did not understand his professional obligations or that he did not understand the potential consequences of his conduct (paragraph 13);
- Mr. Virk's absence of memory was not a diagnostic criterion for the diagnosis (paragraph 14); and

[3] Hearing Transcript, page 667.

- The mental illness should not affect Mr. Virk's integrity nor his ability to recognize the difference between the truth and a lie (paragraph 14).

20. The Appeal Panel finds that the first and fourth prongs of the *Palmer* test are not met in this instance. The mental health of Mr. Virk was clearly in play during the Merits Hearing and Mr. Virk chose not to lead evidence that would have been available to him with due diligence. For the reasons above outlined by the Committee, the evidence of Dr. CE could not reasonably be expected to have affected the result. The Committee's weighing of Dr. CE's evidence is entitled to deference.

21. Mr. Virk referred in paragraph 75 of his Application brief to eight cases in which he said "conduct was excused or the disability mitigated discipline pronounced." The Appeal Panel acknowledges that accepted, timely evidence of contributing mental health issues may lead to each result. However, the Application was concerned with the introduction of fresh evidence, not the application of evidence to the initial determination of liability or sanction.

22. Similarly, the other cases cited by Mr. Virk do not deal with fresh evidence applications at this stage of the proceedings. *Luzius*[4] dealt with a determination by the hearing panel during the sanctioning phase that the joint submission on guilt was not sustainable based upon a connection between the lawyer's mental illness and his professional misconduct. The hearing panel vacated its acceptance of the agreed statements of fact and finding of guilt and asked the parties to advise as to next steps.

23. In *Hicks*[5], the appeal panel determined that the hearing panel had seriously misapprehended the evidence, leading to findings that were unsupportable. The appeal panel held that it owed no deference to the hearing panel's findings and was not restricted to the evidence heard by it. Accordingly, the appeal panel accepted new evidence, including the psychiatric evidence, without conducting a fresh evidence analysis in accordance with *Palmer*.

24. In *Ryan*[6], a discipline committee ordered that Mr. Ryan be disbarred. Mr. Ryan appealed the decision and brought a motion to adduce medical evidence to show that he was under a mental disability that contributed to his misconduct. The Court of Appeal ordered that the case be re-opened before the discipline committee for the limited purpose of hearing and deciding on that medical evidence. The Law Society was permitted to adduce contrary medical evidence. After considering the medical evidence at a second hearing, the discipline committee confirmed its earlier decision that disbarment was the appropriate sanction.

25. In *Crozier*[7], the hearing panel ordered Ms. Crozier to be disbarred. On appeal, she sought to introduce fresh evidence in four categories. Two of the categories, including medical evidence regarding Ms. Crozier, were admitted into evidence with the consent of the Law Society. The Law Society contested the admission of the other two categories and the appeal panel ruled that they were not admissible as they did not meet the fresh evidence test. Based on the new medical evidence, the appeal panel altered the sanction and set aside the disbarment.

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[4] *Law Society of Upper Canada v. Luzius,* 2013 ONLSHP 193.
[5] *Law Society of Upper Canada v. Hicks,* 2006 ONLSAP 0001.
[6] *Law Society of New Brunswick v. Ryan,* 2003 SCC 20.
[7] *Law Society of Upper Canada v. Crozier,* 2004 ONLSAP 4.

26. In *Shevchenko*[8], the Alberta Court of Appeal dealt with an appeal as to sentence in a criminal case. The accused was a First Nation citizen who had suffered trauma and abuse through his boarding school experience. He had been diagnosed with depression and bipolar disorder and was prescribed medication. He was not on his medication when he was arrested and he recalled becoming increasingly delusional before committing the offence in question. The Court held that the sentencing judge had misapprehended the medical evidence and the impact of the accused's mental illness. As a result, the sentence was found to be demonstrably unfit.

27. The foregoing authorities do not assist Mr. Virk with respect to his Application for leave to adduce fresh evidence in this case relating to his mental condition.

28. In summary, the Appeal Panel finds that the *Palmer* test is not satisfied with respect to the Application for leave to adduce the medical evidence.

The Credibility of GG

29. GG was a witness with respect to Citations 8, 9 and 10. A lawyer, BM, hired a lawyer, CP, to commence an action against an MLA due to alleged improprieties during the candidate nomination process. Mr. Virk was retained to represent the MLA. BM alleged that Mr. Virk had a conflict because he had met with Mr. Virk several years earlier and disclosed confidential information to him. The meeting was corroborated by another lawyer, GG, at whose office the meeting took place. Citations 9 and 10, that were found to be proven, arise from Mr. Virk's unequivocal denials to both CP and the LSA that Mr. Virk had never met with BM previously. The Committee found the meeting did take place and that Mr. Virk's outright denials of the meeting were untrue.

30. Mr. Virk submits that unbeknownst to him at the time, GG was under an investigation by the LSA for misconduct alleged by a doctor. Mr. Virk submitted that the additional information would have impacted GG's credibility and therefore the findings of the Committee.

31. With respect to the *Palmer* test, Mr. Virk submitted:

    1) The LSA had knowledge of the alleged misconduct of GG and did not disclose it to Mr. Virk. Other evidence regarding GG's character emerged only after the Merits Hearing;

    3) The allegations made against GG are from another lawyer and a doctor and are therefore credible; and

    2 and 4) The impeachment of GG's credibility would lead to rejection of his testimony by the Committee. As a result, Citations 9 and 10 would not be proven.

32. The LSA's position with respect to the *Palmer* test was as follows:

    1) There is no evidence that Mr. Virk ever sought pre-hearing disclosure regarding GG's discipline history through the pre-hearing conference process. GG's professional misconduct was not raised by Mr. Virk's counsel during

[8] *R. v. Shevchenko,* 2018 ABCA 31.

cross-examination of GG. The evidence discloses that litigation between GG and the doctor was ongoing prior to the Merits Hearing and would have been discoverable through a courthouse search;

2) The issues involving the doctor, the other lawyer and GG are clearly contentious and at this time amount to unproven allegations. The LSA's complaint proceedings are private until citations are issued, at which point they are posted on the LSA website. The LSA had no obligation to disclose unproven allegations against a witness. The proposed evidence relates to unproven allegations of dishonesty in completely unrelated proceedings;

3) Not addressed; and

4) The admission of the evidence would not have affected the result as the fact of an unproven complaint against GG in an unrelated matter would not have been probative with respect to his credibility, which was assessed by the Committee which heard his testimony.

33. The Appeal Panel finds that prongs 1, 2 and 4 of the *Palmer* test have not been met with respect to this portion of the proposed evidence. Some of the evidence could have been adduced through reasonable diligence before the Merits Hearing. The unproven allegations are not relevant to this proceeding and could not reasonably be expected to have affected the result. The Committee had the opportunity to see and hear GG and to assess his credibility.

The Stay Application Materials

34. Mr. Virk submitted that the pleadings, briefs and transcripts of the proceedings of the Stay Application demonstrate that the Committee acted under a significant misapprehension of the evidence during the course of the proceedings. Mr. Virk submits that the Stay Application materials are fresh evidence for purposes of the *Palmer* test. He submits that the Stay Application materials ought to be part of the record considered for purposes of his application to quash the decisions of the Committee.

35. With respect to the *Palmer* test, Mr. Virk submits:

1) The Stay Application materials were obviously not available to the Committee at the Merits Hearing;

3) The records speak for themselves and are credible; and

2 and 4) The transcripts of the Stay Application "are enough to quash" the decisions made by the Committee.

36. The LSA puts forward a much different position. It points out that "hearing record" is defined under section 49(2)(d) of the *Act* and that the transcript of the Stay Application is not part of the hearing record for this appeal. The Stay Application decision is not under appeal.

37. LSA counsel points out that at paragraph 121 of Mr. Virk's brief, he asserts that a point of exchange in the stay proceedings that would be pertinent for a panel to consider include "clear remorse demonstrated by the Applicant." The Appeal Panel agrees with the LSA that Mr. Virk's submissions during the Stay Application were not evidence under

oath. The fact that Mr. Virk expressed remorse during the Stay Application, and during the hearing of his appeal, does not alter the fact he did not give any evidence of remorse during the Sanction Hearing as he chose not to testify.

38. The Appeal Panel finds that the Stay Application materials fail prongs 2 and 4 of the *Palmer* test.

39. In summary, for the foregoing reasons, the Appeal Panel dismisses Mr. Virk's Application for leave to adduce fresh evidence and as a result dismisses the other remedies and orders sought by him as part of the Application.

The Appeal

40. In the Amended Notice of Appeal, Mr. Virk seeks the dismissal of only six of the 10 Citations found to have been proven: 1, 3, 9, 10, 15 and 19. The Appeal Panel will consider the submissions of the parties on each of those Citations, followed by the Appeal Panel's analysis and findings based on the applicable standards of review. The Appeal Panel will then consider the appeal with respect to sanction, again subject to the applicable standard of review.

The Standards of Review

41. Both parties cited the recent decision of the Alberta Court of Appeal in *Yee v. Chartered Professional Accountants of Alberta*[9] as setting out the standards of review applicable to a statutory appeal to a higher administrative authority. The Appeal Panel notes that the decision in *Yee* was issued after the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[10] which dealt with appeals from an administrative body to an external body, the Courts. This is an internal appeal, as was the case in *Yee*.

42. In *Yee*, Justice Slatter set out the following succinct guideline at paragraph 35 of his Reasons:

> [35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:
>
> (a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;
>
> (b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

[9] *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98, paragraphs 29-35.
[10] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: *Newton* at para 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on *Dunsmuir*. With respect to matters such as the appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.

43. Both parties submitted that the evidence must be "clear, convincing and cogent". Mr. Virk submitted that a citation such as failing to be candid was akin to a citation for deceit and as such the evidence required was below that required in a criminal proceeding but above a balance of probabilities. The case authority cited by Mr. Virk has been eclipsed by the decision of the Supreme Court of Canada in *F.H. v. McDougall*[11] in which the Court held that there is only one standard of proof in a civil case and that is proof on the balance of probabilities. In *Moll v. College of Alberta Psychologists*[12], Chief Justice Fraser accepted that standard and also expressly rejected the "clear, convincing and cogent" standard.

44. With respect to two of the citations (9 and 10) and the decision on sanction, Mr. Virk includes as a ground of appeal the insufficiency of the Committee's reasons. In *Moll*, the

[11] *F.H. v. McDougall*, 2008 SCC 53, paragraph 40.
[12] *Moll v. College of Alberta Psychologists*, 2011 ABCA 110, paragraph 22.

Alberta Court of Appeal provided the following guidance with respect to the sufficiency of reasons:

> (a) Their three purposes are to tell the parties why a decision was made, to provide public accountability for that decision and to permit effective appellate review;
>
> (b) Reasons are not to be read in a vacuum but rather in context; and
>
> (c) That context necessarily includes the totality of the evidence led during the proceedings, the issues raised and the arguments advanced in counsels' submissions.[13]

45. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*[14] the Supreme Court of Canada dealt with sufficiency of reasons in a case involving judicial review of an arbitrator's decision. As noted above, this is an internal appeal within a regulatory body, as opposed to an appeal to the courts. Nonetheless, in commenting on the reasonableness of reasons, the Court stated:

> It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring to both the process of articulating the reasons and to outcomes".

46. More recently, in *R. v. Ramos*[15], the Manitoba Court of Appeal dismissed an appeal from a sexual assault and sexual interference conviction. The Supreme Court of Canada orally dismissed a further appeal, for the reasons of Justice Mainella of the Manitoba Court of Appeal.[16] Justice Mainella, citing authority, enunciated the following principles with respect to the sufficiency of reasons:

    a. The duty to give reasons is met where the basis for a decision, whether it be stated explicitly or is apparent from the circumstances, satisfies the purpose for the reasons – to explain the decisions of the parties, to provide public accountability and to permit meaningful appellate review (paragraph 46);

    b. With the benefit of hindsight, it is often not difficult to say that reasons could have been more detailed and clearer. However, the duty to give reasons does not require a trial judge to meet "some abstract standard of perfection". Rather, the trial judge must articulate an intelligible pathway to the result reached given the context of the specific case (paragraph 47);

    c. There is no obligation to discuss every fact, issue or thought the trial judge has provided that the reasons respond to the substance of the live issues and the parties' key arguments (paragraph 47); and

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[13] *Moll*, supra, paragraph 33.
[14] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, [2011] 3 SCR 708, paragraph 47.
[15] *R. v. Ramos*, 2020 MBCA 111.
[16] *R. v. Ramos*, 2021 SCC 15.

d. Adequate reasons explain why a decision was reached as opposed to how it was reached. The expectation is that the trial judge's reasons provide a "logical connection between the 'what' – the verdict – and the 'why' – the basis for the verdict". This duty should be given a "functional and purposeful interpretation" (paragraph 46).

47. With respect to the standard of review applicable to sanction, the question of what sanction a professional should face as a result of misconduct is a question of mixed facts and law.[17] The question for the appellate body is not whether it would have imposed a different sentence, the question is whether the decision-maker applied wrong principles or whether the sentence is demonstrably unfit, that is, clearly or manifestly excessive. A sanction will not be demonstrably unfit if it falls within a reasonable range of sanctions for the misconduct proven.

The Citations Under Appeal

Complaint C020152037

48. Mr. Virk appeals the findings of the Committee on Citations 1 and 3. Mr. Virk admitted guilt with respect to Citation 6 and is not appealing the findings that Citations 2, 4 and 5 were proven. Citation 7 was dismissed by the Committee.

49. This complaint arises from a client, JK, who retained Mr. Virk to defend him in a paternity and child support proceeding brought on by PQ. PQ was represented by another lawyer, NW. The facts then become more unusual and may be summarized as follows:

- JK and PQ met on an online dating site set up largely for individuals to meet with each other for sexual encounters. They had a sexual encounter. PQ became pregnant and delivered a child in January 2010. PQ asserted that JK was the father.

- The defence strategy of JK and Mr. Virk was to argue that PQ was sexually promiscuous and that JK was not the father.

- Early in the parentage proceedings, a court application was brought by PQ. Partway during the proceedings, PQ advised NW that she recognized Mr. Virk and that she had had a sexual relationship with him while she was pregnant, about two months before the baby was born. She and NW approached Mr. Virk and she told Mr. Virk that it was good to see him again. Mr. Virk responded to the effect that he had not met her previously.

- After the court proceeding concluded, PQ advised NW that she had had chat room communications with Mr. Virk which led to their sexual encounter. She provided over 30 pages of chat room transcript and other information to NW, who in turn provided them to Mr. Virk. The chat room discussion, which did not identify Mr. Virk by name, indicated that he was brown-skinned and that she was pregnant. Mr. Virk wrote to NW denying that he had previously met PQ. NW did not believe Mr. Virk.

- NW then left the firm at which he was practising and the file was assumed by another lawyer.

[17] *Ryan*, supra, paragraph 41.

- From the time that PQ's allegations were first made until Mr. Virk withdrew from the file about five years later, Mr. Virk told JK that PQ had made these allegations and was seeking to get him off the file. Mr. Virk never told JK that PQ's assertions were true.

- An application was eventually brought to have Mr. Virk disqualified from his representation of JK by virtue of Mr. Virk's sexual relationship with PQ. Justice B asked Mr. Virk whether he denied the allegation and Mr. Virk replied that he did. Justice B advised Mr. Virk that whether the allegations were true or not, it was not serving his client's interests and he suggested that Mr. Virk withdraw from the case. Mr. Virk did so.

- Later, Mr. Virk accepted a limited scope retainer from JK to obtain a non-contact order against PQ based on allegations that PQ had approached and threatened JK's ex-wife. JK ended up with an unfavourable costs award against him and made a complaint to the LSA, which commenced an investigation of the matter surrounding JK and PQ. In the course of that investigation, at an interview, Mr. Virk told the LSA investigators that he had never met PQ prior to the first day in court while he was representing JK.

- During the investigation, the LSA investigators received information from PQ that helped identify the precise date of the sexual encounter with Mr. Virk at the Edmonton hotel at which they met. The LSA obtained a Court Order for the provision of information from the hotel. The LSA received a hotel reservation and check-in card in Mr. Virk's name and paid for by a [Bank] credit card.

- When Mr. Virk was asked whether he had attended at that hotel or whether he had a [Bank] credit card at the time in question, he denied both facts. As a result of that denial, the LSA obtained another Court Order directing the [Bank] to provide the credit card application for the card that was used. The application information indicated that Mr. Virk had applied for the card and it was issued to him.

- Mr. Virk then refused a request to be re-interviewed. The LSA then provided him with some additional documentation in its possession, including the hotel reservation check-in card and Mr. Virk's credit card application. Mr. Virk again repeatedly refused to re-attend for a further interview.

50. At the Merits Hearing, for the first time, Mr. Virk, instead of continuing his denial of his sexual encounter with PQ, stated that he had no recollection of it. He had unequivocally denied to his client, the LSA and the Court any relationship with PQ from August 2010, when PQ confronted him in the courtroom, until the start of the Merits Hearing, about nine years later. In his Factum, Mr. Virk acknowledges that in his direct testimony at the Merits Hearing he acknowledged his sexual relationship with PQ.

51. With respect to Citation 1, the Committee found that Mr. Virk's failure to be candid with JK put him in a conflict with JK. The Committee found that the sexual encounter between PQ and Mr. Virk occurred, at the time and place to which PQ testified. The Committee also found that Mr. Virk's statements denying a sexual relationship with or having met PQ before the court application were not as a result of a lack of memory but were intentional lies. In the face of evidence that Mr. Virk had a sexual encounter with a woman seven months pregnant, at a hotel room booked in Mr. Virk's name, and paid for with Mr. Virk's credit card, the Committee disbelieved Mr. Virk's claim that he had no

recollection of the event, that occurred only nine months earlier. That finding is entitled to significant deference by this Appeal Panel, which, although it did not have the benefit of observing Mr. Virk's testimony, shares the Committee's assessment of Mr. Virk's intransigent lack of truthfulness on this point.

52. Mr. Virk submits that he did not fail to be candid with JK as Mr. Virk did not knowingly withhold information from him as Mr. Virk claimed not to remember that information. The Committee's finding that Mr. Virk lied regarding his recollection of the sexual encounter disposes of that argument. Further, Mr. Virk has not appealed the finding of the Committee that he failed to be candid with his client, JK (Citation 2).

53. Mr. Virk also submits that the LSA's original position was that Mr. Virk's conflict was with PQ rather than with JK. The Committee found there was no conflict of interest with respect to PQ. Rather, Mr. Virk's conflict was in representing JK without telling him the truth. The fact that Mr. Virk had a sexual encounter with PQ may reasonably have impacted JK's decision to continue to retain Mr. Virk as JK may have questioned his loyalty. JK was never in a position to make an informed decision as to whether his lawyer was loyal to him or to provide informed consent to the continuation of the retainer as Mr. Virk failed to truthfully disclose his relationship with PQ. The Committee found that created a conflict. The Appeal Panel finds no error in that finding.

54. Mr. Virk submits that the LSA changed its position over the course of the hearing from the conflict being with respect to PQ to the conflict being with respect to JK. The opening submissions of LSA counsel, in response to a question from the Committee, indicates that is not the case. LSA counsel clearly stated that the conflict was with respect to Mr. Virk's representation of JK because of Mr. Virk's relationship with PQ[18].

55. Mr. Virk claims that there was a lack of procedural fairness by the LSA allegedly changing the particulars with respect to the alleged conflict. The hearing record demonstrates that Mr. Virk had reasonable notice of the position of the LSA near the start of the Merits Hearing. The Saskatchewan Court of Appeal stated:

> …procedural fairness will only be violated by inadequate particulars if the member is deprived of knowledge of the facts alleged to constitute misconduct, and is therefore deprived of knowledge of his case to meet…[19]

56. The Appeal Panel finds no procedural unfairness to Mr. Virk respecting this citation.

57. With respect to Citation 3, the Committee found that Mr. Virk had misled NW. Mr. Virk's response is that because NW did not believe Mr. Virk's denials of the sexual encounter with PQ, NW was never misled at any point. In essence, Mr. Virk submits that he cannot be found guilty of misleading another lawyer if his effort to mislead that lawyer is unsuccessful.

58. The Committee found that the denial by Mr. Virk of his sexual encounter with PQ was made with the intent to mislead NW, whether NW was misled or not.

[18] Hearing Transcript, page 63.
[19] *Hesje v. Law Society of Saskatchewan*, 2015 SKCA 2, paragraph 51; cited with approval in *Law Society of Alberta v. Heming*, 2020 ABLS 15, paragraph 35.

59. The Code of Conduct at the time of the denials by Mr. Virk to NW provides:

> R.1 A lawyer must not lie to or mislead another lawyer.
>
> C.1 This rule expresses an obvious aspect of integrity, one of the fundamental principles underlying this Code. In no situation, including negotiation, is a lawyer entitled to deliberately mislead a colleague.

60. The Committee focused on the intention of Mr. Virk in lying, as opposed to the acceptance of the false information by the listener, NW. It would be anomalous if a lawyer telling identical lies to two different lawyers, one of whom believed the lie and one who did not, could only be guilty of conduct deserving of sanction with respect to the more gullible of the two individuals. The Committee's reasoning is in the Appeal Panel's view consistent with the intention of the Code of Conduct (Code) and demonstrates no error of law or unreasonableness.

61. In summary, and for the foregoing reasons, the Appeal Panel dismisses Mr. Virk's appeal respecting Citations 1 and 3. In specific response to the grounds of appeal for those Citations:

   a. Mr. Virk was aware near the start of the Merits Hearing that the LSA's position was that the conflict arose with respect to JK and there was no procedural unfairness;

   b. The Committee correctly analysed the conflict of interest arising from Mr. Virk's failure to disclose his sexual relationship with PQ to his client JK; and

   c. The Committee was correct in finding for purposes of the Citation that Mr. Virk misled NW by lying to him, whether or not NW believed the lie.

Complaint C020152645

62. Mr. Virk has appealed Citations 9 and 10 with respect to this complaint. Citation 8 was found by the Committee to be not proven. This complaint arose from another allegation of conflict against Mr. Virk.

63. BM was seeking a political nomination and asserted that he had been forced to withdraw for improper reasons. BM hired his lawyer, CP, to commence an action against a constituency association and a provincial MLA. Mr. Virk was retained to represent the MLA.

64. CP asserted that Mr. Virk was in a conflict of interest because BM said that he had met with Mr. Virk in the offices of another lawyer, GG, in August 2009. BM asserted that the meeting with Mr. Virk was arranged through GG as Mr. Virk was planning to enter into a law practice arrangement with GG at the time. The meeting occurred at GG's offices and GG was present periodically throughout the meeting. BM and GG testified that notes of the meeting were only taken by Mr. Virk. BM asserted that during that meeting he advised Mr. Virk of personal, confidential information.

65. When CP wrote to Mr. Virk respecting the alleged conflict, Mr. Virk, as he had done respecting PQ, unequivocally denied that he had met BM previously. This is the basis for Citation 9.

66. At the Merits Hearing, BM testified and there were some inconsistencies between that testimony and CP's prior letter to Mr. Virk. CP was not called to testify. GG testified at the Merits Hearing and confirmed that for at least a period of time, he and Mr. Virk were contemplating a practice relationship together. He confirmed that Mr. Virk and BM met at GG's office and that he was present throughout portions of the meeting. He said that he had observed Mr. Virk asking questions and taking notes about domestic issues between BM and his wife, matrimonial property, and BM's assets here and abroad. Mr. Virk's counsel argued that GG's interests were so aligned with BM's interest that GG's evidence should not be taken as credible.

67. The Merits Decision indicates that the Committee was alive to the inconsistencies in the evidence. The Committee accepted evidence demonstrating that Mr. Virk had met with BM previously, contrary to his denial to CP. That finding is owed deference by the Appeal Panel. Similar to the situation respecting Citation 3, the Committee found that Mr. Virk had lied to another lawyer. Mr. Virk submits that because CP was not called as a witness, there is no evidence as to whether he was actually misled. For the reasons set out above, the Appeal Panel finds no error in the Committee's finding that telling a lie amounts to misleading another lawyer, whether or not the listener believes the lie, and that Mr. Virk misled CP.

68. With respect to Citation 10, the Committee found that Mr. Virk failed to be candid with the LSA. It found Mr. Virk's denial of any sort of business relationship with GG to be untrue. It found Mr. Virk's denial of having ever met with BM to be untrue. It found Mr. Virk evasive with respect to providing documentation that he had in storage and that was sought in the investigation.

69. There was evidence to support those findings:

- GG testified about his interaction with Mr. Virk in the summer of 2009 and their discussions about setting up a new law firm as a joint venture. He said that the name of the firm was going to be VLG Lawyers. Mr. Virk wrote a cheque to GG for $5,000 with respect to the start up of the office. GG testified that Mr. Virk was at the office at least four or five times and met some clients. The association lasted about ten days.

- Mr. Virk initially denied having any formal arrangement and stated that he and GG never collaborated and worked together. He described it as a proposed collaboration. A few months after providing that information to the LSA investigator, Mr. Virk indicated that his relationship with GG lasted less than two weeks.

- Mr. Virk told the LSA investigators that his office had a cash receipt book in 2009 and a few months later stated that he could not recall whether there was a cash receipt book at that time. When later asked how he was recording cash receipts in 2009, Mr. Virk advised that he did not recall. He was not sure whether there was a cash receipt book and testified during the Merits Hearing that he did not look through his file boxes to determine if there was a cash receipt book for 2009.

- Mr. Virk was asked by the LSA investigators to provide his intake forms for client consultations in 2009. Mr. Virk asked whether there was any way that he could avoid doing that as the files were disorganized. Despite further requests by the LSA for information, Mr. Virk did not produce any consultation records for 2009.

- In a June 2016 interview, Mr. Virk advised the LSA investigators that he had a release form for notary public work that was kept from 2009 to the present. In September 2016, Mr. Virk told the investigators that the forms were disposed of after two years. In his testimony at the Merits Hearing, Mr. Virk indicated that in fact his firm still had the forms from 2009.

- In his September 9, 2016 interview, Mr. Virk told the LSA investigators that before he set up his own office, he would meet with private practice clients at [W], but it was very rare to meet with clients. However, after reviewing appointment schedules obtained from Mr. Virk's then assistant, it was apparent that there were quite frequent meetings with clients in the spring and summer of 2009.

70. The Committee's findings based on the credibility of witnesses are entitled to deference. The finding of the Committee that Mr. Virk failed to be candid with the LSA is supported by the evidence and demonstrates no error of principle or unreasonableness.

71. In summary, for the foregoing reasons, the Appeal Panel dismisses Mr. Virk's appeal respecting Citations 9 and 10. In specific response to the grounds of appeal for those Citations:

    a. The Committee noted the inconsistencies in the evidence and the lack of corroboration on some points. The Committee in fact found that the LSA had not proven one factual matter on a balance of probabilities where the Committee found that neither Mr. Virk's or BM's version of events was compelling. The Committee was free to accept the evidence of BM and GG over the evidence of Mr. Virk and that finding is entitled to significant deference by the Appeal Panel;

    b. For the reasons set out above with respect to Citation 3, the Committee did not err in finding that Mr. Virk misled CP when Mr. Virk untruthfully denied meeting BM.

Complaint C020170377

72. Mr. Virk appeals the finding of the Committee respecting Citation 15. He does not appeal the Committee's finding respecting Citation 14. Citation 16 was dismissed by the Committee. This citation arises from statements made by Mr. Virk to Justice L at the start of a trial of a family civil matter.

73. The parties had been ordered to produce all the documentation to be used at the trial by October 31, with the trial scheduled for February of the following year. Both parties produced documents after the deadline. At the opening of the trial, Mr. Virk produced a binder of documents that he wished to refer his client to during the client's testimony. In a discussion between counsel and the court, Mr. Virk asserted that all the documents in the binder had been previously produced. The complainant, opposing counsel, disagreed. She testified that thirty-two pages, out of many hundred pages, had not previously been produced. She characterized Mr. Virk's representation to the court as untrue.

74. In his Factum, Mr. Virk admits that he made a mistake in his opening remarks at the trial. However, he further submits that there is no evidence that the court was under any misapprehension as a result or that Mr. Virk's mistaken representation had any effect on the proceedings. Mr. Virk submits that he had at the time a sincere belief that his

representation was true and that at worst it was a "trivial or technical breach" that was not deserving of sanction.

75. The LSA submitted that Mr. Virk made an unequivocal statement of fact that was untrue. He therefore misled the court.

76. The LSA does not accept Mr. Virk's position that he simply misspoke when he said all of the documents had been previously produced and were not new documents. It points out that one of the new documents was an email between Mr. Virk and his client and another was a Demonstrative Exhibit, neither of which would have been seen by opposing counsel before their production. Further, in response to a question by his counsel as to why Mr. Virk told the judge they were not new documents, Mr. Virk replied that he was not intending to rely on the Demonstrative Exhibit as evidence, as something that would be tendered as a full exhibit, suggesting that the Demonstrative Exhibit was included in the binder to aid in the organization of the documents for the trial. Mr. Virk did not review the binder on the night of the opening day of trial to see whether his representation was true or not. There was no evidence that Mr. Virk ever advised the court that he needed to correct his misstatement. The LSA submits that Mr. Virk was wilfully blind in making his statement to the court.

77. The Committee found that Mr. Virk was cavalier with respect to his representation to Justice L. As officers of the court, lawyers owe a duty to the court to be meticulously honest and candid.

78. The Appeal Panel finds no error in the standard imposed by the Committee or in the application of the facts to that standard.

79. During the Merits Hearing, LSA counsel abandoned reliance upon evidence that statements within the reply to Notice to Admit Facts filed by Mr. Virk's client also formed a basis for a finding that Mr. Virk failed to be candid to the court. Mr. Virk submitted that as the Committee did not address the reply to Notice to Admit Facts in its reasons, and as that was one of two particulars put forward by the LSA in support of Citation 15, the Citation ought to have been dismissed.

80. The Appeal Panel agrees with the submissions of the LSA that it was unnecessary for the Committee to refer to the abandoned particular in its reasons. The failure to be candid with the court Citation was supported by the other evidence relating to the oral representation made to Justice L. It was unnecessary for the LSA to prove both particulars in order to prove guilt with respect to the Citation.[20]

81. In summary, for the foregoing reasons, the Appeal Panel dismisses Mr. Virk's appeal respecting Citation 15. In specific response to the grounds of appeal for that Citation:

    a. The Committee did not err in finding that the Citation for failing to be candid was proven on the evidence. The Committee was not required to find that both particulars of the Citation had to be proven in order to find Mr. Virk guilty of the Citation;

    b. The Committee made no error in principle in finding that Mr. Virk made a false statement to the court, thereby breaching his duty of "meticulous honesty and

[20] *Heming,* supra, paragraph 37.

candour." The Committee did not characterize Mr. Virk's false statement as an "overstatement." Similar to the findings respecting Mr. Virk's misleading statements to other lawyers, whether or not the court was under any misapprehension as a result of Mr. Virk's false statement is not relevant to whether or not Mr. Virk was candid with the court; and

c. The Committee did not impose an unreasonable standard of care to opening statements and preliminary applications of a trial. The standard imposed by the Committee, that of meticulous honesty and candour, was consistent with the submission of Mr. Virk's counsel that "judges have a right to presume that a lawyer's word is gold."

Complaints C020162785 and C020163049

82. Mr. Virk admitted guilt with respect to Citations 17 and 18.

Complaints C020171398

83. Mr. Virk appeals the finding of the Committee respecting Citation 19. Citation 20 was dismissed by the Committee. Citation 19 arises with respect to an undertaking given by Mr. Virk to the LSA in connection with articling students.

84. In the spring of 2016, a student, SL, submitted an articling application to the LSA in which she asked that Mr. Virk be appointed as her principal. The LSA had some concerns because Mr. Virk had been the subject of previous disciplinary proceedings, the subject of several client service type complaints and had been dealing with the Practice Review Committee. The LSA was concerned that Mr. Virk would be stretched too thin if he had more than one student at a time. The LSA and Mr. Virk agreed that he could take on an articling student subject to a number of conditions. One of the conditions was that Mr. Virk provide an undertaking "to not apply to have two concurrent articling students," with three exceptions, the third of which was before "first seeking and receiving leave from this undertaking."

85. As a result, Mr. Virk told SL that he could no longer take her on as an articling student but he would try to find a principal for her. SL had previously worked with DB, a lawyer at another firm. Mr. Virk contacted DB and he agreed to take on the role as SL's principal on the understanding that Mr. Virk would pay SL's salary, her LSA fees and her CPLED course registration charges. In addition, SL would have a home base in Mr. Virk's offices until such time as DB had space in his office.

86. For about the first three months of SL's articles, DB acted as her principal and provided the mentorship and guidance that one would expect of a principal. The majority of SL's work came from Mr. Virk or others at Mr. Virk's firm. The expansion space anticipated to come open at DB's offices did not materialize. A senior lawyer, JM, joined Mr. Virk's office and SL's articles were transferred from DB to JM about three months into the articling term. JM testified that he viewed himself as SL's principal and that he provided a level of mentorship to her. The Committee was satisfied that both DB and JM adequately discharged the responsibilities of a principal to SL.

87. Mr. Virk maintained all financial responsibility for SL and provided the bulk of her work. The foregoing facts respecting SL's articles with DB and JM, and the involvement of Mr. Virk, were not disclosed to the LSA.

88. Mr. Virk submits that he did not breach his undertaking as he never applied to be the principal for two students and never was the principal for two students during the period in question. He did not give an undertaking that in any way restricted the number of students in his office or to whom he provided work. DB and JM were not sham principals, as suggested by the LSA, as the Committee found that they were adequate principals. Mr. Virk submits that the Committee erred in interpreting the "substance" of the undertaking as restricting Mr. Virk to have only one student in place in his office.

89. The LSA submitted that the discussions between it and Mr. Virk that led to his undertaking showed that the intention was to limit Mr. Virk to the supervision of one student. The exception was for a two-month period where the articles of two students would overlap. Eighty percent of SL's work was on files for which Mr. Virk was her supervisor. The LSA submits that the Committee's conclusion that the arrangement between Mr. Virk and SL, although her principal was not Mr. Virk, ran contrary to the substance of the undertaking was reasonable.

90. Rule 7.2-14 of the Code provides:

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

The commentary to that section provides that undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. It further provides that trust conditions should be clear, unambiguous and explicit. Those qualities apply equally to undertakings and in the Appeal Panel's view are intended to preclude an undertaking or trust condition being open to interpretation.

91. The Committee found that the reason for Mr. Virk's undertaking was to limit his supervision to one student. It found that Mr. Virk's supervision of and delegation of work to SL, although her principal was not Mr. Virk, undermined "the rationale for the undertaking." Having a second student would not allow Mr. Virk to provide appropriate and adequate supervision, guidance, and mentorship. There is no evidence that in fact that resulted.

92. The undertaking prohibits an application by Mr. Virk for a second student. He made no such application. The undertaking requested by the LSA could have restricted the ability of Mr. Virk to work extensively with or to supervise another student while he was the principal to another student. It does not appear that the LSA sought such an undertaking and none was given by Mr. Virk. While it may have been preferable for Mr. Virk to have discussed the proposed arrangements regarding SL, DB and JM with the LSA, his failure to do so did not result in a breach of the undertaking he gave. The Appeal Panel expresses no view as to whether Mr. Virk's conduct may have supported a different citation.

93. A finding that a lawyer breached an undertaking should not depend upon an interpretation of the undertaking by the lawyer who gave it, the person to whom it was given or the hearing committee reviewing whether or not the undertaking was met. The Appeal Panel finds that the Committee erred in finding that Mr. Virk breached his undertaking.

94. In summary, the Appeal Panel dismisses Citation 19, finding that it was not proven on the evidence.

Summary Respecting the Findings of Misconduct

95. In summary, Mr. Virk has been found guilty or has admitted guilt with respect to the following Citations, with the nature of the misconduct summarized broadly by characterization:

    1) Sustained on appeal – acting in a conflict of interest;

    2) Proven and not appealed – failing to be candid with his client;

    3) Sustained on appeal – misleading another lawyer by lying to him;

    4) Proven and not appealed – failing to be candid with the court;

    5) Proven and not appealed – failing to be candid with the LSA – governability;

    6) Admitted – failing to cooperate with the LSA's investigation – governability;

    9) Sustained on appeal – misleading another lawyer by lying to him;

    10) Sustained on appeal – failing to be candid with the LSA – governability;

    11) (Including 13) Admitted – failing to serve his client and properly account to his client;

    12) Admitted – failing to attend to the finalization of a court order in a timely manner;

    14) Proven and not appealed – failing to fulfill an undertaking;

    15) Sustained on appeal – failing to be candid with the court by making a false representation;

    17) Admitted – failing to serve his client; and

    18) Admitted – failing to attend to the finalization of court orders in a timely manner.

96. The Appeal Panel has upheld all of the findings of guilt made by the Committee, with the exception of Citation 19, which the Appeal Panel has dismissed. The Appeal Panel finds the dismissal of Citation 19 does not in and of itself render the Sanction Decision manifestly excessive or demonstrably unfit. The issue of whether disbarment is a demonstrably unfit sanction must be weighed against the 14 instances of unprofessional conduct that have either been proven or admitted.

The Appeal of the Sanction

97. LSA counsel submitted that Mr. Virk's misconduct merited disbarment. The conduct related to seven separate and unrelated complaints (although with the dismissal of Citation 19, six complaints had findings or admissions of unprofessional conduct) and involved matters of integrity, professional obligations in the course of file handling, and governability obligations with respect to Mr. Virk's duties to the LSA. Mr. Virk's counsel argued that the appropriate sanction was a suspension in the range of twelve to twenty-four months. Mr. Virk's counsel urged that consideration be given to the previously

undiagnosed mental conditions disclosed during the Sanction Hearing and that a suspension would allow Mr. Virk to deal with treatment.

98. The Committee placed significance on the number of complaints over an extended period of time and summarized the misconduct as follows at paragraph 24 of the Sanction Decision:

> In this case, Virk's conduct runs the gamut from lacking integrity, failing to serve clients, acting with impropriety concerning his fellow lawyers and their clients, and failing to cooperate with his governing body where he was mandated to do so. Short of stealing other people's property, there is not much more that Virk could have done wrong.

99. The Committee described the medical evidence adduced in the Sanction Hearing as a "new factor" and considered it. The Committee accepted that the mental disorder would have some bearing on the misconduct but held that it had little or no bearing on Mr. Virk's ability to tell the truth or his ability to understand and appreciate the consequences of his professional obligations to his clients, to other lawyers and their clients, to the courts and to the LSA. The Committee held that it was not persuaded on the evidence that there was a causal or contributory connection between Mr. Virk's mental disorder and any of his misconduct and "particularly the more serious aspects such as the integrity-related breaches and ungovernability."[21] The Committee rejected the evidence of mental disorder as a mitigating factor such that the otherwise appropriate sanction ought to be reduced.

100. The Committee noted that the purpose of disciplinary proceedings is not to punish offenders but rather is to protect the public, to maintain high professional standards and to preserve the public's confidence in the legal profession. It noted Mr. Virk had previously been subject to a short suspension relating to failures to serve his clients properly.

101. The Committee considered a suspension and expressly rejected that as an appropriate remedy that would adequately protect the LSA, the public and the profession.

102. Mr. Virk submits that his disbarment is a demonstrably unfit sanction on four grounds.

1) <u>Insufficient Reasons</u>

103. As stated in *Moll* and *Ramos*, assessment of the sufficiency of reasons should not be done in a vacuum. The reasons of the Committee demonstrate that it was alive to the issues and the arguments of the parties. In *Ryan*,[22] the Supreme Court of Canada stated:

> A decision will unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

104. The Committee's Sanction Decision is brief, but it must be read with the previous decision on the merits that sets out the Committee's findings with respect the

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[21] Sanction Decision, paragraph 32.
[22] *Ryan*, supra, paragraph 55.

sanctionable conduct. The Sanction Decision clearly demonstrates that the Committee was alive to:

- The competing submissions of a very lengthy suspension versus a disbarment;
- The impact of the evidence concerning Mr. Virk's mental health conditions;
- The instances and nature of the conduct deserving of sanction;
- The purpose of the LSA disciplinary proceedings and sanctioning process;
- The importance of protecting the public and the integrity of the profession;
- Whether Mr. Virk would be a successful candidate for rehabilitation;
- Whether there was a causal connection between Mr. Virk's mental condition and his misconduct; and
- The impact of Mr. Virk's prior discipline record.

105. The Committee expressly found that it did not believe a suspension would adequately protect the LSA, the public and profession. The Committee also placed emphasis on the general deterrent effect of the sanction. The Appeal Panel finds that the reasons of the Committee are sufficient and demonstrate a reasonable analysis supporting the conclusions reached on the evidence.

2) Disbarment is a Disproportionate Sentence

106. Mr. Virk submits that other lawyers have lied, or have breached undertakings, or have had multiple complaints, and have not been disbarred, all of which is correct. He cites several cases involving Alberta lawyers that involved lying and in which the sanction was a suspension.[23] The facts in all of those cases are clearly distinguishable from the facts here. The number of Citations and the nature of the Citations in this case are not comparable to those in the cases cited by Mr. Virk.

107. In previous reasons of a Bencher appeal panel in an appeal by Mr. Virk, the panel stated:

> Although it is the case that a hearing committee must consider whether a contemplated sanction falls within an acceptable range of sanctions, it is also the case that:
>
> > Although most participants in the discipline process might agree that similar penalties should be imposed for similar cases of misconduct, the penalties imposed for similar misconduct differ widely, both within and among jurisdictions. This is largely due to the fact that one of the main purposes of the process is to protect the public. It may be entirely appropriate that a lawyer who is proven to

[23] *Law Society of Alberta v. Forsythe-Nicholson*, 2010 ABLS 7; *Law Society of Alberta v. Gerald Smith*, 2007 LSA 24; *Law Society of Alberta v. Shustov*, 2014 ABLS 28; *Law Society of Alberta v. Magnan*, 2014 ABLS 24; *Law Society of Alberta v. Chhoker*, 2017 ABLS 4; and *Law Society of Alberta v. McKay*, 2016 ABLS 34.

> be incorrigible be disbarred for the same conduct for which a different lawyer is reprimanded if the disciple hearing panel is reasonably satisfied that the likelihood of recurrence is minimal in the latter case.
>
> G. MacKenzie in Lawyers & Ethics: Professional Responsibility and Discipline, looseleaf ed. (1993 as updated).

> It is for this reason, and because a hearing committee is in the best position to determine what is a just and appropriate sanction in all the circumstances, that the discretion of the hearing committee cannot be interfered with lightly.[24]

108. The Appeal Panel finds the following statement from *Ryan* to be applicable to Mr. Virk's criticism of the Committee's reasons:

> Applying a somewhat probing examination of the Discipline Committee's analysis and decision, I find that the reasons given by the Committee, taken as a whole, are tenable, grounded in the evidence, and supporting of disbarment as the choice of sanction. There is nothing unreasonable about the Discipline Committee choosing to ban a member from practicing law when his conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions. [25]

109. The LSA cited a number of cases in which Alberta lawyers were disbarred and in which misappropriation was not found.[26] Again, the facts in those cases are distinguishable from the ones here. However, two of the cases in particular in which disbarment was found contain features similar to those in this case.

110. In *Skrypichayko,* the member faced 19 citations. After the start of the hearing, Mr. Skrypichayko provided a statement of admitted facts and admissions of guilt to citations 1-17. After hearing and considering the evidence, the hearing committee found Mr. Skrypichayko guilty with respect to citations 18-19. The hearing committee found that Mr. Skrypichayko's conduct demonstrated "a wholesale lack of integrity" and that he was ungovernable. He had failed to represent his client's interests, failed to communicate, failed to account, failed to handle trust money properly, failed to follow clear and simple rules and laws, hurled accusations at clients rather than responding meaningfully to complaints, flouted and attempted to subvert the investigation processes of his regulator, created false evidence both before and at the hearing, and practised law while suspended. Mr. Skrypichayko was disbarred.

111. In *Ewasiuk*, the member was convicted of 20 citations. The member's counsel grouped the citations into four categories: Law Society related (including failure to cooperate); failing to serve clients diligently; misleading a client; and ungovernability. Mr. Ewasiuk was called to the bar in 1980 and had been found guilty of professional misconduct

[24] *Law Society of Alberta v. Virk*, 2014 ABLS 51, paragraphs 44-45.
[25] *Ryan*, supra, paragraph 59.
[26] *Adams v. Law Society of Alberta*, 2000 ABCA 240; *Law Society of Alberta v. Skrypichayko*, 2016 ABLS 57; *Law Society of Alberta v. Clarence Ewasiuk*, 2012 ABLS 16; *Law Society of Alberta v. Ouellette*, 2016 ABLS 53; and *Law Society of Alberta v. Magnan*, 2015 ABLS 17.

earlier, in 1990 and again in 2003. The penalty in each instance was a small fine and the payment of hearing costs. The hearing committee found that Mr. Ewasiuk had lied to and misled both his clients and the Law Society. He concocted phoney settlement schemes and failed to cooperate with the Law Society's investigation. There was some evidence of a depressive illness affecting Mr. Ewasiuk that the hearing committee dealt with as follows:

> Even though the Member's misconduct may have been influenced by poor judgment with a causal connection to some depressive disorder, that state of mind is very far from satisfying the "but for" test.[27]

112. The hearing committee in *Ewasiuk* went on to state[28]

> The evidence has fallen short of persuading us that the Member's past misconduct is mitigated because it was due to incompetence due to mental disorder (whether expressed as major depressive state or as something else going on), as at the currency of these deceptions and recognized by the Member and untreated medically or psychiatrically.
>
> Nor are we persuaded that the Member's present state of remission or his ongoing treatment regimen will prevent future integrity-related breaches. The evidence did not explain how the medication and current stability in the Member's life would make him honest and trustworthy. We cannot speculate on this.

113. The hearing committee found that Mr. Ewasiuk's very difficult personal situations neither explained or excused his lying and deceit. The committee found the misconduct arose because Mr. Ewasiuk's character was compromised. His misconduct was integrity-related and not due to illness. The committee held that the denunciation of the misconduct required disbarment, not a period of suspension.

114. The Appeal Panel finds no basis to conclude that the Committee applied erroneous principles or that the sanction of disbarment is clearly manifestly excessive in all of the circumstances.

3) <u>Failure to Adequately Attribute Medical Evidence Received in Mitigation</u>

115. The Committee considered the evidence of Dr. CE called during the Sanction Hearing, including his report of November 18, 2019. The Committee noted the view of Dr. CE that on a balance of probabilities there was at least in part a connection between Mr. Virk's misconduct and the mental health diagnosis of [mental health issue]. Dr. CE was of the opinion that the connection was sufficiently close to suggest that the [mental health issue] materially contributed to the conduct under discussion. However, the Committee held that it was not persuaded on the evidence that there was a causal or contributory connection between Mr. Virk's mental disorder and any of his misconduct, particularly the more serious aspects such as the integrity-related breaches and ungovernability. The Committee found that the mental health disorder had little or no bearing on

[27] *Ewasiuk*, supra, paragraph 630.
[28] *Ewasiuk*, supra, paragraphs 634 – 635.

Mr. Virk's ability to the tell the truth or his ability to understand and appreciate the consequences of his professional obligations to his clients, to fellow lawyers, to the courts and to the LSA.

116. That finding is also significant with respect to Mr. Virk's disproportionate sentence argument. His counsel, in submissions at the Sanction Hearing, stated that Mr. Virk's conduct "falls short of disbarment here primarily because of the recent medical diagnosis."[29] The Committee did not find the medical evidence to be a significant factor in mitigation.

117. The Committee's assessment of Dr. CE's evidence and the weight to be given to it is entitled to deference. The evidence of Dr. CE must be considered in its entirety. Dr. CE stated in his report (Exhibit L):

> …the diagnosis of [mental health issue] does not provide an exhaustive or complete explanation for the conduct under discussion. Despite the material contribution, the writer is unable to suggest that Mr. Virk lacked the capacity to change his behaviour if he so chose. As the determinants of behaviour are typically complex and multi-factorial in nature, the writer is unable to support the notion that but for the [mental health issue], Mr. Virk would not have engaged in the conduct under discussion. …the writer did not find sufficient evidence to suggest that Mr. Virk's symptoms (related to the [mental health issue], and at the time of the alleged conduct) were impairing to a degree that he could not appreciate the quality and nature of his conduct (or omissions) or that he could not appreciate that such conduct might fall outside the required code of conduct. The writer also did not find evidence to suggest that Mr. Virk did not understand his professional obligations, or that he did not understand the potential consequences of his conduct. On cross-examination, Dr. CE confirmed the following:

- He could not say that Mr. Virk would not have engaged in the deceptive misconduct if he did not have the disorder;[30]
- He could not say whether, even if under treatment for his [mental health issue] and maladaptive personality traits, Mr. Virk would not continue to engage in deceptive behaviour;[31]
- Deceptive behaviour is not included as part of the diagnostic criteria for [mental health issue];[32]
- In every case where Mr. Virk was faced with a situation of where he could either tell the truth or lie but chose to lie, he did so with free will and volition.[33] The diagnostic criteria of [mental health issue] does not include loss of memory.[34] The diagnostic

[29] Hearing Transcript, page 1071, lines 19-25.
[30] Hearing Transcript, page 1119, lines 8-14.
[31] Hearing Transcript, page 1119, lines 15-21.
[32] Hearing Transcript, page 1119, lines 22-25.
[33] Hearing Transcript, page 1121, lines 18-21.
[34] Hearing Transcript, page 1124, line 25 - page 1125, line 1.

criteria for a major [mental health issue] episode does speak to a potential diminished ability to think or concentrate but not to complete loss of memory;[35]

- Mr. Virk advised him that he had never had to take time off from work for medical issues, that his [mental health issue] episodes were not prolonged and that he had no difficulty whatsoever with forgetfulness or memory problems;[36] and

- There is no evidence of a measurable impairment in memory and attention while he was meeting with Mr. Virk.[37]

118. In response to questions from the Committee, Dr. CE further confirmed that Mr. Virk's scores under the structured inventory of malingering symptomology were suggestive of potential feigning of memory difficulties.[38]

119. A Law of Society of Ontario hearing panel recently considered similar issues.[39] A lawyer, Khan, submitted several false or misleading billings to Legal Aid Ontario and created false invoices that purported to be from third-party service providers for services billed to Legal Aid Ontario. The submission of the false invoices occurred over many months and the false time billings occurred over a period of about two years. Khan had no prior disciplinary record. Khan was charged and pleaded guilty to uttering forged documents.

120. Khan led evidence that he had undiagnosed ADHD and depression at the time of his misconduct. Khan submitted that he had not committed professional misconduct because his conduct was caused or affected by a mental illness. The panel rejected that submission, finding that Khan had not demonstrated a causal link between his mental illness and the commission of the misconduct. In the sanction phase, the panel went on to consider the effect of the mental health evidence as a mitigating factor. The panel noted at paragraph 7:

> There is no case thus far in which a presumptive penalty of revocation for calculated, repeated, dishonest conduct of the kind that we described earlier has been mitigated by the existence of mental illness that bore no causal link to that conduct.

121. The panel noted that there were several decisions in which panels found exceptional circumstances where the causal link was not completely rejected. However, in those cases, the professional status was terminated not through revocation but through permission to surrender the licence.

122. The panel in *Khan* went on to state at paragraph 91:

> Mr. Khan's medical circumstances, considered in conjunction with his flagrant and fraudulent actions that took place independently, do not permit us to alleviate the penalty of revocation. Taken together with the other mitigating and aggravating circumstances, it is not obvious to us, and we believe it would not be obvious to other licensees and the public, that this is an individual whose continued licence would maintain confidence in the integrity of the

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[35] Hearing Transcript, page 1125, lines 2-8.
[36] Hearing Transcript, page 1125, line 9 – page 1126, line 22.
[37] Hearing Transcript, page 1127, lines 2-14.
[38] Hearing Transcript, page 1138, line 8 – page 1139, line 8.
[39] *Law Society of Ontario v. Khan*, 2018 ONLSTH 131.

profession and its self-regulation by the Law Society. Stripped to its essentials, a reasonably informed observer would not regard mental illness causing a significant ethical failure A (a disorganized practice) to alleviate the public interest implications of much more serious conduct, intentional misbehaviour B (dishonesty and fabrication).

123. The Appeal Panel finds that the Committee's conclusions with respect to the applicability of and weight to be given to the medical evidence to the issue of sanction were reasonable and show no error of principle or law.

4) Failure to consider other factors in rehabilitation and mitigation

124. The LSA Hearing Guide sets out a number of general factors to be taken into account in deciding sanction:

a. The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

b. Specific deterrence of the member in further misconduct.

c. Incapacitation of the member (through disbarment or suspension).

d. General deterrence of other members.

e. The denunciation of the conduct.

f. Rehabilitation of the member.

g. Avoiding undue disparity with the sanctions imposed in other cases.

125. The Hearing Guide emphasizes that each of the foregoing factors is connected to the two primary purposes of the sanctioning process: (i) protection of the public; and (ii) maintaining confidence in the legal profession.

126. The Hearing Guide sets out more specific factors including: the nature of the conduct; the level of intent; the impact or injury caused by the conduct; the number of incidents involved; and the length of time involved.

127. The Hearing Guide also sets out what it describes as "special circumstances" that may be aggravating or mitigating, including the following: prior discipline records; risk of recurrence, member's reaction to the discipline process (guilty pleas or refusals to acknowledge wrongdoing); length of time the lawyer has been in practice; a dishonest or selfish motive; personal or emotional problems; physical or mental disability or impairment; interim rehabilitation; and remorse.

128. Mr. Virk submits that the Committee failed to review the evidence of factors that may have mitigated the sanction and to further provide reasons with respect to that consideration.

129. The Sanction Decision does not articulate in any detail the evidence that Mr. Virk submits ought to have been considered as mitigating factors. The Sanction Decision does reflect consideration of certain factors: some of the misconduct resulted in harm

and inconvenience to others; there were a number of occurrences arising from a number of complaints over an extended period of time; the evidence of a mental health disorder; whether Mr. Virk will be a successful candidate for rehabilitation of his mental disorder; and there was a prior discipline record.

130. Mr. Virk submits that the following circumstances ought to have been considered by the Committee and addressed in the Sanction Decision:

a. Virk successfully completed Practice Review;

b. Virk entered pleas of guilt in advance of the Merits Hearing to several citations [while Mr. Virk admitted five citations, he contested fourteen citations and was found guilty on nine of them];

c. There was an absence of "client harm" in the "integrity" complaints which he faced [although this ignores the harm to the reputation of the profession caused by integrity offences];

d. Little evidence of practical consequences of Mr. Virk's misconduct;

e. The absence of any financial gain for Mr. Virk through his misconduct;

f. His age;

g. Other lawyers involved in the hearing considered Mr. Virk to be a capable lawyer;

h. Mr. Virk was seeking senior help with respect to his practice while he was incapacitated;

i. His practice supported other lawyers, students and staff; and

j. His practice was evolving from the time of the complaints to the time of the Merits Hearing.

131. The Appeal Panel views the above submission to be substantially a criticism of the reasons, or lack of reasons, in this area in the Sanction Decision. Having regard to the seriousness of Mr. Virk's misconduct, as found by the Committee, the factors above cannot in the view of the Appeal Panel provide justification to impose a lengthy suspension where otherwise a disbarment would be appropriate.

132. The Alberta Court of Appeal has stated:

> A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.[40]

[40] *Adams v. Law Society of Alberta*, 2000 ABCA 240, paragraph 6.

133. The Committee placed emphasis on the general deterrence impact of the sanction and the assurance to the public that the profession places "integrity over self-interest.[41]

134. That focus by the Committee is supported by the court's reasons in *Adams*[42]:

> While it may be difficult to measure with precision the harm that a lawyer's misconduct may have on the reputation of the profession, there can be little doubt that public confidence in the administration of justice and trust in the legal profession will be eroded by disreputable conduct of an individual lawyer.
>
> It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that proposition has been rejected in criminal cases for the same reasons it should be rejected here. It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers.

135. The Appeal Panel agrees with the Committee's conclusion that disbarment is the appropriate sanction. The Appeal Panel does not find disbarment in all of the circumstances and on the hearing record to be manifestly excessive or demonstrably unfit.

Summary

136. The findings of the Committee regarding Mr. Virk's professional misconduct are confirmed, with the exception of Citation 19, which the Appeal Panel dismisses. The Appeal Panel dismisses Mr. Virk's appeal regarding sanction and confirms the Order for Disbarment.

137. Given the dismissal of Mr. Virk's Appeal, the LSA is entitled to its costs in this appeal, payable within three months of this written decision. LSA counsel will prepare a Statement of Costs and will send it to the Chair for review and approval within one week of this written decision. The parties may make brief submissions regarding costs within one month of this written decision.

138. The record and other hearing materials, and this report will be available for public inspection, including providing copies of Exhibits for a reasonable copy fee, although redactions will be made to preserve personal information, client confidentiality and solicitor/client privilege pursuant to Rule 98(3) of the Rules of the LSA.

Dated at Calgary, Alberta, June 1, 2021.

[41] Sanction Decision, paragraph 34.
[42] *Adams*, supra, paragraphs 10 - 11.

Ken Warren, QC

Ryan Anderson, QC

Bill Hendsbee, QC

Walter Pavlic, QC

Lou Pesta, QC

Reasons for Dissent

(Reasons for the dissent, Jim Lutz, QC; Cora Voyageur concurring)

139. We have read the decision of the majority of the Appeal Panel members (the Majority). We agree with the Majority on the reasons and decision regarding the Fresh Evidence Application. We do not agree with their conclusion on all of the citations, nor do we agree with the sanction imposed by the Committee.

140. The Majority dismissed the finding of guilt on citation 19, the breach of undertaking of May 12, 2016, having found it to be unreasonable. We agree, and therefore will not address that citation in detail.

Preliminary Matters

141. We agree that the Appeal Panel had jurisdiction to conduct the hearing on November 23, 2020 in accordance with the Jurisdictional Document Exhibits Binder of the Law Society of Alberta, Tabs 1-11. No objection was stated by the parties.

Background to Appeal

142. The Committee found Mr. Virk guilty of citations for failures to serve clients, being dishonest with other lawyers, his regulator (failing to cooperate during an investigation) and the Court and failing to adhere to undertakings[43].

143. Mr. Virk's oral submissions were based largely on his written submissions. He argues that the Committee should not have found him guilty of citations 1, 3, 9, 10, 15 and 19 in the Merits Decision of September 9, 2019.

[43] Virk Factum, paragraph 1.

144. Mr. Virk further argues these citations for misconduct do not merit the ultimate punishment - disbarment for the member - as ordered by the Committee in its Sanction Decision. Such severe punishment creates unreasonable disparity when compared with sanctions imposed in comparable cases.[44] Counsel for the LSA urged deference to the Committee's findings and that the reviewing body should go beyond simply looking at the reasons given: "Inferences can be drawn by the Court that were not necessarily articulated by the tribunal."[45]

Standard of Review

145. We agree with the parties and the Majority that the appropriate standard of review is cited in *Yee*[46]. A reasonableness standard applies to questions of mixed law and fact, such that we may only interfere with the sanction decision if it is demonstrably unfit, based on errors in principle or not reasonably sustainable. The standard of review is noted in the authorities of the LSA: "there is only one civil standard of proof at common law. This is proof on a balance of probabilities."[47]It is not open to the Appeal Panel to substitute their view of what the Committee ought to have decided.

Review of Hearing Committee Findings on the Merits

Citation 1 – The J.K. Citations

146. Mr. Virk falsely denied having a sexual relationship with a litigant in an action where he acted for the opposing party, then lied to opposing counsel when confronted with the particulars of the relationship.

147. The Committee found no conflict of interest within the meaning of *R. v. Neil*[48] and *MacDonald Estate v. Martin*[49] in relation to P.Q., the person with whom Mr. Virk had a sexual relationship.[50]

148. The Committee nonetheless held "we do view the truth, or more importantly the failure to tell the truth to his own client, creates a conflict". The failure to tell the truth to his own client was held to create a conflict.[51]

149. The reasoning of the Committee is unclear. We acknowledge, as stated by the LSA counsel, the Code envisions alternate means by which the Committee could reach its conclusion. The Committee held that withholding information of this sexual relationship potentially deprived J.K. of the ability to make decisions based on accurate information, because Mr. Virk was not candid with his client. This accorded with LSA counsel's description of conflict: "it's a broader piece preferring his own interests. His interests may be in conflict, the secretive nature of them, versus having the information out to support [J.K.'s] case."[52]

150. Whether an actual conflict existed is speculative and raises more questions. J.K.'s testimony at the hearing reflected his belief that Mr. Virk always acted in his best

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[44] Virk Factum, pararagraphs 2-3
[45] LSA Factum, page 5, paragraph 15.
[46] *Yee,* supra, paragraph 35.
[47] *F.H. v. McDougall*, supra, paragraph 40 and *Moll,* supra, paragraph 22.
[48] *R. v. Neil,* 2002 SCC 70.
[49] *MacDonald Estate v. Martin,* 1990 CanLII 32.
[50] Hearing Decision, paragraph 50.
[51] Hearing Decision, paragraph 51.
[52] Hearing Transcript, page 953, line 22-26.

interest. Mr. Virk's prior relationship with P.Q. aligned his interest to that of J.K. There was no evidence before the Committee to indicate Mr. Virk put his own interest before those of J.K. The prior relationship with P.Q. was purely coincidental, and as the interests of Virk and J.K. aligned there would then be no conflict.

151. The record before the Committee reflects Mr. Virk's handling of P.Q. as consistent with his role as J.K.'s counsel, and nothing more would be expected of him.[53]

152. The Committee's interpretation of "conflict" stretches the definition beyond what conduct was intended to be covered in the citation.[54]

153. A review of Rule 3.4 of the Code and related commentaries do not support the Committee's reasons for finding a conflict on these facts.

154. Courts have consistently held that a fair hearing can only be had if the parties affected by the Tribunal's decision know the case to be made against them; only then can they rebut evidence prejudicial to their case and bring evidence to prove their position.[55] Procedural fairness in a criminal or quasi criminal proceeding accords with section 7 and 11(d) of the *Canadian Charter of Rights and Freedom*[56]

155. It would be unfair to find Mr. Virk guilty of a different citation than the one charged, especially given that the facts are the same as those he pleaded guilty to in citation 2. The Hearing Decision was unreasonable in finding Mr. Virk guilty of a strained and incorrect definition of conflict on citation 1 that more resembles what he already admitted in the duty of conduct breach in Citation 2.

156. The problem is twofold. First, one cannot marshal a defence against conflict of interest under Rule 3.4-1 of the Code with notice to defend an allegation based on Rule 3.2-3. That is unfair to Mr. Virk. Second, Mr. Virk previously admitted breaching Rule 3.2-3 of the Code by failing to be candid with J.K. on the basis of the same facts under Citation 2. The delict of both citations is exactly the same. Simply put, the Committee incorrectly found Mr. Virk was in conflict on Citation 1 based on the evidence before them in relation to another citation. This is unreasonable and an appeal of Citation 1 should be allowed.

157. The Committee also erred in its credibility assessment by relying on Mr. Virk's refusal to be further interviewed or produce documentation to bolster his evidence.[57]. While there may be consequences of not co-operating, silence is a neutral factor in this context. It cannot be used to prove or disprove credibility.

Citation 3

158. We would dismiss Mr. Virk's appeal on Citation 3, which turned on Mr. Virk's attempt to mislead N.W. The fact N.W. testified he was not misled as a consequence of Mr. Virk lying to him is irrelevant. The conduct itself is prohibited regardless of the result. This finding of the Committee should be maintained.

Citations 4 & 5

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[53] Hearing Transcript, page 136, lines 19-27 to page 137, lines 1-24.
[54] Hearing Transcript, page 945, lines 5-10.
[55] *Principles of Administrative Law*, Fourth Edition by David Jones and Anita de Villars, Q. C. (Toronto: Carswell 2004) page 292.
[56] *R. v. McFie,* 2018 ABPC 283, paragraph 22.
[57] Hearing Decision, paragraph 58.

159. We would also dismiss Mr. Virk's appeal on Citations 4 and 5. His lack of candor before Justice B and his false denial of a sexual relationship with P.Q. constitute prohibited conduct, even absent any material consequence arising from his falsehood. His evasiveness with the LSA is also prohibited. The Committee's finding should be maintained.

Citation 9

160. The Committee found Mr. Virk violated the prohibition against misleading statements in his dealings with C.P. The Committee's analysis on this count mirrors its decision in Citation 1 and suffers the same flaws. Mr. Virk's denial of having met B.M. could not reasonably be interpreted as a conflict.

161. Another flaw in the Committee's ruling is that the citation specifically alleges C.P. was misled. C.P. did not testify so there was no evidence he was misled (Hearing Decision, paragraph 94). Conflict misconduct should not be strained and interpreted to encompass the prohibition involving misleading statements. For the same reasons as Citation 1, that the Committee's interpretation of "conflict" stretches the definition beyond what conduct was intended to be covered in the citation, the appeal of the Committee's finding of guilt should be allowed.

Citation 10

162. Citation 10 deals with Mr. Virk's lack of candor to the LSA concerning his business dealings with G.G. and relationship with B.M. The Committee heard evidence and assessed credibility. Their findings are entitled to deference and their finding of guilt should be maintained.

Citation 14

163. This citation is the failure to pay $126.00 for a transcript as part of an undertaking by Mr. Virk in a domestic matter. The Committee's comments in paragraph 98 of the Hearing Decision are apropos. The finding of guilt should be maintained on Citation 14.

Citation 15

164. The failure to be candid with Justice L concerning documentary evidence that Mr. Virk assumed was previously disclosed was characterized in his submissions as an oversight. Counsel for the LSA argued regardless of whether this was an oversight, Mr. Virk failed to take any steps to correct this misapprehension, which is what was is required under Rule 5.1-5(b) of the Code.

165. Whether this was an oversight left uncorrected or tactical or dishonest conduct, Mr. Virk had a duty to correct this misapprehension. He failed to do so. The Committee's decision is entitled to deference and should be maintained.

Citation 19

166. For the reasons set out by the Majority, the appeal from the Committee's finding of guilt must be allowed.

Summary

167. To summarize Mr. Virk in our view is guilty or admitted guilt to the following citations:

Citation 2	Failure to be candid with J.K. – guilt was admitted
Citation 3	Misleading N.W.
Citation 4	Failure to be candid with Justice B
Citation 5	Failure to be candid with the LSA
Citation 6	Failure to cooperate with the LSA – guilt was admitted
Citation 10	Failure to be candid with the LSA
Citation 11	Failure to serve and properly account to his client – guilt admitted
Citation 12	Failure to attend and finalize a Court order in a timely manner – guilt admitted
Citation 14	Failure to fulfill undertaking
Citation 15	Failure to be candid with the Court
Citation 17	Failure to serve his client – guilt admitted
Citation 18	Failure to attend to the finalization of a Court Order – guilt admitted

Review of Hearing Committee Decision on Sanction

168. The Sanction Hearing took place on December 17, 2019. Dr. CE testified on behalf of Mr. Virk. Counsel for Mr. Virk sought a lengthy suspension. Counsel for the LSA sought disbarment.

169. Mr. Virk's only prior disciplinary matter was for failing to serve a client properly, which resulted in a short suspension (Sanction Hearing Decision, paragraph 33).

Standard of Review

170. The standard of review requires deference be given to the Committee's decision. It is only appropriate for the Appeal Panel to interfere with a sanction where a material error occurred that impacted the sanction or where the sanction is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. The Appeal Panel is not entitled to interfere simply because it would have weighted the relevant sentencing objectives and factors differently and imposed a different sanction.[58]

171. Chief Justice Fraser in *Moll*[59] writes:

> Assessing the sufficiency of reasons should be done having regard to the three purposes that reasons serve: (1) to tell the parties why a decision was made; (2) to provide public accountability for that decision; and (3) to permit effective appellate review: ***R.E.M.,*** supra, para. 11. However, reasons are not to be read in a vacuum but rather in context: ***Walsh v. Council for Licensed Practical Nurses***, 2010 NLCA 11; 295 Nfld. & P.E.I.R. 222 at para. 28. That context necessarily includes the totality of the evidence led during the proceedings, the issues

[58] *R. v. Aguilera Jimenez,* 2020 YKCA 5, paragraphs 24-27.
[59] *Moll,* supra*,* paragraph 33.

> raised, and the arguments advanced in counsels ' submissions: ***R.E.M.**,* supra, at para. 17; and ***Johnston v. Alberta (Energy and Utilities Board)*** (1997), 1997 ABCA 265 (CanLII), 200 A.R. 321, 1 Admin. L.R. (3d) 241 (C.A.), at para. 10.

172. Similarly, in the seminal decision of *Baker v. Canada (Minister of Citizenship and Immigration)*[60], the Supreme Court held:

> It is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

173. *In R. v. Sheppard*[61]*,* the importance of providing reasons was stressed as follows:

> There is a general sense in which a duty to give reasons may be said to be owed to the public rather than to the parties to a specific proceeding. Through reasoned decisions, members of the general public become aware of rules of conduct applicable to their future activities. An awareness of the reasons for a rule often helps define its scope for those trying to comply with it.

Mr. Virk's Personal Circumstances

174. Mr. Virk was diagnosed with a Mental Health Condition by Dr. H[62]. Detailed reports were provided by Dr. S (Exhibit I) and Dr. H (Exhibit H).

175. Mr. Virk testified on the impact [mental health issue] had on his professional life. He noted previously uncharacteristic behaviours such as depression[63], dysfunctional relationships with staff and clients[64], drug consumption[65], and sexualized behaviour[66].

176. Dr. CE testified as an expert in psychiatric addictions and occupational impacts[67]. He opined in his November 19, 2019 report (Exhibit L) and testified that Mr. Virk suffered from [mental health issue][68]as well as an unspecified [mental health issue], [mental health issue] personality traits, [mental health issue] traits and [mental health issue] traits[69]. Further, Dr. CE stated that the illness "impacts function"[70] and as a chronic illness has no cure[71]. The onset of the symptoms of Mr. Virk's mental health problems

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[60] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), paragraph 43.
[61] *R. v. Sheppard,* 2002 SCC 267 at paragraph 22.
[62] Hearing Transcript, page 671, lines 2 and 10.
[63] Hearing Transcript, page 577, lines 9-12.
[64] Hearing Transcript, page 577, lines 21-26.
[65] Hearing Transcript, page 577, lines 22-26.
[66] Hearing Transcript, page 578, line 8.
[67] Hearing Transcript, page 1075, line 22.
[68] Hearing Transcript, page 1080, lines 22-23.
[69] Hearing Transcript, page 1082, lines 8-13.
[70] Hearing Transcript, page 1086, line 24.
[71] Hearing Transcript, page 1088, lines 20-21.

developed or began to manifest as early as Mr. Virk's late teens and early university years according to Dr. CE.[72]

177. Dr. CE testified Mr. Virk's condition was a [mental health issue] that may contribute to behaviour[73] and impact his occupational functioning[74].

178. Contrary to the Committee's decision, Dr. CE testified the "[mental health issue] can affect memory through distractibility and alter the level of salience attached to each event"[75]. Dr. CE agreed that Mr. Virk's memory "can be affected adversely"[76], which supports Mr. Virk's lack of recollection of his encounter with P.Q.

179. We accept Dr. CE's opinion is that Mr. Virk's mental illnesses does not explain all of his conduct[77], and that Mr. Virk's management of his mental illness is contingent on a number of factors: adherence to treatment, abstaining from use of substances and engaging in appropriate therapeutic interventions[78]

Integrity

180. We find the Committee's reliance on Dr. CE's evidence on integrity troubling. In cross-examination by counsel for the LSA, Dr. CE conceded that questions of integrity were beyond the scope of his expertise[79]:

> Q: I take it, then, that you are not able to say whether, even if under treatment for his [mental health issue] and maladaptive personality traits, Mr. Virk would not continue to engage in the behaviour?
>
> A: That is correct. I'm able to speak to medically answerable questions, and generally integrity is <u>not</u> a medically answerable domain.

181. Regardless of Dr. CE's concession that he cannot answer questions on integrity, the Committee relied on his response to an incomprehensible triple negative question to establish Mr. Virk's lack of integrity[80]:

> Q: Thank you. So addressing those integrity breaches or deceptive behaviours, is it fair to say that your but for conclusion in paragraph 16, speaking specifically to integrity, is that you are not able to say that Mr. Virk would not have engaged in the deceptive behaviour if he didn't have the illness?
>
> A: That's indeed correct.

182. The Committee erred by accepting Dr. CE's opinion on Mr. Virk's integrity in light of his clear evidence that he is not qualified to answer such a question.

[72] Hearing Transcript, page 1089, lines 26-27 and page 1090, lines 19-23.
[73] Hearing Transcript, page 1093, lines 4-6.
[74] Hearing Transcript, page 1094, lines 19-22.
[75] Hearing Transcript, page 1106, lines 2-18.
[76] Hearing Transcript, page 1107, lines 17-18.
[77] Hearing Transcript, page 1109, lines 14-18.
[78] Hearing Transcript, page 1110, lines 6-10.
[79] Hearing Transcript, page 1119, lines 15-21.
[80] Hearing Transcript, page 1119, lines 8-14.

183. In *Law Society of Alberta v. Torske*[81], Dr. CE testified in a similar case about the connection between integrity and addiction. The Panel in *Torske* declined to follow Dr. CE's opinion that integrity is a medically definable issue on which he can render an opinion[82]..

184. Counsel for the LSA compounded the problem by questioning Dr. CE on the effect of mental illness on integrity. In a particularly puzzling passage counsel asks[83]:

> Q: Thank you. So again, specifically speaking to integrity concerns, in every instance that this Panel has considered where Mr. Virk was faced with a situation where he could either tell the truth or he could lie and where he chose to lie, he did so with the mental capacity to understand what he was doing and understand the consequences of what he was doing, correct?
>
> A: Can I perhaps just comment that I did not assess him at the time when the behaviour under discussion occurred. In retrospect, I did not find evidence to suggest there's a cognitive disorder that would have precluded memory of those events.
>
> Q: Right. As far as you're aware, based on your assessment, when he made those choices, he did those choices with free will and volition?
>
> A: That's correct.

185. Dr. CE rendered an opinion in an area he conceded he is not qualified to answer – integrity – and the LSA exacerbated the problem by relying on his inadmissible answers which were predicated upon unproven prior deceptive behaviour and lack of conscience, not part of any diagnostic criteria relevant to these proceedings[84].

186. Dr. CE further overstepped his sphere of expertise: while acknowledging the Personal Assessment Inventory (PAI) as a "snapshot in time" he suggested he could extrapolate beyond the assessment because, "responses are generally derived as to how people would approach things in general most of the time"[85]. Again, offering an opinion on integrity.

187. Dr. CE confirms his own diagnosis with an example of circular reasoning[86]:

> Q: Sir not everyone who has [mental health issue] engages in lying and deceit?
>
> A: That's correct.
>
> Q: Nor does everyone who engages in lying and deceit have [mental health issue].
>
> A: That is correct.

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[81] *Law Society of Alberta v. Torske,* 2015 ABLS 13.
[82] *Torske*, supra, paragraph 131
[83] Hearing Transcript, page 1121, lines 5-21.
[84] Hearing Transcript, page 1121, lines 5-21.
[85] Hearing Transcript, page 1122, line 27 to page 1123, line 4.
[86] Hearing Transcript, page 1120, lines 17-22.

188. Dr. CE's opinion is marginal at best; however, he does support the presence of a diagnosed mental illness during the period of time when Mr. Virk's conduct attracted the citations.

189. We are extremely troubled by the lack of any diagnostic method that left the Committee with nothing more than generalities, over-stepping his sphere of expertise and unsupported reasoning as a basis for disbarment.

190. A review of Dr. CE's diagnosis does support undiagnosed mental health issues that impacted Mr. Virk's conduct. Unfortunately, the Committee's sanction decision does little to address, reconcile or accommodate these illnesses.

191. Mr. Virk's counsel clarified the issues of impairment, inattention and memory which relate to Mr. Virk's credibility and his recollection at the time of the first citations. Mr. Virk's counsel advanced Dr. CE's opinion that, while Mr. Virk might not exhibit memory or recollection issues at the time of the assessment, he did see signs of previous cognitive symptoms. Dr. CE agreed that there was a prior history of previous cognitive symptoms which indicated a mental illness[87]. Dr. CE could not exclude those symptoms from existing at the time of the conduct taking place, thus supporting mental illness as an express factor the Committee needed to consider[88].

192. Dr. CE thoughtfully apologized for the "ambiguity of his report" (Hearing Transcript, page 1129, line 5), however the Committee appears to have misconstrued the conclusions. It offered no clear path of its analysis to impose the most severe sanction under the *Act*, that of disbarment under section 72(1)(a).

193. Dr. CE remained "guardedly optimistic" with regards to Mr. Virk's prognosis[89]. The Committee Chair's questioning of Dr. CE suggested that Mr. Virk's condition is manageable and could be successfully treated with appropriate treatment protocols[90]. Yet what is gleaned from this examination appears nowhere in the sanction decision nor is it reconciled with the evidence.

194. Counsel for the LSA argued Mr. Virk did not have mental health issues that would affect his integrity and further that the medical evidence did not support a link between mental illness and integrity[91].

195. The Committee endorsed the mental illness diagnosis[92]. It also accepted that the mental illness had bearing on Mr. Virk's conduct at the time of the citations[93]. In that same paragraph the Committee held the mental health issue had no bearing upon Mr. Virk's ability to tell the truth nor his ability to understand and appreciate the consequences of his professional obligations, integrity to his client, to his fellow members and their clients, to the Courts and his governing body, despite Dr. CE's clear testimony he could not render an opinion on integrity[94].

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[87] Hearing Transcript, page 1131, lines 2-11.
[88] Hearing Transcript, page 1131, lines 12-15.
[89] Hearing Transcript, page 1127, lines 18-21.
[90] Hearing Transcript, page 1139, lines 9-27 to page 1144, lines 1-6.
[91] Sanction Decision, paragraph 8.
[92] Sanction Decision, paragraph 11.
[93] Sanction Decision, paragraph 26.
[94] Hearing Transcript, page 1119, lines 15-21.

196. The Committee's failure to acknowledge that mental illness was at issue during the conduct was unreasonable, despite the finding to the contrary from Dr. CE and Mr. Virk's testimony, and there was no evidence to support LSA counsel's assertions that mental health was not an issue.

197. The Committee acknowledged Mr. Virk's potential to be successfully treated[95] but appears to have disregarded Dr. CE's prognosis on treatment[96] and the favourable prognosis resulting from the Committee Chair's questions[97].

198. To invoke the most severe punishment available to the Committee with little or no explanation for how it was a reasonable sanction in light of the mental illness diagnosis renders this decision unreasonable.

199. A brief comparison to other cases reflects that disbarment is appropriate for lack of integrity citations generally relating to breaches of trust and trust fund misappropriation, and more egregious behaviour.

200. Although Mr. Virk had a minor relevant discipline history, it was neither protracted, egregious nor capable of supporting the Committee's assertion that he was ungovernable, or that the risk to or protection of the public required disbarment.

201. The sanction was wholly disproportionate even without consideration of the mental illness Mr. Virk laboured under during the relevant period in question.

202. A review of Mr. Virk's authorities and those of the LSA reveal no comparable case that results in disbarment for this type of conduct. The authorities cited by Mr. Virk suggest suspensions even without any consideration of a mental illness (Virk Factum, pages 50-53).

203. In *Shevchenko* the Court of Appeal states[98]:

> A fit sentence is one that is proportional to the seriousness of the offence and the circumstances of the offender. The law makes clear that consideration must be given to an appellant's mental health where it is established to be compromised, and to consider the role it may have played in the offence.

204. The Court of Appeal in *Shevchenko*, citing several authorities, endorsed a "more lenient disposition reflective of the offender's diminished responsibility" in sanction[99].

205. Even in circumstances where the evidence does not disclose that the mental illness was a direct cause of the offence or that it was carried out under periods of delusion, the presence of mental illness can significantly mitigate sentence.[100]

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[95] Sanction Decision, paragraph 30 and Exhibit L, paragraph 44.
[96] Hearing Transcript, page 1139, lines 9-27 to page 1144, lines 1-16.
[97] Hearing Transcript, page 1139, lines 9-27 to page 1144, lines 1-6.
[98] *Shevchenko,* supra, paragraph 25
[99] *Shevchenko*, supra, paragraph 25, citing from *R. v. Trembley,* 2006 ABCA 252, paragraph 7.
[100] *Shevchenko,* supra, paragraph 27.

206. Failure by the Committee to appreciate the extent and manifestation of Mr. Virk's mental illness and its link to moral blameworthiness makes their decision an error in law rendering the sanction decision unreasonable.[101]

207. In *Torske*, the hearing committee dealt with similar circumstances of a member convicted of forgery who was given a nine-month conditional sentence by the Court, which included drug addiction and undiagnosed Bipolar II disorder. Notwithstanding that the offences showed a lack of integrity and substance abuse disorder, the Panel held rehabilitation and ultimately a suspension with treatment was the appropriate sanction.[102]

208. A review of other authorities *Law Society of Alberta v. Prithipaul,* 2018 ABLS 17, *Law Society of Alberta v. Paul Leclair,* 2009 LSA 11, *Law Society of Alberta v. Nelson,* 2014 ABLS 27, *Law Society of Alberta v. Morales,* 2018 ABLS 23 reflect equal if not more serious conduct allegations resulting in suspensions even without the consideration of mental health issues.

Summary

209. In summary, we find that the Committee erred in its assessment of the evidence and that by failing to correctly consider the effect of Mr. Virk's mental health issues, as well as the above misinterpreted the evidence, the Committee's decisions were unreasonable.

210. Given these errors in addition to the setting aside of the findings of guilt on citations noted, we further find a suspension of 18-24 months as suggested by Mr. Virk's counsel should be imposed.

Dated at Calgary, Alberta, June 1, 2021.

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Jim Lutz, QC

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Cora Voyageur

[101] *Shevchenko,* supra, paragraph 36.
[102] *Torske,* supra, paragraphs 156-161.