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

AND

IN THE MATTER OF AN APPEAL
REGARDING NAEEM RAUF
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel

Kathleen Ryan, QC – Chair
Elizabeth Hak – Lay Bencher
Jim Lutz, QC – Bencher
Barbara McKinley – Lay Bencher
Bud Melnyk, QC – Bencher
Corinne Petersen, QC – Bencher
Margaret Unsworth, QC – Bencher
Louise Wasylenko – Lay Bencher

Appearances

Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Ian Wachowicz – Counsel for Naeem Rauf

Hearing Date

September 5, 2019

Hearing Location

Edmonton, Alberta

APPEAL PANEL DECISION

Overview and Summary of Result

1. Mr. Rauf appeals from a finding of guilt in the written decision of the Hearing Committee dated May 31, 2018 (the "Decision"). The Hearing Committee found that Mr. Rauf was guilty of conduct deserving of sanction in respect of a letter Mr. Rauf wrote criticizing a newly appointed Queen's Bench Justice ("JAB"). Mr. Rauf does not appeal the sanction.

2. There were no objections to the constitution of the Appeal Panel (the "Panel") or its jurisdiction. A private hearing was not requested. The public hearing on Mr. Rauf's appeal proceeded.

3. Mr. Rauf's appeal was heard by the Panel of eight Benchers on September 5, 2019.

4. Prior to the issuance of these reasons, the Supreme Court of Canada ("SCC") released its decision in *Canada (Minister of Citizen and Immigration)* v. *Vavilov*, 2019 SCC 65. Accordingly, the Panel afforded Mr. Rauf and the Law Society of Alberta (the "LSA") the opportunity to make further submissions. Written submissions were provided by both the LSA and Mr. Rauf in January and February 2020. Both the LSA and Mr. Rauf submit that *Vavilov* changes the standard of review in this matter to an appellate standard of review.

5. On March 6, 2020, the Alberta Court of Appeal decided *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98. *Yee* addressed *Vavilov* in the context of the standard of review for an internal appeal. This is an internal appeal. The Panel provided the LSA and Mr. Rauf an opportunity for further submissions in light of *Yee*. Mr. Rauf and the LSA subsequently provided a joint communication through counsel that although *Yee* "varies somewhat from the *Vavilov* decision" the parties maintained that the *Vavilov* appellate standard applies to this appeal.

6. In our view, the standard of review that applies to this appeal, an internal appeal from a tribunal to a higher appeal tribunal within an administrative body, is the standard set out in *Yee.*[1] Notwithstanding this conclusion, we have also considered the *Vavilov* appellate standard in the event that we have erred in applying the *Yee* standard of review to this matter. In either case, the outcome is the same.

7. After reviewing the Decision and the hearing record (the "Record"), and considering the representations of the LSA and Mr. Rauf, the Panel confirms the Hearing Committee's finding of guilt.

8. Applying *Yee*, we find the Decision was both reasonable and reasonably sustainable. We find no error of law or principle. Applying the *Vavilov* standard, as submitted by the parties, we find no palpable or overriding error in findings of fact nor the inferences made from those findings. We further find that even if bad faith in this context is a question of mixed fact and law, the findings of fact form a proper foundation for the Hearing Committee's determination of bad faith. There was no misstatement of law respecting bad faith nor improper application of a legal principle in finding bad faith. On either standard, the Hearing Committee properly considered the evidence and applied proper legal principles in the finding of bad faith and conduct deserving of sanction.

9. In writing the Letter and in distributing it in the manner he did, Mr. Rauf acted in bad faith. The conduct was conduct deserving of sanction. The appeal is dismissed.

10. The Panel orders costs of the appeal in the amount of $23,452.50 to be paid by Mr. Rauf within one year of the date of this decision.

[1] This includes the standard set out in *Newton v. Criminal Trial Lawyers Association,* 2010 ABCA 399 paragraphs 41-44, also referenced in *Pelech v. Law Enforcement Review Board,* 2010 ABCA 400 paragraphs 20-22. We further note that this question will again be before the Alberta Court of Appeal shortly in *Moffet v. Edmonton (Police Service)* 2020 ABCA 80 wherein Crighton, JA granted permission to appeal on this very question.

Background of the Matter Under Appeal

11. The single citation against Mr. Rauf was particularized as follows:

> It is alleged that in criticizing an appointment to the Court of Queen's Bench, M. Naeem Rauf's comments were in breach of the Code of Conduct, and in particular, of Rules 4.06(1), 6.02(1), 6.02(6), and 6.05(1), and that such conduct is conduct deserving of sanction.

12. The citation arose from a letter dated September 15, 2016 (the "Letter"). Mr. Rauf wrote the Letter after JAB's appointment, but before her swearing-in as a Justice of the Court of Queen's Bench. The Letter was four pages of critical comment directed at JAB's integrity as a Crown prosecutor and, in effect, the process that appointed her to the Bench.

13. The Hearing Committee found Mr. Rauf guilty of conduct deserving of sanction as particularized in the citation, including breach of certain Rules of the Code of Conduct.[2]

14. Pursuant to section 75 of the *Legal Profession Act,* RSA 2000, c. L-8 (the "*Act*"), Mr. Rauf appealed the Decision on the finding of guilt.[3] This is an appeal under section 75 of the *Act*.[4] It is not an appeal to the court; rather, it is an internal appeal to a Panel of Benchers of the LSA. Pursuant to section 76(1), the Panel held a hearing to consider the Decision and the Record together with representations from Mr. Rauf and the LSA. The Panel may affirm or quash the finding of guilt.

15. Mr. Rauf appealed specific findings of the Hearing Committee primarily on the basis of unreasonableness. Mr. Rauf also stated that the Hearing Committee erred in law in that it did not follow the test set out in *Groia v. Law Society of Upper Canada,* 2018 SCC 27*,* and that, if it had, the Hearing Committee was bound to find that Mr. Rauf did not engage in conduct deserving of sanction.[5] Mr. Rauf did not amend his grounds of appeal after the release of *Vavilov*. However, in light of *Vavilov*, he argues that the case should now be reviewed on an appellate standard of review. In this regard, he states that the SCC's decision *Groia* was not applied and therefore the Hearing Committee has erred in law. It is noteworthy that the Decision predated *Groia.*

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[2] Code of Conduct (Version 2015_V1, as was in effect between June 1, 2015 and December 1, 2016).**Encouraging Respect for the Administration of Justice**: 4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.
Courtesy and Good Faith: 6.02 (1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.
Communications: 6.02(6) A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.
Communication with the Public: 6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.
The Commentary under the Rules in place when Mr. Rauf wrote the Letter, was appended to the Citation and will be referenced as applicable in these Reasons.

[3] There is no appeal from the sanction imposed. The Hearing Committee accepted a joint submission on sanction. Mr. Rauf was suspended for seven days and was ordered to pay costs of $15,000.

[4] 75(1) If the Hearing Committee makes an order under section 72(1), the member in respect of whom the order is made may **appeal to the Benchers** in accordance with this section. [Emphasis added]

[5] The Hearing Committee's decision predates the SCC's decision in *Groia* by one day, and therefore, the Hearing Committee did not have the benefit of that decision.

16. Mr. Rauf also states that the finding of bad faith is one of mixed fact and law with an easily extricable legal principle. Mr. Rauf submits the extricable legal question for this appeal is this:

> What is required for a condemnatory statement made by a member about a fellow member or a judge to be found to have been made in bad faith?

Mr. Rauf states the panel erred in law in deciding that he acted in bad faith. In the alternative, Mr. Rauf states that if bad faith does not have an extricable legal principle to enable a correctness review, then the finding of bad faith was without foundation, was patently unreasonable, and constitutes palpable and overriding error.

17. In its pre-*Vavilov* submissions, the LSA stated that the decision was entirely reasonable and that *Groia* does not apply to this case because Mr. Rauf's case does not engage questions of resolute advocacy in a courtroom context. The LSA states that the case was and should be governed by the reasoning in *Doré v. Barreau du Québec*, 2012 SCC 12. The LSA argues that the decision was reasonable; regardless of the test applied, the appeal should be dismissed.

18. In its supplemental submissions on standard of review post-*Vavilov*, the LSA agrees with Mr. Rauf that an appellate standard of review applies to this appeal. The LSA submits there is no palpable or overriding error in any finding of fact, or in any inference to be drawn from those findings, or in any finding of mixed fact and law. The LSA states that the authorities vary on whether a finding of bad faith is a finding of fact, an inference from a finding of fact, or a finding of mixed fact and law. If a matter of mixed fact and law, the LSA states the there is no extricable principle of law respecting the findings of bad faith such that the Panel must adopt a correctness standard. Regardless, the LSA maintains that the Hearing Committee's analysis was correct as was its application to the facts.

19. Both the LSA and Mr. Rauf focused their post-*Vavilov* submissions on the standard of review of the Hearing Committee's key finding of bad faith.

Grounds of Appeal

20. Mr. Rauf appeals the Decision on the following grounds as set out in his materials:

> 1) The finding of guilt made by the Hearing Committee was unreasonable in that:
>
> (a) It found Mr. Rauf breached Rule 4.06(1)[6] despite uncontroverted evidence that his criticism was supported by Mr. Rauf's "*bona fide* belief in its merit" as stated in the Commentary to Rule 4.06(1) of the Code;
> (b) It found as fact that Mr. Rauf's criticisms of [JAB] were "not true" despite Mr. Rauf's testimony that they were true, without either hearing any

[6] References to Rules in the Amended Notice of Appeal are those Rules in the Code of Conduct (Version 2015_V1).

evidence to the contrary, or, in the alternative, without providing any reasons as its finding that the criticisms were false;

(c) It found Mr. Rauf breached Rule 6.02(6) when the impugned letter sent by Mr. Rauf was not sent in the course of his practice even though Rule 6.02(6) of the Code is limited to communications made "in the course of a professional practice";

(d) It found that Mr. Rauf's belief in the veracity of the criticisms he leveled against [JAB] was irrelevant, which is an error of law;

(e) It found that Mr. Rauf's letter was in bad faith despite uncontroverted evidence that Mr. Rauf related events that he honestly believed occurred, which lead to a finding that Mr. Rauf breached Rule 6.02(1) which requires lawyers to act "in good faith";

(f) It found that Mr. Rauf's critical statements could not be justified because he admitted that he was unaware of the details of the judicial appointment process, when the impugned letter did not in fact contain criticism of the process of judicial appointment in [a] serious way other than incidentally, trivially, and tangentially to his criticisms of [JAB] related to [JAB]'s role as a prosecutor;

(g) It found that Mr. Rauf breached Rule 4.06(1) because the impugned letter "does not say anything of importance at all," despite finding that the allegations in the letter were of a serious nature;

(h) It unreasonably conflated Mr. Rauf's criticism of [JAB] in the impugned letter that was described in the Citation, with his testimony at his hearing in which he criticized aspects of the Code of Conduct.

2) The Hearing Committee breached Mr. Rauf's right to know the case to be met, and denied him natural justice, when it found him to be in breach of Rule 4.06(1) of the Code, in part, due to his comments made during submissions and testimony to the Hearing Committee being critical of the Code of Conduct, without reference to anything in the Citation.

3) The Hearing Committee failed to be guided, in general, by the principles of Section 2(b) of the *Charter of Rights and Freedoms* when exercising the jurisdiction granted to it under the *Legal Profession Act*, and particularly, by finding Mr. Rauf of [sic] guilty of conduct deserving sanction, in part, merely for criticizing the Code of Conduct.

These grounds must now also be read in light of Mr. Rauf's new submissions respecting the appellate standard that he says applies to this Appeal.

The Evidence Before the Hearing Committee

21. The factual background is relatively straightforward. JAB, a former Crown prosecutor, was appointed Justice of the Alberta Court of Queen's Bench. Her appointment was announced June 17, 2016. On September 15, 2016, prior to her swearing in ceremony, Mr. Rauf wrote the Letter intended by him to be published in the Edmonton Journal.

22. The Letter, prepared by Mr. Rauf on his firm's letterhead, was addressed to the Edmonton Journal, but the newspaper did not publish it. Mr. Rauf provided copies of the Letter to other lawyers and to members of the public. Notably, he left copies of it at the Edmonton Law Courts cafeteria.[7] The Letter is reproduced in the Decision. The full extent of the distribution remains unknown.

23. The Letter criticized both JAB's conduct as a lawyer and her appointment to the Bench. The Letter went beyond conduct to also criticize JAB's personal character, ethics and honour.

24. In the Letter, Mr. Rauf said he experienced "shock" at JAB's appointment. He wondered if she was appointed by the same "brilliant judges of character" who appointed another judge to the Bench.[8] He said it was "almost laughable" that JAB would "now go around being referred to as The Honourable [JAB]" when, for Mr. Rauf, she was "anything but honourable." He said he had "rarely, if ever" seen any Counsel more "ethically challenged". In so doing, he noted his 40 years of practice across the bar of two provinces and one territory.

25. After the introduction, the Letter set out five instances of what Mr. Rauf considered JAB's improper conduct in his multiple interactions with JAB as a Crown prosecutor. Two of these are alleged to be misrepresentations of, or errors respecting, evidence. One is alleged to be an improper questioning approach during cross-examination of a witness. One is alleged to be a misstatement of law, whether in error or otherwise, in expressing the burden of proof at preliminary inquiry. One was argument to a jury that Mr. Rauf alleged ought properly to have been directed to the trial judge in 2005. This last event was later referenced by the Alberta Court of Appeal in a decision ultimately overturning the conviction. These five incidents occurred over a period of 11 or more years prior to JAB's appointment.

26. Mr. Rauf said the appointment was a "disgrace" and that he had "no respect" for JAB. In some instances, Mr. Rauf described JAB's conduct as "deplorable". He said every encounter he had with her left Mr. Rauf with a "sour taste." Despite his expression of shock and concern, Mr. Rauf neither reported JAB to the LSA prior to her appointment nor to the Judicial Council after her appointment.

27. Mr. Rauf said he did not report JAB because it would have would have been "immoral" to report her. In his words, he was not a "tattletale." He considered the Code of Conduct obligation to report peer misconduct to be immoral. He also said, "there is a moral obligation not to obey immoral laws."[9] He compared his conduct in not reporting the accusations to Nazi soldiers who chose not to obey Hitler.[10] He also compared himself, under oath, to a child who does not report sexual abuse at the hands of his abuser until years later.[11] Mr. Rauf said he was obliged to write the Letter. Quoting Lord Denning,

[7] The Edmonton Law Courts Building is hereinafter referred to as "the Courthouse." Exhibit 8 Agreed Statement of Facts May 19, 2017; see also the Decision paragraph 49.
[8] The other judge referenced was, at the time, prominently featured in the news and legal community for comments made respecting a sexual assault trial which ultimately resulted in his removal from the bench.
[9] Hearing Transcript, page 106, line 22 and Exhibit 16, letter dated January 25, 2018 to Chair of Hearing.
[10] *Ibid.*
[11] Hearing Transcript, page 186, line 14.

and in apparent contrast to his prior silence, he said that "Silence is not an option when things are ill done."[12] His view was that, with her appointment to the Bench, he should stay silent no longer. He said the public had a right to know that "such a person" was now a judge.[13]

28. At the hearing, the LSA's focus was not on the five events that Mr. Rauf described in the body of the four-page Letter. Those events were not admitted or denied by the LSA, other than to note that the nature of them was so dated, and the timing of the allegations so problematic,[14] in this context, that the LSA should not investigate them. Rather, the LSA focused on the language, tone, and content in the Letter outside those five events and the Letter's method of delivery. The LSA identified twelve different segments of the Letter, which, taken as a whole, established that Mr. Rauf was guilty of conduct deserving of sanction.

29. Mr. Rauf stated that the contents of the letter were true[15] and that he was free to express his opinion of JAB. He said he felt the need to speak truth to power and was prepared to be a martyr to do so.[16]

30. The LSA also tendered evidence of Mr. Rauf's past conduct, including a prior warning for an improper communication, a comment from Mr. Rauf respecting the LSA's Continuing Professional Development requirements, a suspension for failure to pay fees on time, and a technical breach of the trust accounting rules. The last three conduct points appear to have been tendered not for the fact of the breach or comment *per se*, but for the tone and nature of Mr. Rauf's response in dealing with them. In each case, Mr. Rauf chastised the LSA for having to deal with the matter and used strong language in condemning the regulator for wasting his time.[17]

31. Mr. Rauf called evidence from four witnesses in person and tendered multiple letters attesting to his good character, compassion, and skill as a lawyer. None of the witnesses had read the Letter.

32. The Hearing Committee, following the SCC decision in *Doré*, stated that the Letter must be considered as a whole, not merely the constituent parts. On the whole of the evidence, the Hearing Committee found Mr. Rauf guilty of the single citation before it. The Hearing Committee accepted a joint submission on sanction for a seven-day suspension and ordered costs of the hearing.

[12] Hearing Transcript, page 120.
[13] Good Character Evidence Brief of the LSA, Exhibit 8, page 3.
[14] Because Mr. Rauf did not raise an issue while she was a lawyer, the LSA had no grounds to investigate the issue. Her alleged misconduct, however, took place while she was a lawyer, so the Judicial Council would not be an appropriate avenue either.
[15] Mr. Rauf said the statements in the Letter were "true" or were the "truth." Examples of evidence of the Letter being "true" include the Hearing Transcript page 87, line 20, page 91, line 9, page 259, line 20, page 324, lines 13-24, page 325 lines 4-6, or the Letter being the "truth," at page 80, lines 7-15, page 129, line 19, page 248, line 9, page 259, line 22, page 325, line 13. Mr. Rauf said "If I think it is true, then it is the truth." See Transcript page 328 lines 2-17.
[16] Hearing Transcript, pages 184 and 162.
[17] Hearing Transcript page 151 forward and Exhibit 15, letters from Mr. Rauf to Law Society.

The Legal Framework for this Appeal

Standard of Review

33. The standard of review for this appeal was originally agreed by parties, pre-*Vavilov*, to be reasonableness. However, at the time of the hearing of this appeal, the SCC's decision in a trilogy of cases was pending. In *Vavilov*, the Supreme Court set a new standard for appeals of administrative law decisions *to the court*. Prior to *Vavilov,* the standard of reasonableness was also the standard of review for professional disciplinary bodies: *Groia*, at paragraph 43 citing *Law Society of New Brunswick v. Ryan,* 2003 SCC 20 and *Doré*.

34. In *Vavilov*, the SCC confirmed that the starting point for review of an administrative decision by the court is still reasonableness. However, that standard will change depending on the case. In cases where there is a statutory right of appeal *to a court*, the proper standard of review on appeal is the appellate standard of review.

35. This appeal is not an appeal to a court. However, both the LSA and Mr. Rauf say the proper standard of review in this appeal is an appellate standard. Although *Vavilov* does not expressly deal with internal appeals, they say this appeal is, by definition, a statutory appeal and therefore, extrapolating from *Vavilov*, the appellate standard of review should apply.

36. Further, the LSA states, since there is a further appeal to the Court of Appeal from an appeal to the Benchers, it is more sensible for the appellate standard to apply here so as to be consistent with the Court of Appeal. Likewise, Mr. Rauf states that, given that this is, by statute, an "appeal" on "the record," we ought to assume that these words have meaning and that Appeal bodies should not second guess the trier of fact except in cases of palpable and overriding error. With this in mind, both the LSA and Mr. Rauf state that the standard of review set out in *Housen* v. *Nikolaisen,* 2002 SCC 33 applies.

37. The majority in *Vavilov* further held that an appellate standard was appropriate on Constitutional questions, on questions of central importance to the legal system as a whole, and on questions involving a dispute between two administrative bodies on jurisdictional boundaries.

38. In March 2020, the Alberta Court of Appeal considered the application of *Vavilov* in *Yee*. The court specifically addressed the proper standard for an internal appeal in professional disciplinary proceedings. In this regard, the Court of Appeal set out the following respecting standard of review at paragraph 34:

> Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute: *Zuk* at para. 71; *City Centre Equities Inc v Regina (City)*, 2018 SKCA 43 at paras. 58-9, 75 MPLR (5th) 179. The wording of the *Act* makes it clear that the appeal tribunal is to conduct "appeals". Its decision is to be "based on the decision of the body from

which the appeal is made", signalling that the primary role of the appeal tribunal is to review that decision. It follows that the appeal tribunal is not to re-conduct the entire proceeding *de novo*, a conclusion that is affirmed by the provision in s. 111(1)(b) that the appeal proceeds on the "record": *Newton* at para. 64. The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal: *Newton* at para. 81.

39. The Alberta Court of Appeal in *Yee* confirmed that, notwithstanding *Vavilov*, *Newton* still applies in Alberta. There, the Court stated that an internal appeal tribunal's role is "significantly different" from that of an external reviewing superior court.[18] The standard of review to be applied is a question of law, the answer to which depends largely on the wording of the enabling statute. This therefore requires an application of the *Newton* factors[19] to sections 75 to 77 of the *Act*.

40. The *Act* provides that the Panel is to consider the Decision (the hearing report) and the Record, together with the submissions of the LSA and Mr. Rauf. There was no fresh evidence tendered on appeal so that consideration does not apply. In considering the application of the *Newton* factors, nothing in the *Act* suggests a standard of review for this panel that varies from that set out in *Yee*.

41. In this regard, we disagree with LSA counsel and Mr. Rauf. Our view is that this Panel performs a different role than does the Court of Appeal. Were it to perform the same function as that Court, this review could otherwise lead to an unnecessary duplication in the review process. As such, we find that the standard of review to an Appeal Panel of the LSA is that set out by the Alberta Court of Appeal in *Yee* as follows at paragraph 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. [Emphasis added]

The Court in *Yee* then set out the following guidelines:

[18] *Newton* paragraph 37 citing *Paul v. British Columbia* (Forest Appeals Commission), 2003 SCC 55 paragraph 44; *British Columbia (Chicken Marketing Board) v. British Columbia* (Marketing Board), 2002 BCCA 473 paragraph 14.

[19] *Newton* paragraph 43, "The following factors should generally be examined:
(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
(b) the nature of the question in issue;
(c) the interpretation of the statute as a whole;
(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
(e) the need to limit the number, length and cost of appeals;
(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
(g) other factors that are relevant in the particular context."

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;**

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.[20] [Emphasis added]

42. We note that the standard of reasonableness has long been the standard of review for misconduct findings by professional disciplinary bodies: *Groia*, at paragraph 43 citing *Ryan* and *Doré*. Findings of fact will be reversed only if they disclose palpable and overriding error.[21]

43. In light of this finding, we reject the submission of both the LSA and Mr. Rauf that an appellate standard applies to this appeal. In the event we are wrong on the proper standard of review, these reasons also consider the Decision on the appellate standard. On either standard of review, we confirm the finding of guilt.

Applicable Legal Authority - Groia, Doré and Histed

44. This appeal involves the question of a lawyer's open critical comment of another member of the bar who has just been appointed to the Bench. Mr. Rauf contends that

[20] *Yee* paragraph 34.
[21] *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126.

the SCC's *Groia* legal analysis applies to the facts of this case. In *Groia*, the SCC considered a finding of professional misconduct involving a criminal prosecution. Defence counsel Joseph Groia defended John Felderhof, former director of Bre-X Minerals Ltd., in a lengthy and complex case. Mr. Groia repeatedly alleged during the case that the Crown was guilty of prosecutorial misconduct. Mr. Groia advanced multiple allegations of wrongdoing to the point of alleging abuse of process because of the Crown's alleged misconduct. The matter was aggressively litigated by both the Crown and the Defence.

45. Mr. Groia's conduct was described in that case as a "repetitive stream of invective" that was "appallingly unrestrained" and "on occasion unprofessional," "inappropriate," and "extreme."[22] Notwithstanding that behaviour, the finding of Mr. Groia's misconduct by the Hearing Panel, the Appeal Panel, and the Ontario Court of Appeal was ultimately overturned by the SCC. In that case, **it was conceded that Mr. Groia was acting in good faith.** The Law Society of Ontario Appeal Panel failed to take into account Mr. Groia's honest belief in his statements. As such, the finding that Mr. Groia lacked a reasonable basis for his statements was unreasonable.

46. Mr. Rauf states a similar error was made by the Hearing Committee, except that his argument is modified for *Vavilov* to argue that the bad faith finding was made applying a wrong principle or, alternatively, that the Hearing Committee's finding was palpably wrong. Mr. Rauf states the Decision must therefore be overturned.

47. The LSA states that the *Groia* analysis does not apply to the Decision because Mr. Groia's conduct, and therefore the test to apply to it, was triggered by a duty of resolute advocacy. The LSA states that *Groia* applies to conduct during a trial or proceeding requiring resolute advocacy but does not apply outside an active advocacy context. As noted in *Groia*, trials are not tea parties and, therefore, it is understandable in that context that "resolute advocacy cannot be sacrificed at the altar of civility."[23] The LSA says Mr. Rauf's statements had nothing to do with resolute advocacy.

48. The LSA says that *Doré* is the more analogous authority given the nature of the conduct grounding the citation. In *Doré,* the SCC considered the conduct of a lawyer who had written a scathing letter to a judge who ruled against the lawyer's client. In both the court proceeding and, in the ruling, the judge repeatedly criticized Doré and his argument. After the judge ruled against Doré's client, Doré wrote a private letter to the judge. Doré told the judge the letter was personal, not professional. Doré then launched into an extended, entirely unrestrained, personal attack on the judge, resulting in a complaint that the lawyer had violated the Québec Code that required advocates' conduct to "bear the stamp of objectivity, moderation, and dignity." Notably, Doré was held to have violated the Code notwithstanding that the judge's comments were so harsh that the Judicial Council ultimately sanctioned the judge for his conduct.

[22] *Groia* paragraphs 28, 225.
[23] *Groia* paragraph 3.

49. Likewise, the LSA references another case from the Manitoba Court of Appeal. In *Histed,*[24] a lawyer wrote a letter to other lawyers on a case in which, *inter alia*, the lawyer said that the judge was a "bigot." The Manitoba Court of Appeal, in upholding the finding of misconduct, found that any member of the public appearing before the judge would rightly believe that proceedings before the judge would be tainted. The proper approach for Mr. Histed to take, if he believed in the truth of the statement, was to report the judge to the Judicial Council. Mr. Histed had not done that. The Court of Appeal found Mr. Histed's conduct to be "offensive and unprofessional." In an extensive discussion on balancing Mr. Histed's freedom of expression, including the right to speak truth to power, against the need for professionalism and civility, the Court of Appeal found that freedom of expression is not absolute and the restraint on this freedom is justified under section 1 of the *Charter*.[25]

50. Mr. Rauf engaged in severe criticism of a newly appointed Alberta judge. The LSA says Mr. Rauf did so without dignified restraint; he was therefore rightly found guilty of conduct deserving of sanction.

51. If *Groia* applies, the LSA alternatively argues that surrounding circumstances here are entirely different than those in *Groia.* The context here called for Mr. Rauf to exercise dignified restraint in his freedom of expression and entitlement to criticize the judiciary. The LSA notes that both *Doré* and *Histed* were specifically endorsed in *Groia*. The SCC noted that "as a general rule, repetitive personal attacks and those made using demeaning sarcastic or otherwise inappropriate language are more likely to warrant disciplinary action."[26]

52. For the reasons set out below, in our view, the *Groia* analysis can be applied beyond the courtroom. *Doré* and *Histed* were referenced with approval in *Groia*; they also address key questions of balancing a lawyer's freedom of expression against one's obligations under the Code of Conduct. There is no need for the Panel to prefer one authority over another. All three are current and relevant authorities and can inform the Panel's review of the Decision. Both *Groia* and *Doré* apply, along with *Histed*, and provide a useful framework for the determination of this appeal.

53. We find additional support for our view that the *Groia* framework can be applied outside court proceedings in the following statement in that decision:

> Moreover, **the Appeal Panel's approach is flexible enough to capture the broad array of situations in which lawyers may slip into uncivil behaviour**, yet precise enough to guide lawyers and law societies on the scope of permissible conduct.[27] [Emphasis added]

54. Accordingly, our view is that the *Groia* analysis should apply in these proceedings and in matters of incivility generally. In accordance with *Groia*, the Decision, the evidence and

[24] *Histed v. Law Society of Manitoba*, 2007 MBCA 150.
[25] *Histed* paragraphs 43-82.
[26] *Groia* paragraph 100.
[27] *Groia* paragraph 6.

the "full panoply"[28] of contextual factors must be considered together in determining whether the Decision was reasonable.

Relevant Principles from Groia

55. In adopting the *Groia* Appeal Panel decision, the SCC set out three factors to consider in the case of impugned statements of lawyers:

a) What did the lawyer say?
b) What was the manner and frequency of the lawyer's behaviour?
c) What was the trial judge's reaction?[29]

Fundamental to the overall analysis are the following questions:

i. Were the statements made in good faith?
ii. Did the lawyer have a reasonable basis for the statements made?

Context is an important part of this assessment.

What did the lawyer say?

56. In addressing the first factor, the SCC held that allegations that are **either** made in bad faith or without a reasonable basis may amount to professional misconduct. If the statements are made in good faith and have a reasonable basis, there is no misconduct, subject to the overall contextual analysis. In other words, **both** good faith **and** a reasonable basis for the statement are necessary to insulate the offending lawyer from a finding of misconduct.

57. Although the question of good faith and a reasonable basis may be determinative of misconduct in some cases, the Court urged a review of the contextual factors before making that determination:

> Two points about evaluating what the lawyer said warrant comment. First, I do not read the Appeal Panel's reasons characterizing allegations made in bad faith or without a reasonable basis as a stand-alone "test" for professional misconduct. When the reasons are read as a whole, it is apparent that whether or not allegations of prosecutorial misconduct are made in bad faith or without a reasonable basis is simply one piece of the "fundamentally contextual and fact specific" analysis for determining whether a lawyer's behaviour amounts to professional misconduct: A.P. reasons, at paras. 7 and 232.
>
> To be clear, in some circumstances, bad faith allegations or allegations that lack a reasonable basis may, on their own, warrant a finding of professional misconduct. However, a law society disciplinary tribunal must always take into account the full panoply of contextual factors particular to an individual case before making that determination. A

[28] *Groia* paragraph 83.
[29] In *Groia*, the statement was made in court. The third *Groia* factor should be assessed in the context of the impugned statement.

> contrary interpretation would render redundant any assessment of the frequency or manner in which the allegations were made and the presiding judge's reaction – factors which the Appeal Panel considered relevant to the overall inquiry.[30]

58. The Court discussed the need for both good faith and a reasonable basis for the impugned allegations. Various interveners had serious concerns that a good faith statement that lacked reasonable grounds should not be misconduct. The Court shared that concern, but ultimately agreed with the Appeal Panel in *Groia*:

> I share the interveners' concerns that law societies should not sanction lawyers for sincerely held but mistaken legal positions or questionable litigation strategies. Nonetheless, in my view, the Appeal Panel's standard withstands scrutiny. Allegations that impugn opposing counsel's integrity must not be made lightly. A reputation for integrity is a lawyer's most important professional asset. It generally takes a long time to build up and it can be lost overnight. Courts and legal commentators have emphasized the importance of a lawyer's reputation. In *Hill v Church of Scientology of Toronto,* [1995] CanLII 59 (SCC), [1995] 2 S.C.R.1130, at para 118, Cory J. put it this way:
>
> > The reputation of a lawyer is of paramount importance to clients, to other members of the profession, and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyers' professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.
>
> Maintaining a reputation for practicing with integrity is a lifelong challenge. Once sullied, a lawyer's reputation may never be fully restored. As such, allegations of prosecutorial misconduct must have a reasonable foundation. I agree with the Appeal Panel that anything less "gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions": para. 235. The consequences for the opposing lawyer's reputation are simply too severe to require anything less than a reasonable basis for allegations impugning his or her integrity.[31]

59. Having said this, the Court went on to state that "the reasonable basis requirement is not an exacting standard." The statements must not be "speculative or entirely lacking a factual foundation." Particularly in the case of statements made in court, this approach respects the lawyer's obligation not to advance frivolous claims without sacrificing the lawyer's duty of resolute advocacy. This approach is balanced and does not impose so

[30] *Groia* paragraphs 82-83.
[31] *Groia* paragraphs 85-86.

high a standard that the lawyer becomes the ethical guarantor of the foundations of the allegations made.

60. Lawyers sometimes make errors in making representations. The disciplinary body is entitled and obliged to look at the reasonableness of the basis for the impugned statements. Law societies cannot use legal errors to conclude that allegations of prosecutorial misconduct lack a reasonable basis. Were it so, good faith allegations would still yield discipline. As such, the good faith inquiry must start with whether there is a reasonable basis for the statements made. However, the analysis does not end there. Even if the lawyer has a reasonable basis for an impugned statement, if the statement is made in bad faith, the statement may still be offside. Were it otherwise, the context, manner, frequency and reaction to the statements could not be considered despite their clear relevance to the question of misconduct.

61. We find further support for this view in *Groia,* at paragraph 93:

> The more egregious the legal mistake, the less likely it will have been sincerely held, making it less likely the allegation will have been made in good faith. **And if the law society concludes that the allegation was not made in good faith, the second question – whether there was a reasonable basis for the allegation – falls away**. [Emphasis added]

62. Although this passage addresses a reasonable, but mistaken belief, we find this standard should also apply to statements made with a reasonable basis, but ultimately found to be made in bad faith. That is, even if there was a reasonable basis for allegations of prosecutorial misconduct, if the Hearing Committee reasonably found the statements were made in bad faith, the second question falls away and subject to a review of the other factors, including context, a finding of incivility can reasonably follow.

63. This also makes sense on practical grounds. A lawyer's tone and content in communication, even in the course of public criticism, must be still professional. Having a reasonable basis for criticism does not allow a lawyer to say whatever they want whenever they want, to whomever they want about a particular individual. Were that so, there would be no need for "dignified restraint" in criticizing the administration of justice; any response, even to a minor error of a judge or fellow lawyer, could result in a vulgar invective or a very public rant against another participant in the justice system. This would be an inordinately low standard for professionalism. We conclude the SCC did not intend to lower the bar on civility in Canada. Collectively, we must be better than that. The public and the participants in the justice system are also entitled to better discourse in order to maintain faith in an effective administration of justice.

64. We also find support for this approach in *Doré* and *Histed*, noted above. The basis for the lawyer's belief in the impugned statement was not the question in those cases. Rather, it was the tone and the language used that underpinned the finding of unprofessional conduct.

65. In cases of applications for abuse of process for prosecutorial misconduct, the allegation may be made in the courtroom, contemporaneous with the hearing of the case, to the judge, or directly to opposing counsel, with the intent of defending the lawyer's client and on the instructions of that client. These contextual factors were highly relevant in *Groia*, and rightly so. However, as noted above, the *Groia* factors can and should have application beyond the courtroom. The *Groia* statements were made in the courtroom at a time when the duty of resolute advocacy was engaged. That appears to have been a largely determinative contextual factor in the ultimate outcome. But it is still only one of many potential contextual factors to be considered by law societies in determining questions of incivility.

66. Accordingly, whether a lawyer has a reasonable basis for a statement is not a stand-alone factor for determination of civility. What was said, the manner and frequency of behaviour, judicial reaction and, importantly, good faith are all relevant considerations in assessing the impugned statements.

The manner and frequency of the lawyers' behaviour

67. This factor is closely connected to the first. The disciplinary body must consider how the statement was made. What were the surrounding circumstances? Had it happened before? In this regard, the Court noted that a single outburst would not usually attract sanction. By contrast, repetitive attacks on opposing counsel would be more likely to cross the line. The Court discussed attacks on opposing counsel's integrity amounting to a "repetitive stream of invective" or statements made with a "sarcastic and biting" tone[32] as being inappropriate.

68. Other important aspects of context include whether the statements are made in or out of court. In--court statements attract more tolerance. Trial lawyers are expected to resolutely advocate on behalf of their clients in the courtroom. As the SCC observed, a trial is not a tea party. The duty of advocacy to one's client, especially one facing deprivation of liberty, creates an environment where strong language may not only be acceptable, it may be required.

69. Emotions can run high in the heat of litigation. Sometimes there is no opportunity for reflection; engagement, sometimes immediate and forceful engagement, is inherent in the adversarial system. However, as the Court noted:

> This does not mean that a solitary bout of incivility is beyond reproach. A single, scathing attack on the integrity of another justice system participant can and has warranted disciplinary action[33]

70. That was the case in *Doré* and in *Histed*. In each of these cases, a lawyer wrote a single, intemperate, scathing letter about a sitting judge. Both were guilty of misconduct.

[32] *Groia* paragraph 98.
[33] *Groia* paragraph 100 where the Court cited *Doré* and *Histed* among others.

71. Lastly, in looking at the manner and frequency of the behaviour, the Court considered that "challenges to another lawyer's integrity are, by their very nature, personal attacks." A statement that another lawyer has engaged in prosecutorial misconduct is, on its own, a strong statement. However, the Court cautioned against conflating the use of strong language that may be needed to challenge another lawyer's integrity with the type of communications that warrant a professional misconduct finding. In other words, a strongly worded challenge may not warrant professional discipline just because it is strongly worded or might be considered to be a personal attack.

The trial judge's reaction

72. In *Groia*, the SCC found that what, if anything, the presiding judge does about the behaviour is relevant. This reaction presents an opportunity by someone outside the regulator to gauge the nature of the behaviour. It is something of a litmus test. This can become particularly important in dealing with statements made in the courtroom where, despite a potential transcript, a judge has a firsthand opportunity to observe the lawyer's demeanor and tone.

73. Although a judge's reaction is not paramount, it is an important piece of the contextual analysis. The next logical corollary to that reaction is the ability to observe how the lawyer then modulates behaviour in response to a judge's expressed concern. As Moldaver, SCJ observed:

> The lawyer who crosses the line, but pays heed to the judge's direction and behaves appropriately from then on is less likely to have engaged in professional misconduct than the same lawyer who continues to behave inappropriately despite the judge's instructions.[34]

74. In the matter before us, Mr. Rauf's statements were not made in court. There was, nevertheless, a strong reaction from the Court of Queen's Bench of Alberta. The Associate Chief Justice of Alberta referred the matter to the LSA for investigation of what he considered to be an "entirely inappropriate" communication and "conduct unbecoming." The Associate Chief Justice of Alberta considered the manner of distribution of the Letter in a public venue to be "particularly egregious."[35] Consideration of this reaction is analogous to considering a trial judge's reaction in *Groia.*

75. Similarly, in considering whether Mr. Rauf's behaviour constitutes professional misconduct, his reaction to the complaint being filed and his subsequent behaviour are relevant contextual factors. Therefore, both the Court's reaction to Mr. Rauf's behaviour and the response by Mr. Rauf will be further considered below.

Relevant Principles from Doré and Histed

76. The case before the Panel involves not only criticisms of a lawyer for alleged misconduct as a prosecutor, but also principles relevant to criticisms of a judge. By the time of the Letter, JAB's judicial appointment had been announced. Mr. Rauf's criticisms were

[34] *Groia* paragraph 110.
[35] Agreed Statement of Facts, Letter from Associate Justice [JR] to the Law Society of Alberta dated October 3, 2016.

expressly set out in the context of JAB's appointment. Accordingly, as part of the legal framework analysis, there must be consideration of the law as it relates to criticism of the judiciary.

77. There is considerable relevant authority respecting civility toward the judiciary. In *Doré* and in *Histed*, the courts dealt with letters written by lawyers directed at or about sitting judges.

78. These two authorities deal squarely with the question of balancing the freedom of expression guaranteed by the *Charter* against the obligations of civility imposed on lawyers by their regulators. The cases also emphasize the critical role of lawyers in ensuring the accountability of the judiciary.

79. As noted above, in *Histed*, a lawyer accused a judge of being a bigot. The letter was not written directly to the judge; it was meant to be private communication with counsel on a file. Despite the intended privacy of the communication, the public interest required the regulator to intervene. Mr. Histed's right to express himself is protected, but this form of expression was not.[36]

80. As in *Histed*, the SCC in *Doré* stressed the importance of free speech and the importance of lawyers' ability to criticize the judiciary. At paragraph 64, Abella, SCJ referenced and quoted Steel, JA from *Histed*:

> Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it. [Justice Abella's emphasis]

81. She continued, at paragraph 66:

> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[36] *Histed* paragraphs 101-111.

82. In considering the very harshly-worded personal letter that Mr. Doré sent to Justice Boilard, which letter was never intended to be distributed to anyone other than the judge, the Court held as follows:

> Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. **They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.**
>
> A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. **However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.**[37] [Emphasis added]

83. Law societies, courts and lawyers have an obligation to prevent "potent displays of disrespect for the participants in the justice system"[38] where that conduct goes beyond mere rudeness or discourtesy.

84. The matter on appeal before us has a factual matrix that invokes the application of *Groia, Doré,* and *Histed*. With the background and legal framework considered, we now turn to the submissions of the parties.

Submissions of the Parties

Mr. Rauf's Submissions

85. Mr. Rauf's submissions can be summarized into five arguments:

1. The Hearing Committee erred in law, was palpably wrong, or acted unreasonably in finding bad faith.

   In this regard, Mr. Rauf states that the Hearing Committee made reversible errors respecting Mr. Rauf's *bona fide* belief in his statements, the importance of the matters raised in the Letter, the relevance of the allegations in the Letter, and the finding of bad faith. Further, Mr. Rauf states that the Hearing Committee did not

[37] *Dore* paragraphs 68-69.
[38] Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 Can. Crim. L.R. 97, page 101.

apply the *Groia* decision and generally failed to account for Mr. Rauf's honestly-held opinion and his own evidence as a reasonable basis for his statements.

In post-*Vavilov* submissions, Mr. Rauf focused his submissions on the finding of bad faith, asserting that the finding was a question of mixed fact and law with a readily extricable legal principle. Mr. Rauf states the principle was wrongly applied which then led the Hearing Committee to wrongly find bad faith. [Collectively, ground 1(a),(b),(d),(e), and (g)]

2. The Hearing Committee unreasonably found that the Letter was written in the course of Mr. Rauf's professional practice. [Ground 1(c)]

3. The Hearing Committee found Mr. Rauf's statements critical of the judicial appointment process when in fact the Letter did not contain any serious criticism of the judicial appointment system. [Ground 1(f)]

4. The Hearing Committee unreasonably conflated criticism of JAB from the Letter with Mr. Rauf's critical comments about the Code in his testimony and submissions, thereby also depriving Mr. Rauf the right to know the case to be met. This is a denial of natural justice in that other portions of the Code were not part of the citation. [Grounds 1(h) and 2]

5. The Hearing Committee was not guided by section 2(b) of the *Charter of Rights and Freedoms*, particularly in respect of Mr. Rauf's criticism for the Code of Conduct. [Ground 3]

Mr. Rauf's arguments are further summarized below.

Error in Finding Bad Faith Given Reasonable Basis for Statements Made

86. Mr. Rauf submits that the Hearing Committee was bound to follow the *Groia* test but failed to do so. Mr. Rauf acknowledges that the SCC decision in *Groia* was not yet released at the time of the Decision, but states that the case must be viewed through the *Groia* lens on this appeal. Mr. Rauf states that the two questions to be answered, consistent with the legal framework discussed above, are the following:

    1. Were Mr. Rauf's statements made in good faith?
    2. Did Mr. Rauf have a reasonable basis for the statements made?

87. In this regard, Mr. Rauf points to five aspects of the Decision which, he argues, demonstrate that the Hearing Committee made unreasonable findings on, or ignored the reasonable basis aspect of, the *Groia* test. He states this failing caused the Hearing Committee to find bad faith. Mr. Rauf submits that the Hearing Committee did not accept Mr. Rauf's evidence respecting the five separate instances of problematic conduct described in the Letter (collectively, the "Accusations"). He argues that, in the absence of evidence to the contrary, this approach was unreasonable. He states the Accusations were not speculative or baseless. In so doing, he says the Hearing Committee also

overlooked commentary in Rule 4.06(1) of the Code that allows such comments if the lawyer has a *bona fide* belief in the statements made.[39]

88. Mr. Rauf contends that the Hearing Committee found the Accusations in the Letter to be "untrue" despite the absence of evidence on this point. The specific Hearing Committee finding challenged is the following statement:

> Being nothing more than Mr. Rauf's personal opinions, however held, they are not true.[40]

89. Mr. Rauf also submits that it was unreasonable to find that the Letter "does not say anything of importance at all." Mr. Rauf says the statements made respecting the Accusations are important, as was his right to express his opinion. He states this is an error of law. Moreover, he says the Accusations were neither speculative nor baseless and hence were reasonably grounded under the *Groia* analysis.

90. In his written responses to the LSA and under oath, Mr. Rauf says that the events described in the Accusations occurred and that the statements made as to JAB's character were "true" or "the truth." The latter were his opinions, and he was entitled to them. Indeed, Mr. Rauf said that he was prepared to defend his opinions on JAB's ethics and integrity. He views the citation as an attempt to wrongly "shut him up."[41]

91. Mr. Rauf contends that the Hearing Committee found the Accusations to be false.[42] This, Mr. Rauf contends, was a "patently unreasonable" finding. He says, "Once the Hearing Committee concluded that the Accusations were untrue because they were only his opinions, the finding that the "Letter was written in bad faith naturally follows."

92. The bad faith finding is at the core of Mr. Rauf's appeal and it accounts for appeal grounds 1(a)(b)(d)(e)(g) above. Mr. Rauf also states that these errors then create an unreasonable constraint on his free speech.

The Letter was not Written in the Course of Professional Practice

93. Rule 6.02(6) of the Code provides as follows:

> A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or

[39] The Commentary Mr. Rauf references is as follows: "Criticizing Tribunals – Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system. A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned."

[40] Decision paragraph 133.

[41] Decision paragraph 76; see, for example, Mr. Rauf's oral submissions before the Hearing Committee, Hearing Transcript page 283.

[42] Mr. Rauf's counsel stated that the Hearing Committee started with the fact that "none of these five things happened" and that the Hearing Committee said, "Mr Rauf is lying" about the contents of the Letter (Appeal Transcript pages 36-37).

any other person in a manner that is abusive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

94. Mr. Rauf contends that the Letter was not written in the course of his professional practice because it was originally intended for the Edmonton Journal. He wrote the Letter as a concerned citizen. It was, therefore, unreasonable to include this Rule breach in the Citation.

There was no Criticism of the Appointment Process

95. Rule 4.06 (1) of the Code provides that a lawyer must encourage public respect for and try to improve the administration of justice. In the Letter, Mr. Rauf stated that he wondered whether JAB's appointment was approved by the "same brilliant judges of character" who appointed another judge who was, at the time, being highly criticized for improper comments made during a sexual assault trial.

96. Mr. Rauf states he did not breach this provision of the Code because the Letter was not a criticism of the process; it was a criticism of two judges.

97. Mr. Rauf contends that his lack of knowledge of the appointment process does not matter because it was not relevant. In evidence, he said that he did not know about the appointment process because he was "not going to go suckholing around to get a judicial appointment."[43]

98. Mr. Rauf's counsel says that this was Mr. Rauf's "tongue [in] cheek" reference to himself, not anyone else. He says he did not criticize other judges nor did he criticize the appointment process. He further stated the findings on this use of "slang" in evidence were improper because, despite being given in evidence at the hearing, it was not a separate citation.

The Hearing Committee Conflated Code Criticism with the Citation, a Breach of Natural Justice

99. Connected to the above, Mr. Rauf states that the Hearing Committee conflated other hearing evidence of Mr. Rauf's disdain for the Code of Conduct and other Rules of the Law Society of Alberta with the relevant evidence to be considered for the citation, resulting in the Hearing Committee straying far from relevant considerations. Further, Mr. Rauf states that the Code is, at best, subordinate legislation and he should be able to openly criticize it. To limit that speech was unreasonable.

100. Mr. Rauf argues that the Hearing Committee's reliance on this evidence resulted in him being denied the opportunity to know the case to be met. The Hearing Committee cited multiple examples of this language that included sworn evidence or submissions, or both, to describe the Code and other obligations as "Stalinist", "vacuous," "mealy-mouthed," and "sycophantic." On appeal, Mr. Rauf says the Hearing Committee was wrong for faulting Mr. Rauf in "having the temerity to express [criticism of the Code] ... in

[43] Hearing Transcript page 109.

colourful language." Mr. Rauf says this was not a separate citation and it was irrelevant to the single citation before the Hearing Committee.

The LSA Process and Decision Constitute an Unreasonable Limit on Mr. Rauf's Section 2(b) Charter Rights

101. Last, Mr. Rauf contends that throughout the process, he was entitled to freely express his honestly-held views. He says the finding of conduct deserving of sanction constitutes a breach of his *Charter* section 2(b) rights to that expression.

102. In ignoring Mr. Rauf's *bona fide* belief in the Accusations and opinions, Mr. Rauf argues the LSA's process was an undue interference with his right to express these opinions, which were reasonably held. Each of the Accusations was based on his personal experience with JAB. For example, the Alberta Court of Appeal found that JAB incorrectly directed argument to a jury instead of the trial judge and found an improper approach on cross-examination respecting a trial JAB prosecuted in 2005, some 11 years before JAB's appointment. The Accusations were not countered by evidence to the contrary from the LSA. Mr. Rauf states JAB could have been called as a witness. Others could have come to her defence if they felt she was unjustly targeted. He said this was the LSA's burden to prove and it failed in its burden.

LSA's Submissions

Accusations are not the Issue; Tone, Language and Character Attacks are the Issue

103. The LSA states the Hearing Committee clearly set out and applied the law reasonably in a way that is justifiable, transparent, and intelligible. The LSA argues that the Decision is eminently defensible on the facts and law. The finding of guilt was reasonable. The LSA further submits that this Panel must not substitute its own opinion or reweigh the evidence.

104. The LSA provided a global response to the grounds of appeal. The LSA contends that the citation was not issued because of the Accusations described in the Letter.[44] The hearing was not about those events. Therefore, the Accusations are not the issue. Rather, the issue was and is the language, the tone, the content of the Letter and the manner in which Mr. Rauf made the statements. The LSA says Mr. Rauf himself provided all of the evidence needed for the Hearing Committee to draw conclusions about his conduct.

105. What occurred in the past was neither admitted nor disputed. Some of the alleged conduct of JAB occurred in 2005. The LSA states it could not, and should not defend the Accusations against JAB.[45] The events which are the subject of the Accusations are stale-dated, with no ability to conduct a fair hearing. This is now effectively beyond the jurisdiction of the LSA.

[44] Appeal Transcript pages 74-75.
[45] Appeal Transcript page 85.

106. It was, however, a concern that Mr. Rauf had never reported these events at the time they occurred because it meant that the LSA could not realistically investigate them. Once they had been raised in the Letter, JAB was not effectively in a position to defend herself at the hearing.[46]

107. The LSA steadfastly maintains JAB's dated alleged conduct is not the issue. This hearing was about Mr. Rauf's conduct. The LSA notes that the judge in *Doré* who was the subject of comment was himself disciplined by the Judicial Council. Doré had a right to criticize the judge; he did not have the right to do it in the manner and extent that he did. The Hearing Committee was entitled to make the findings it did.

The Letter is Personal Opinion with Character Attacks and Name Calling

108. The LSA states Mr. Rauf was not cited for the Accusations. It was his personal attacks on JAB that crossed the line. The LSA broke down the areas of concern in the Letter into two categories:

1. Personal opinions designed to express a lack of respect; and
2. Denigrating characterizations or name calling.

109. In the first category, the LSA referenced language such as "disgrace," "shock," "type of person," "sour taste," and "no respect." In the second category, the LSA referenced a number of examples, including "ethically challenged" and that it was "almost laughable" to refer to JAB as honourable when she was "anything but honourable."

110. The LSA states the Hearing Committee's analysis of the facts and of the law was thorough and reasonable. The finding of bad faith was grounded in ample evidence. The law was properly applied to the evidence.

There was Ample Evidence to Find Bad Faith

111. The LSA states that the Hearing Committee conducted a proper review of the law and applied the law properly to the evidence. In respect of the key finding of bad faith, the LSA argues that the Hearing Committee's finding was reasonable. It further states that the evidence substantially supported the finding of bad faith and cited six separate examples to demonstrate this:

i. Mr. Rauf did not speak up when things were "ill done" by JAB, and others, in the past because, in his words, he was not a "tattletale." He said "it's disgraceful to go around tattling, tattletaling." The LSA argues the Hearing Committee was entitled to consider this evidence in contrast to Mr. Rauf's contention that he was compelled to speak out against JAB's appointment to the Bench. It was a major credibility issue for Mr. Rauf. The LSA says the Hearing Committee was open to find that Mr. Rauf did not mean what he said when he claimed he criticized the judge because he had a duty to speak up. The conflicting evidence supported the Hearing Committee's finding that the Letter was written in bad faith.

[46] Mr. Rauf previously recognized that judges would not typically enter the fray. This is also referenced in the commentary to Rule 4.06(1).

ii. Mr. Rauf only *selectively* spoke up. Mr. Rauf spoke of two instances where a lawyer and a judge were engaged in conduct, each of which could have been the subject of a complaint. Instead, he did nothing. His justification for not reporting them was that the profession's Code created a "Stalinist regime" that should be disobeyed. This explanation has no merit for a member of the LSA and undermined Mr. Rauf's position that he was bound to speak out, to martyr himself for the truth. The LSA submits it was open to the Hearing Committee to consider this evidence to support its finding of bad faith.

iii. Mr. Rauf also selectively applied the Rules. Commentary to Rule 4.06(1) of the Code provides that judges are often by convention prevented from defending themselves. This imposes special responsibilities on lawyers. Mr. Rauf had effectively so stated in a different letter written to the Edmonton Journal years prior to the Letter, in which he commended judges for "remaining above the fray instead of descending into it."[47] The LSA says that Mr. Rauf did not extend the same respect to JAB when he criticized JAB for not giving evidence at Mr. Rauf's hearing. Mr. Rauf instead said her remedy was to sue him in defamation. The LSA again states that it was open to the Hearing Committee to find that Mr. Rauf's inconsistent approach informs the question of bad faith.

iv. The LSA states that the Hearing Committee was entitled to disbelieve Mr. Rauf and reject his *bona fides* when he said that he was a "downwardly mobile legal aid lawyer" and that his opinion had "no potency." Mr. Rauf himself invoked his 40 years of experience in the Letter. Further, he called four witnesses to speak to his character. The LSA says the Hearing Committee was reasonable in its finding that Mr. Rauf's "attempts to diminish the potency of his influence were not credible."[48]

v. The Law Society states the Hearing Committee was right to consider Mr. Rauf's lack of knowledge of the judicial appointment process in the motivation for the Letter. In his evidence at the hearing, Mr. Rauf says that the Letter was written as part of his duty as a lawyer "committed to the improvement of the administration of justice."[49] However, Mr. Rauf admitted he knew nothing about the appointment process. The Hearing Committee rightly found that the Letter criticized the process. By contrast, Mr. Rauf gave this answer when asked about that process and if he knew how judges were appointed:

> Not really. I don't care. I mean, I'd accept a judgeship, but I'm not going to go suckholing around to get a judicial appointment, so I've never investigated how exactly judges are appointed.[50]

[47] Article (Aug 7, 2001) (Exhibit 10 page 253).
[48] Decision paragraph 114.
[49] Hearing Transcript pages 120-121.
[50] Hearing Transcript page 109.

vi. After the complaint arose, as part of his response to the LSA, Mr. Rauf facetiously reported himself to the LSA for writing complimentary public letters.[51] When asked under oath which Code provision the complimentary letters breached, Mr. Rauf stated "I don't read your hundreds of pages of Codes."[52] This was not simply a "tongue in cheek" comment or "colourful" response from Mr. Rauf. The LSA says Mr. Rauf need not like the Code, but as a member of the LSA, he must obey it.

There was no Conflation of Evidence; Evidence was Properly Considered on the Single Citation

112. In responding to Mr. Rauf's appeal, the LSA submits Mr. Rauf was not facing citations for his beliefs about the LSA or for not liking the Code of Conduct. He was, however, facing a citation under the Code of Conduct about which he admitted he knew nothing. The LSA argues that it was proper for the Hearing Committee to consider this evidence and open to the Hearing Committee to determine that Mr. Rauf did not act in good faith in being ignorant of the Code before writing the Letter.

The Letter was Written in Mr. Rauf's Professional Capacity

113. The LSA noted that Mr. Rauf wrote the Letter on his professional letterhead and he invoked his profession and his professional experience to show his disdain for the judicial appointment of a lawyer he disrespected. He distributed it to lawyers and colleagues, and he left copies of it at the Courthouse cafeteria. The Letter was written in the course of his professional practice. The Hearing Committee properly so found. Regardless, Mr. Rauf's Code obligation to encourage respect for and try to improve the administration of justice[53] is not restricted to a lawyer's professional practice.

The Reasons for Each Rule Breach were Detailed and Supported by the Evidence

114. The LSA further notes that the Hearing Committee's decisions on each Rule of the Code were supported by clear findings supported by evidence. For example, Rule 6.02(1) of the Code, the duty of courtesy and good faith, was breached and the reasons for that finding are, *inter alia*, at paragraph 131 and 132 of the Decision. Rule 6.02(6) of the Code, the Rule against offensive communications in professional practice, was breached and paragraph 133 of the Decision is directed to that. Rule 6.05(1) of the Code, the Rule allowing communications with the public provided that there is no infringement of duty to the profession, courts, administration of justice, was breached. Paragraph 134 of the Decision is directed to that. Rule 4.06(1) of the Code, the obligation to encourage respect, was breached and the reasons for that finding, *inter alia*, were at paragraphs 110-130. In each case, the LSA says ample evidence supported the Decision.

115. The LSA also notes the Hearing Committee's findings, at paragraph 129, that Mr. Rauf expressly did not intend to advance the administration of justice. The Hearing Committee

[51] While Mr. Rauf did not admit this self-report was facetious, it is apparent from the whole of the Decision that it was treated as such.
[52] Hearing Transcript page 118.
[53] Rule 4.06(1).

instead found the Letter to be a personal attack. The LSA states it was open to the Hearing Committee to so find based on the evidence.

116. Generally, the LSA argues that the Decision was a model of administrative decision-making. The Decision was reasonable and should be given deference.

Analysis and Discussion

117. On appeal, this Panel must be concerned with whether the decision was reasonably sustainable. The Decision must be free of legal error and error in principle. As was recently noted by the Alberta Court of Appeal respecting self-regulation for the medical profession for appeals to a court, lawyers are afforded both the privilege and the responsibility of self-regulation. The Court held:

> The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession, and the profession is well-positioned to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest. On the other hand, professionals subjected to discipline are entitled to have disciplinary decisions reviewed externally on appeal to this Court.[54]

118. As an Appeal Panel of Benchers, we stand in a similar position to the Hearing Committee, also comprised of Benchers, to determine what is or is not conduct deserving of sanction for a lawyer. That said, as an internal appeal body, the *Act* does not contemplate that this Appeal Panel should act as a hearing of first instance. To do so would essentially render the Hearing Committee proceedings "irrelevant and academic."[55]

119. For the reasons below, we find the Decision of the Hearing Committee contained no errors of law or principle. It is reasonably sustainable on the evidence and on the outcome. No factual findings or inferences from the evidence could reach the threshold necessary to be overturned on appeal regardless of the standard of review applied. The Decision falls within the range of possible, acceptable outcomes and is entirely defensible in respect of the facts and the law. As such, the appeal must be dismissed.

Groia Applies, as do Doré and Histed

120. Before reviewing the submissions on their merits, it is appropriate to revisit the legal framework for this review. This was much debated at the appeal hearing. As noted above, in our view, the *Groia* framework can and should apply to this matter despite the fact that Mr. Rauf's statements were not made in a courtroom or in the midst of extant litigation. In so much as the SCC had not yet issued its decision, the Hearing Committee could not realistically follow that analysis in the same manner as described above.

[54] *Al-Ghamdi v. College of Physicians and Surgeons of Alberta,* 2020 ABCA 71 paragraph 10.
[55] *Newton* paragraph 64, citing *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175.

However, we have the benefit of the SCC's analytical framework and can and should apply the relevant portions of the analysis in this appeal.

121. The question of what was said, the manner and frequency of what was said, and any judicial reaction are proper considerations on appeal. The statement was not made in open court and therefore neither attracted the duty of resolute advocacy, nor the insulation it might otherwise provide the impugned statements. Although the impugned statements were not made in court, there was certainly judicial reaction to Mr. Rauf's statement. Likewise, Mr. Rauf's reaction to being called out by the Court and his regulator are relevant.

122. In considering whether the Decision is reasonably sustainable, it is proper to review the evidence and circumstances surrounding the allegation of misconduct. We must examine the Record as well as the Decision.

123. Although we have found that the analysis in *Groia* can and should apply to this matter, our view is that *Doré* also applies. Nothing in *Doré* contradicts *Groia* for the purposes of this analysis. Although the Accusations were focused on alleged prosecutorial misconduct, they were not courtroom allegations. They were not made in the midst of extant litigation inside or outside the proceedings. We find that it was reasonable to apply *Doré.* The Letter was a single scathing personal attack on JAB, a lawyer with a pending judicial appointment.

124. The Decision and the Record support the finding of conduct deserving of sanction for the reasons that follow.

The Hearing Committee Properly Considered the Groia Factors

125. Applying *Groia,* as urged by Mr. Rauf, we must determine whether the Committee properly considered whether the lawyer was acting in good faith and whether there was a reasonable basis for the impugned statements made. As part of that analysis, we must look to the contextual factors of the evidence considered for the impugned statements. As in *Groia*, we must consider the following: Did the Hearing Committee properly review what was said by the lawyer? The answer is clearly yes. Indeed, the entire Letter was set out in the Decision itself. The Hearing Committee also carefully reviewed Mr. Rauf's evidence, both in his replies to the LSA respecting the Letter and his evidence under oath. The Hearing Committee considered his evidence and submissions, frequently quoting Mr. Rauf *verbatim*, in the Decision.

126. The Hearing Committee reviewed the language of the Letter in detail, the manner of Mr. Rauf's statements, and the reaction from the Associate Chief Justice of Alberta.[56] The Hearing Committee also reviewed Mr. Rauf's response to the concerns raised by the Court and his responses to the LSA. In essence, the Hearing Committee undertook a similar analysis to that set out in *Groia*.

[56] The reaction of the Court, in the context of *Groia*, was based on an in-court statement during a trial from the presiding trial judge. That does not apply here, and it is expected that this third factor may not apply in incivility cases outside the courtroom. However, because there was a judicial reaction to the statement here, indeed a formal complaint, it is appropriate to note it.

127. Objectively, the Letter crossed the line for what we would expect of a lawyer and member of the Law Society of Alberta. When questioned on the motive for and contents of the Letter and his conduct, Mr. Rauf could have modulated his behaviour; instead, he escalated it. The Hearing Committee rightly considered this evidence.

128. This leads to the next question in the *Groia* analysis. What were the circumstances, manner, and frequency of the impugned statement?

129. Mr. Rauf's preparation and distribution of the Letter were not spur of the moment decisions where one might have reasonably excused Mr. Rauf for an impulsive or intemperate remark. He did not overreact in the midst of a trial or other litigation. He was not in the courtroom. He was not instructed by a client to fiercely advocate a position. He had unlimited time to compose the Letter and to consider its rejection by the newspaper. The duty of resolute advocacy does not arise in connection with the writing and distribution of the Letter. The manner of the Letter's distribution aggravated what was already poor judgment by its author.

130. Was there a reaction from the judiciary? There was not a reaction akin to the trial judge in *Groia*, but there was certainly a reaction from the Associate Chief Justice of the Court of Queen's Bench. Applying *Groia*, the Hearing Committee's consideration of both the Court's reaction and Mr. Rauf's modulation of his conduct, if any, was proper. It was therefore reasonable for the Hearing Committee to consider Mr. Rauf's reaction to the Associate Justice Chief referring the matter to the LSA and his reaction to the LSA's request for a response to the complaint. It is notable that, save for a passing "hindsight is 20-20" reference in evidence, Mr. Rauf did not retreat from his statements. Nor did he exhibit any signs of pensive sober second thought throughout the process.

131. Right through to the conclusion of the conduct hearing, Mr. Rauf was steadfast in his approach. In some cases, such as the self-report for complimentary letters and false analogies showing him to be a victim, Mr. Rauf showed disregard for the regulatory process. He appeared at times facetious and sarcastic in his approach to the citation, to the LSA, and to the Hearing Committee. Just as the SCC found Mr. Groia's reaction to the judge's intervention significant,[57] so too has been Mr. Rauf's reaction.

132. Mr. Rauf contends that his "colourful" responses, sworn evidence and submissions made "with panache" should be considered as resolute advocacy on his behalf in defending himself. However, to do so would require the Hearing Committee and this Panel to ignore the biting sarcasm in his responses to the LSA and his evidence under oath. This was not merely self-advocacy; this was Mr. Rauf's evidence as to what he did and why he did it. It was reasonable for the Hearing Committee to consider the evidence of his intent and the inconsistencies in his explanations for his behaviour.

[57] Mr. Groia was advocating in Court for a client as opposed to giving evidence for himself. For the most part, the trial judge in the case was silent. From the time the trial judge intervened on the 57th day to caution Mr. Groia on his behaviour, Mr. Groia revised his approach and showed a "marked change" in behaviour. It was an error for the Appeal Panel not to account for the changed response after the direction of the trial.

133. Even discounting entirely those aspects of his remarks that could be considered resolute advocacy, the Hearing Committee was left without a credible consistent explanation from Mr. Rauf for his conduct. His evidence left the Hearing Committee entirely open to find that bad faith was the explanation for Mr. Rauf's conduct. The Hearing Committee's findings were reasonable on the evidence; there is no reviewable error.

134. Accordingly, although we reject the LSA's argument that *Groia* does not apply, our view is that applying the *Groia* analysis does not assist Mr. Rauf on appeal. Further, the *Groia* analysis does not in any way displace the law and the principles set out in *Histed* and *Doré*, both of which were cited and affirmed in *Groia*. Further, the duty of resolute advocacy for one's client in the courtroom, which entails a myriad of professional obligations, did not apply to Mr. Rauf's conduct in writing and distributing the Letter.

135. In addition to considering the above, the Hearing Committee reviewed several factors before coming to its determination of conduct deserving of sanction, including at least the following:

a) the need for lawyers to be able to criticize judges;
b) the need for the ability to criticize the judicial appointment process;
c) the need for lawyers to be able to defend clients;
d) the importance of free speech;
e) the fact that a newspaper had already declined to publish the content;
f) the express language used;
g) the apparently dated nature of the Accusations and its impact on JAB's meaningful ability to respond;
h) the manner and extent of the distribution of the Letter;
i) that Mr. Rauf left copies of the Letter at the Courthouse;
j) the public discourse at the time respecting another judge;
k) the reaction from the Associate Chief Justice of the Court of Queen's Bench of Alberta;
l) Mr. Rauf's response to the complaint;
m) Mr. Rauf's self-report for a complimentary letter;
n) Mr. Rauf's explanations for not coming forward sooner despite the Code obligations;
o) Mr. Rauf's understanding of the appointment process; and
p) Mr. Rauf's statement that he was obliged to speak out, but said the same Code obligation was "immoral."

136. Noting the above, it remains necessary to consider Mr. Rauf's other arguments respecting the Hearing Committee's finding of bad faith. This necessarily entails exploring Mr. Rauf's argument that the factual context for his statements were not properly considered by the Hearing Committee.

Groia Elements: Factual Basis for the Statements Made does not Excuse Conduct

137. The LSA did not dispute the Accusations by Mr. Rauf other than to note:

a) No complaint to the Crown, the LSA, or the Judicial Council was ever made by Mr. Rauf contemporaneous with the alleged events or since;
b) By convention, judges do not descend into the fray and therefore the delay has prejudiced JAB from defending the allegations and receiving due process;
c) Mr. Rauf's reasons for not reporting JAB, namely that the duty to report is immoral and must be disobeyed, are entirely at odds with his statement at the hearing where he adopted Lord Denning's principled statement that "Silence is not an option when things are ill done";
d) The case was not about the Accusations or JAB's conduct; it was about Mr. Rauf's conduct.

138. The Hearing Committee found Mr. Rauf was entitled to his opinion of JAB's past conduct. It was and is his opinion to hold. For Mr. Rauf, this meant that JAB was not a qualified appointment for the Court of Queen's Bench. Given that the standard for the reasonable basis of the statement must not be too exacting, it also follows that the Accusations raised in the Letter were sufficient, though largely untested, to ground a reasonable belief in his opinion.

139. In this case, however, it is important to not conflate the Accusations with the basis of the citation. There were three prerequisites to the harsh statements about JAB's character and ethics:

a) The events comprising the alleged prosecutorial misconduct (the Accusations);
b) The conclusion that the Accusations constituted prosecutorial misconduct;
c) The statement that JAB is ethically challenged, not honourable, not worthy of respect, a disgrace, a terrible appointment and the type of person so lacking in character that it is laughable she will now have the title of "Honourable" as a judge.

140. The LSA has not conceded any alleged misconduct by JAB. However, for the purposes of the Decision, there was no evidence to the contrary. There is also no evidence to suggest that Mr. Rauf's Accusations were wild speculation or baseless.[58] Applying the relatively low threshold in *Groia*, there was a basis for Mr. Rauf to make the Accusations.

141. In argument, however, Mr. Rauf apparently equates the basis of the Accusations as a license for a personal attack. Mr. Rauf argues that appellate intervention is required for the finding of bad faith either because it was a patently unreasonable finding or, alternatively, because the Hearing Committee misapplied an extricable legal principle in finding bad faith. He argues that the Hearing Committee found that he had no reasonable basis for the statements he made. We do not agree that the Hearing Committee made that finding.

142. Mr. Rauf's belief in the first, and even the second of the prerequisites to his statements respecting JAB does not insulate him from sanction for the intensely personal disparaging statements that preceded and followed his descriptions of dated past experiences with JAB as a lawyer. Even though the Hearing Committee found that Mr.

[58] As in *Groia.*

Rauf is entitled to his opinion as "subjectively true," the tone and manner of delivery of that opinion was and is unprofessional.

143. In *Doré*, the judge was himself sanctioned for his treatment of Mr. Doré in court, but this did not excuse Mr. Doré from sanction for his conduct. Mr. Doré had reason to be intensely upset with the judge, but Doré's letter crossed the line. The conduct in this case is worse. JAB has been found guilty of nothing. Mr. Rauf confirms he advanced no complaint against her at any time. Mr. Rauf's Letter attacked JAB many years after the events of the Accusations arose, at a time when he likely knew she would not defend herself. He did so in a highly public manner. It was proper for the Hearing Committee to scrutinize his motive. The evidence from Mr. Rauf himself provided the Hearing Committee ample reason to find improper motive for Mr. Rauf's conduct.

144. In that regard, the Hearing Committee was in the best position to assess Mr. Rauf's evidence. The Hearing Committee was concerned with Mr. Rauf's good faith based on his own evidence. The Hearing Committee heard his evidence under oath, was able to assess his demeanor, and is better suited to assess his evidence of intent, good faith, credibility, and reliability.[59]

145. Mr. Rauf states that the Hearing Committee unreasonably erred in saying that the Letter "does not say anything of importance at all." This statement is one that is particularly criticized by Mr. Rauf on appeal because he believes it is relevant to the reasonable basis for his statements. He states that the Accusations are all important, as was his right to criticize a judicial appointment. He therefore states that this is an unreasonable finding or, on an appellate standard, was a patently unreasonable finding or constituted a misapplication of an extricable legal principle necessary to the finding of bad faith.

146. However, we must view this statement in the context of the whole Decision. Prosecutorial misconduct is important, as is the ability to criticize the judiciary; this was not lost on the Hearing Committee. But that point was not the subject of the citation or the impugned portions of the Letter.

147. The Hearing Committee was alive to the right of Mr. Rauf to hold his opinion and to the need to balance free speech against the lawyers' obligations of civility. The Hearing Committee well understood that there were five instances of alleged concern or errors, at least one of which led the Court of Appeal to overturn a trial Decision in which JAB was the prosecutor. However, when the Decision is read as a whole and in context, it is clear that the "anything of importance" statement was not in respect of the five events described in the Letter. The "importance" in this passage in the Decision was a reference back to freedom of speech, the need to speak out against injustice, to speak truth to power and that silence is not an option when things are ill done. None of these important principles are referenced in the Letter. When read in context, this is clear from the Decision:

> Mr. Rauf testified and submitted about the importance of this case, of **the importance of freedom of speech**, **freedom of expression**. He

[59] *Fletcher v. Manitoba Public Insurance Co*., 1990 CanLII 59 (SCC), page 204.

> quoted from legal and literary luminaries to support what he considered to be fundamental rights that were being trampled upon by the LSA. As has been said above, **those rights and principles are of the utmost importance, but they are not what this hearing is about.** It was recognized from the very beginning of the hearing that lawyers are free to criticize the judiciary. It is recognized that Mr. Rauf is free to criticize [JAB]. **What is at issue is not whether he can criticize her Ladyship, or others, but whether he can do so in the manner he did.**
>
> **The Letter does not engage those higher principles cited by Mr. Rauf.** *It does not say anything of importance at all,* instead, it only demonstrates that Mr. Rauf had a severe dislike for one of his colleagues at the Bar and felt the urge to lash out at her, at her appointment, and at those who appointed her.[60] [Emphasis added]

148. The Hearing Committee, in context, was speaking of Mr. Rauf's stated motive and the importance of freedom of speech. We appreciate that Mr. Rauf argues that the Letter *was* an example of free speech. However, Mr. Rauf's argument on this point is that the Hearing Committee effectively found that prosecutorial misconduct is unimportant. Having regard to the full context of the statement and the Decision in its entirety, we do not agree.

149. That said, the Hearing Committee's Decision did not turn on this one phrase. The Hearing Committee did not find Mr. Rauf guilty of conduct deserving of sanction because he did not convey a more nobly articulated intent at the outset of the Letter. The Hearing Committee did not find that Mr. Rauf falsely accused JAB of events that happened, in some cases over a decade earlier. The Hearing Committee found Mr. Rauf guilty of conduct deserving of sanction because it found the Letter was a personal attack written in bad faith.

150. The Hearing Committee further found the following at paragraph 129:

> Mr. Rauf asserted that his intention in writing the Letter was to advance the administration of justice and to improve the appointment process. The Committee does not believe that he had any such intention. We find that the prime purpose of the Letter was to undermine the reputation of JAB and the appointment process. The Committee finds that the language used in the Letter amounts to personal attacks which undermine rather than advance public respect for the administration of justice.

151. This finding of fact respecting the prime purpose of the Letter was reasonable. Moreover, there was ample evidence to support this finding. We ought not disturb this finding on appeal. If there was an error in the finding that the Letter said nothing of importance, we view this as an error which cannot impact the totality of the Decision and the validity of and justification for the finding of conduct deserving of sanction.

[60] Decision paragraph 116.

152. In the alternative, if the *Vavilov* appellate standard of review applies to this matter, we should also review the finding of bad faith through the lens of that standard. As a result, the finding below is entitled to deference unless there is a readily extricable legal principle in that finding which was misapplied.

153. In considering that question, the parties put forward submissions respecting whether the finding of bad faith was a question of fact or a mixed question of fact and law.[61] There are appellate authorities that support either interpretation.

154. The finding that Mr. Rauf wrote the Letter not for the purpose of improving justice, but to lash out at a person he disrespected is a finding of fact. The findings of bad faith are inextricably linked to the factual and credibility findings made by the Hearing Committee. Accordingly, whether the question is one of fact, or mixed fact and law, the underpinnings for the finding of bad faith in this case are findings of fact.

155. As in *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30*,* the Hearing Committee was in the best position to consider the evidence. Although the trial judge in *Fidler* found good faith, the key is that the question of bad faith or good faith was one that was inextricable from the findings of fact by the trier of fact. On that question, McLachlin, CJC and Abella, SCJ held as follows[62]:

> Sun Life's conduct was troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. **The trial judge's reasons disclose no error of law, and his eventual conclusion that Sun Life did not act in bad faith is inextricable from his findings of fact and his consideration of the evidence.** As Ryan J.A. concluded in dissent:
>
> > The trial judge saw and heard the witnesses. He examined the written material filed as exhibits. It was for him to assess the evidence and to determine its weight and effect. In my view Ms. Fidler has not been able to demonstrate that the conclusions of the trial judge were unreasonable or palpably wrong. [Emphasis added]

156. Even if we were to assume that bad faith is a question of mixed fact and law in this context, and even if there were a readily extricable legal principle, the underlying element of bad faith here was grounded in the ample evidence of animus in the Letter itself. This evidence was then amplified by Mr. Rauf himself through his response to the complaint and through his contradictory evidence in the hearing itself. The Hearing Committee was reasonable and correct in its consideration of the evidence of Mr. Rauf's motive and the reasons for rejecting Mr. Rauf's argument that his motive for the Letter was to improve the administration of justice. There was no legal error nor misapplication of a legal principle in finding bad faith. As in *Groia,* given the finding of bad faith, the question of reasonable basis for the statements falls away.

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[61] The LSA cited *Sharp Electronics of Canada Ltd. v. Nelson,* 2003 ABCA 57*, Cormack v. Indergaard,* 2018 ABCA 41, *Colasanti v. 1808278 Ontario Inc* 2018 ONSC 1784, *Abbey v. Ontario (Community and Social Services),* 2018 ONSC 1899 and *R. v. Lewis*, 1979 CanLII 19 (SCC) as authorities for a finding of bad faith (or good faith) to be a question of fact. The LSA noted that these decisions suggested bad faith is a question of mixed fact and law: *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30 and *McGeady v. Saskatchewan Wheat Pool*, 1999 CanLII 12311 (SKCA).

[62] *Fidler* paragraph 75.

The "Opinion" or "Truth" Finding Does not Change the Outcome

157. The Hearing Committee found at paragraph 133 that:

> Being nothing more than Mr. Rauf's personal opinion, however held, they are not true.

Mr. Rauf asserts this finding is unreasonable.

158. The Hearing Committee extensively considered, both during the hearing itself and in the Decision, whether Mr. Rauf's expressions were opinion. This was a point of significant focus for Mr. Rauf at the hearing. Mr. Rauf's evidence varied between statements that the Letter was "true" or "the truth" and that the Letter was "his opinion." Objectively the Letter contains both expressions of opinion and statements of past events as Mr. Rauf perceived them. The Accusations are such events. However, whether the Accusations in fact constituted prosecutorial misconduct and whether JAB, as a result, lacked honour, character and ethics are clearly expressions of opinion. Those personal attacks on JAB's honour, character and ethics were the subject of the citation, not the Accusations.

159. The LSA recognizes that the better word choice at paragraph 133 of the Decision might have been "truth" instead of "true." A review of the entire Decision and the Record, however, clearly shows that the Hearing Committee recognized that opinions contained in the Letter may have been true to Mr. Rauf, but that does not make them objectively true despite Mr. Rauf's repeated urging that the Letter is "the truth."[63]

160. Again, in context, the statement at paragraph 133 of the Decision that Mr. Rauf's personal opinions are not true must be read in the context of the analysis at paragraphs 72 to 81 and the Record itself. The Hearing Committee did not find that the Accusations were opinions. Rather, the Hearing Committee found Mr. Rauf's statement respecting JAB's character and the quality of her appointment were opinions. In that regard, the Hearing Committee was correct to state that holding those opinions does not make them true or, perhaps better stated, the truth, despite Mr. Rauf's repeated assertions that the Letter was "true" or the "truth."

161. We disagree with Mr. Rauf's statement on appeal that the "Committee concluded that the Accusations were untrue." At paragraph 107 of the Decision, the Hearing Committee expressly found Mr. Rauf's opinions to be "subjectively true." In our view, in proper context, the Hearing Committee concluded that Mr. Rauf's statements about JAB's character and suitability for the bench were opinions and hence not truth. That is different. Further, Mr. Rauf states that the bad faith finding "naturally follows" …as "inseparable from a finding that the statements were untrue." We respectfully disagree. The Hearing Committee was aware that the dated nature of five events made them "too late to investigate, too late to learn the truth" as the LSA observed, but that was not the

[63] Decision paragraph 73. 'True', according to oxfordlearnersdictionaries.com, means "connected with facts rather than things that have been invented or guessed… real or exact …accurate".

issue. Mr. Rauf's tone and manner of expressing comments about the Accusations were the issue.

162. Further, this appeal should not rise or fall on a single word. Reasons are to be read as a whole and not dissected: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paragraph 18. Although the truth versus opinion point was a focus for the Hearing Committee and raised on Appeal, it does not change the critical outcome. Applying the *Groia* framework, whether Mr. Rauf believed the statements made in his Letter or not, it was reasonable for the Hearing Committee to conclude the Letter was written in bad faith.

It was Reasonable to Find a Breach of the Duty of Courtesy, Civility and Good Faith

163. Rule 6.02(1) of the Code provides that a lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice. Given the above reasons, the Hearing Committee reasonably found that the Letter was a breach of Rule 6.02(1) of the Code.

164. The Hearing Committee properly found that Mr. Rauf breached Rule 6.02(1) of the Code. The reasons below reasonably sustain the Decision:

> For similar reasons, we are of the view that Mr. Rauf breached Rule 6.02(1) of the Code. Mr. Rauf's choice of language and his decision to express long-held personal opinions and disdain for [JAB] in the Letter demonstrate discourtesy and incivility that are unacceptable. We do not believe that the Letter was written in good faith. We believe, and we find, that it was written in bad faith, that Mr. Rauf's purpose was to harm [JAB], to use the influence he had, which he knew to be quite extensive, to undermine her and her reputation. In our view, and in particular considering our finding that Mr. Rauf intended to harm [JAB] and her reputation, Mr. Rauf has crossed the lines described above in the case law and authorities. His conduct is misconduct, deserving of sanction.[64]….
>
> Mr. Rauf, we find, believed that a letter written in the fashion of this one, expressing personal opinions of disdain purporting to be the authoritative product of long legal and ethical experience, was the very type of letter that would be published in the ordinary course by the *Edmonton Journal*. In writing the letter with that belief and with the intention that it be published and broadly disseminated among lawyers and members of the public, Mr. Rauf infringed his obligations to the profession, the courts, and the administration of justice.[65]

165. The intended and ultimate manner of distribution is central in our view. The Letter was originally intended by Mr. Rauf to be disseminated in one of the largest newspapers in Canada. When that effort failed, it appears that Mr. Rauf found another way to personally attack JAB by distributing the Letter at the Courthouse. The tone, content,

[64] Decision paragraph 131.
[65] Decision paragraph 134.

language and manner of distribution exhibited no dignified restraint. We find the Hearing Committee had ample evidence upon which to find that Mr. Rauf breached Rule 6.02(1) of the Code. In so doing, Mr. Rauf breached his obligations to the profession, to the court, to the administration of justice and to the public.

166. We also agree with the Associate Chief Justice that the choice of subsequent dissemination, including leaving letters at the Courthouse cafeteria apparently to maximize distribution in the legal community was "particularly egregious." Mr. Rauf's choice of the mechanism of distribution provided further evidence to the Hearing Committee that this conduct was not based on any noble intent to improve the administration of justice, but was rather criticism motivated by bad faith and without any proper measure of dignified restraint.

The Letter was Written in the Course of Mr. Rauf's Professional Practice

167. Rule 6.02(6) of the Code provides that a lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional.

168. Mr. Rauf argued that Rule 6.02(6) of the Code could not apply to him because, he stated, the Letter was not written in the course of his professional practice. The Letter was written on his professional practice letterhead "M. Naeem Rauf, Barrister & Solicitor." The Letter implicitly invokes the reader to consider his statements in the context of his 40-year experience as a lawyer. The Letter was intended for the public and expressly provided to a number of lawyers. It was distributed at the Courthouse itself in the public cafeteria. The Hearing Committee properly rejected this argument.[66] This finding was reasonable and was entirely supported by the evidence.

169. Further, Mr. Rauf was found to have breached Rule 6.02(6) of the Code because the words he said were intended by him to be considered true, correct and valuable to the public. As the Hearing Committee noted, "Mr. Rauf wanted people to hear his opinions, to believe them. In writing, publishing, and disseminating those opinions, Mr. Rauf abused his position as a member of the LSA, and he abused [JAB]."[67] The finding that Mr. Rauf breached this Rule as part of the single citation was reasonable.

It is Relevant to Consider Other Options Available and Stated Ignorance of Same

170. The Hearing Committee was also rightly concerned about Mr. Rauf's characterization of the appointment process. He stated he did not know how judges were appointed. On two occasions, both in evidence and in a written response to the LSA in the Record, he said that he had no interest in reviewing the process because, although he would accept a judgeship, he would not "go suckholing around" to get one. The Hearing Committee found these statements to be intentionally derisive and pejorative ridicule. The Hearing Committee referenced other similar examples used by Mr. Rauf, in evidence or

[66] Decision paragraph 111.
[67] Decision paragraph 133.

submissions, in describing the LSA's Rules and Code. These included: "Stalinist, vacuous, mealy-mouthed, and sycophantic." The Hearing Committee expressly noted Mr. Rauf's view that behaving differently before the tribunal would be "boot-licking" when the Hearing Committee found the following:

> No thoughtful lawyer considering his or her obligations under the Code of Conduct could ever consider it justified to so criticize the judicial appointment process while knowing, as Mr. Rauf admitted, that he knew nothing at all of the process…. The entire first paragraph of the Letter, which sets the tone for the remainder, is entirely unacceptable from a member of the LSA.[68]

171. Mr. Rauf argued on appeal that many lawyers privately question judicial appointments without knowing the full details of the appointment process. This may be true, but this hearing was about Mr. Rauf's conduct. He published highly derogatory personal attacks using the pedestal of his legal experience and his position in the legal community to do so. In this regard, the Hearing Committee reasonably found he breached the Code of Conduct. It was reasonable for the Hearing Committee, in this context, to reject Mr. Rauf's stated motive that he wrote the Letter to improve the administration of justice.

The Hearing Committee did not Conflate the Evidence nor did it Breach Principles of Natural Justice

172. The Letter on its face appeared to be a personal attack. However, there was more evidence than just the Letter available to the Hearing Committee. Although absent from the Letter itself, Mr. Rauf later gave evidence that he wrote the Letter to improve the administration of justice. As such, it was valid for the Hearing Committee to consider Mr. Rauf's stated motive. This included questioning on proper avenues that Mr. Rauf could have taken spanning years prior to the date of the Letter. Other options were also considered in *Histed*. This was not a conflation of the Code and the citation. This was a relevant line of inquiry to determine whether Mr. Rauf's statements were made in good faith and in accordance with the reasonable expectations of a member of the LSA.

173. In particular, it was relevant that Mr. Rauf said that he did not report JAB for conduct a decade earlier because he is not a "tattletale," yet he was prepared to "martyr" himself in his disciplinary proceedings because he could not remain silent about this "terrible" appointment. He said the LSA's obligation to report misconduct was an immoral rule and so he felt duty bound not to follow it, but was prepared to write a scathing letter about someone he did not respect. The Hearing Committee was clearly concerned about this evidence. It was an obvious inconsistency, and it was reasonable and proper for the Hearing Committee to weigh this evidence in the context of the question of good faith. There is no reviewable error.

174. Further, the Hearing Committee was troubled by Mr. Rauf's persistent, apparently facetious, statements that if Mr. Rauf was to be sanctioned for the Letter, then so too should he be sanctioned for other letters he had written in the past praising certain

[68] Decision paragraph 119.

judges. The biting sarcasm and baiting of the LSA in Mr. Rauf's response letters is apparent. Mr. Rauf's disdain for the Code, in this context, was relevant. The evidence was not conflated by the Hearing Committee. The finding of guilt was not for breaches of other provisions of the Code; it was for the breaches outlined in the single citation. The fact that the Hearing Committee considered relevant that Mr. Rauf did not "read your hundreds of pages of Codes" was not a conflation of the evidence. Rather, it was a relevant avenue of inquiry in determining the good faith basis for the Letter. Even without this evidence, however, the totality of the evidence supported a finding of bad faith.

175. We find the Hearing Committee's rejection of Mr. Rauf's motive for writing the Letter to be reasonable and solidly founded on the evidence. The Decision in this regard is clear and reasoned in its approach. There is no reviewable error.

176. The Hearing Committee also reasonably rejected Mr. Rauf's self-description in evidence as a "downwardly mobile Legal Aid lawyer" and that he thus lacked public influence and "potency." Mr. Rauf called multiple character witnesses and supplied numerous reference letters, all attesting to his skills, character and acumen as a lawyer. Mr. Rauf also invoked his seniority and experience in the Letter. The Hearing Committee found that Mr. Rauf's "downwardly mobile Legal Aid lawyer" reference was not credible. The Hearing Committee was in the best position to make this finding, one supported by the evidence, and we do not disturb it.

177. The Hearing Committee further noted that the Code and commentary states that "'the mere fact of being a lawyer lends weight and credibility to public statements."[69] The Hearing Committee found that Mr. Rauf deliberately intended to influence public opinion for the many that respect him. We agree; the finding was entirely reasonably on the evidence.

178. In the context of the entire Decision, we do not agree that the Hearing Committee conflated evidence. Nor do we view the Hearing Committee's finding of Mr. Rauf's lack of knowledge and his disdain for the Code as a breach of natural justice. Mr. Rauf was always facing a single citation. He was not charged with nor found guilty of any other citation. The Hearing Committee properly considered Mr. Rauf's inconsistent evidence on relevant aspects of the Code as part of the consideration of the single citation.

Mr. Rauf Breached the Duty of Dignified Restraint in Criticism of the Judiciary - Doré and Histed

179. The Hearing Committee extensively considered several authorities, including *Doré* in particular, at paragraphs 68 to71. The Hearing Committee also noted that the judiciary is not entitled to immunity from public criticism any more than an elected official is; however, there are limits to those criticisms. To that end, the Hearing Committee referenced *Histed*, particularly in the context of the right to free speech contrasted against the lawyer's obligation to remain civil in discourse.

[69] Decision paragraph 112 citing Code Commentary Rule 4.06(1).

180. At paragraph 106 and 108 of the Decision, the Hearing Committee cited, *inter alia*, the following from *Histed*:

> The judiciary should be open to criticism, but to operate effectively, the legal system must operate with some degree of civility and respect. Criticism must be within certain parameters. Lawyers are required by the *Code* to avoid the use of abusive or offensive statements, irresponsible allegations of partiality, criticisms that are petty or intemperate and communications that are abusive, offensive, or inconsistent with the proper tone of a professional communication.
>
> […]
>
> While litigants and other interested persons may comment publically on cases before the courts and may criticize judicial decisions in terms which some might consider offensive, lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession. Similar to Ross in the case of *Ross*, who was free to exercise his fundamental freedoms in a manner unrestricted by the order, but only upon leaving his teaching position, if Histed wishes to have that same unfettered right to criticize the administration of justice, he may do so, but not while a member of the Law Society.

181. The Hearing Committee held as follows at paragraph 107:

> As discussed above, Mr. Rauf holds certain matters to be subjectively true, and those matters were fully set out and detailed by him in his defence. The Committee finds that those matters provide no defence to the citation. Mr. Rauf has a right to express himself. He has a right to express criticism of the administration of justice, of the judicial appointment process, and of [JAB] herself, personally or professionally, but, if he chooses to do so, he must do so having regard to the limits imposed by the Code of Conduct and to the limits imposed by the statements made by the Courts…

182. In this case, the Letter was distributed before the judge was sworn in, but the hearing took place well after that. As a result of the timing between the notice of the appointment and the swearing in, the conduct could be said to straddle the line between improper criticism of a judge and incivility to a lawyer. Therefore, it was reasonable for the Hearing Committee to consider both Mr. Rauf's obligations to JAB as a lawyer as well as his obligations to her, the judiciary, and the administration of justice in light of her appointment. Mr. Rauf chose not to openly criticize JAB until her appointment to the Bench.

183. As a result of Mr. Rauf's choice not to complain to the LSA at any time prior to JAB's judicial appointment, neither JAB nor the public were afforded the opportunity of contemporaneous investigation and response, with all the procedural protections that the

LSA process would have afforded. The timing of the Letter was prejudicial to JAB. Mr. Rauf would have reasonably anticipated that JAB would not descend into the fray of his hearing. He was alive to this approach from the judiciary from past experience and even commended the merits of that behaviour then, but he faulted the LSA for not calling JAB as a witness in his hearing.

184. The findings in this regard, combined with those of bad faith, underpin the Committee's reasons for finding the breach of Rule 4.06(1) and Rule 6.05(1) of the Code. There was no error of law. The findings were reasonable on the evidence. We do not disturb them. These findings significantly distinguish this matter from *Groia.* There, the appeal panel found that Mr. Groia was acting in good faith. The Hearing Committee found that Mr. Rauf wrote the letter in bad faith. As such, the basis for the Accusations falls away. Likewise, applying *Doré* and *Histed*, criticism of the judiciary must be made with dignified restraint. On these aspects alone, this appeal must fail.

The Committee was Alive to the Importance of Free Speech Balanced Against the Duty of Civility and to the Administration of Justice

185. The Hearing Committee further noted that Mr. Rauf argued the importance of free speech and freedom of expression. Mr. Rauf had quoted from many renowned judges, philosophers and authors in evidence and in his responses to the Law Society. While recognizing the importance of criticism and free speech, and a lawyer's obligation to speak out against injustice, the Hearing Committee found that Mr. Rauf's intent was instead to personally attack JAB. On the evidence, this finding was reasonable.

186. The Hearing Committee expressly endorsed the fact that "lawyers are free to criticize the judiciary." This is an important recognition from the Hearing Committee. The Hearing Committee was clearly alive to the need to balance freedom of expression against the lawyer's obligations under the Code when it referenced an authority on that very point:

> Mr. Rauf spoke frequently about his right to freedom of expression and asserted that that right protected him from being found guilty of conduct deserving of sanction on the citation here. The Manitoba Court of Appeal, in *Histed*, spoke directly to that issue, stating at paragraph 60 that:
>
> > There have been a number of cases which have confirmed the importance of the objectives being considered here. Those cases have confirmed that the legislation and codes of professional conduct are directed toward two important objectives, namely, the protection of the administration of justice and the protection of the public. Those objectives have been found to be sufficiently pressing to warrant infringing freedom of expression.
>
> Those are the very objectives to which the provisions from the Code of Conduct, as listed in the particularized citation, are directed. They expressly limit freedom of expression by members of the LSA.

> We consider that that is an issue that has been decided and by which we are bound. We must therefore recognize, as stated in *Doré*, that the conduct we are discussing forms part of what is only a permitted exception to the right of freedom of expression such that we must tread carefully. And we do.[70]

187. Recognition of Mr. Rauf's freedom of expression, subject to limits set out above, was confirmed. However, the critical issue was "not whether he can criticize her Ladyship, or others, but whether he can do so in the manner he did."[71]

188. As the Hearing Committee noted, and we agree:

> Mr. Rauf often asserted through the Hearing and in his submissions that his constitutional right to free speech immunized him from discipline by the LSA. It is clear to us that Mr. Rauf is not so immune, but must comply with the Code of Conduct.[72]

189. In *Doré*, the SCC considered the balancing of free speech against a lawyer's professional obligations. The Court held as follows[73]:

> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

190. In *Histed*, the Manitoba Court of Appeal also considered the balance between freedom of speech, including the ability to speak truth to power as part of the important role lawyers play as advocates, against the obligations to maintain respect for the administration of justice. In calling a judge a bigot in a letter, this would leave those appearing before that judge with the impression that a fair hearing was not possible. If Mr. Histed believed in the truth of the statement, Mr. Histed had other options to raise such concerns. He was unprofessional in conducting himself in writing this letter. Mr. Histed's section 2(b) rights were therefore reasonably limited by section 1 of the *Charter*.

191. The Hearing Committee was clearly alive to the need to carefully consider the evidence in the context of Mr. Rauf's right to challenge authority. The Hearing Committee applied the proper legal test, made no errors of law or principle, and reasonably found that Mr. Rauf's conduct was unprofessional. This ground of appeal is dismissed.

192. It was reasonable for the Hearing Committee to find that Mr. Rauf's Letter was not an attempt to increase the level of discourse on judicial appointments. The Letter was not

[70] Decision paragraph 102.
[71] Decision paragraph 116.
[72] Decision paragraph 104.
[73] *Doré* paragraph 66.

an invitation for the LSA, the Crown or the Judicial Counsel to review JAB's conduct. The Hearing Committee reasonably found that Mr. Rauf instead publicly lashed out at a lawyer, now judge, whom Mr. Rauf disrespected. Mr. Rauf may have had personal grounds to hold his opinion, but the tone, the language, the content, as well as the manner in which he distributed the Letter were unacceptable. It was reasonable, based on all of the evidence, for the Hearing Committee to conclude that the Letter was written in bad faith.

193. Applying the *Groia* requirement for good faith in the context of the surrounding circumstances, while noting the *Histed* and *Doré* requirement for "dignified restraint" in criticism of the judiciary, the findings on bad faith were reasonable. So too were the findings in respect of each Code breach.

194. For the reasons above, this outcome would have been the same had we applied the *Vavilov* appellate standard. In considering that standard, we find no error of law or misapplication of legal principle. Nor do we find any palpable and overriding error of fact nor inference from the facts as found by the Hearing Committee. On either standard, we do not disturb the findings of the Hearing Committee.

Conclusion

195. A lawyer plays a vital role in the administration of justice. This role may require resolute advocacy, particularly in the midst of representing those facing deprivation of liberty in criminal proceedings. When a lawyer is not in the courtroom, the lawyer is not expected to mute oneself to refrain from engaging in issues connected to the administration of justice. Indeed, the advocacy for human rights and improvements in the administration of justice often takes place outside the courtroom. There, a lawyer is expected to conduct oneself with integrity and civility, including when a lawyer criticizes a judicial appointment and the appointment process.

196. Lawyers not only have a right to criticize the legal system, in some cases they may have a duty to do so, including the appointment process and the appointment of judges. Open criticism of our legal system is a hallmark of a free and democratic society.

197. Lawyers have freedom of expression. It is not absolute. By virtue of their privileged position in society, their relationship to their clients, their role in the administration of justice, and their Code of Conduct, lawyers cannot say whatever they want, whenever they want, to whomever they want, regardless of whether one has an underlying basis for a stated opinion. Lawyers are not immune from regulatory oversight in their expression. Lawyers and judges are expected to serve the public with civility and dignity. Lawyers are also bound by the Code of Conduct. Even robust criticism must be measured against the public's expectation of a lawyer's professionalism. This requires criticism to be exercised with dignified restraint.[74]

198. The reasoning in *Groia* has application beyond a courtroom advocacy context. The fact that the impugned conduct in *Groia* largely occurred in a courtroom during criminal

[74] *Doré* paragraph 68.

proceedings does not preclude its application generally in law society disciplinary proceedings. The framework in *Groia* is broad enough to be applied in the diverse array of situations in which lawyers find themselves. With due consideration of contextual factors, its analysis can be extended to include civility outside the courtroom. Here, this included criticism of a judicial appointment, allegations of prosecutorial misconduct, and an uncivil offensive going to the heart of JAB's personal attributes. The *Groia* analysis requires that the impugned statements must be made both in good faith and with a reasonable basis. Context is important. Although the courtroom environment was an important contextual factor *Groia*, it was one factor and is not a prerequisite to the application of the *Groia* framework for Mr. Rauf's appeal.

199. Likewise, *Doré* and *Histed* still govern cases such as these. That is particularly so given that this case raises issues related to the judiciary, the appointment process, and the administration of justice. A single attack on another justice system participant can warrant a finding of misconduct as it did in *Doré*. This was also expressly recognized in *Groia*.

200. In this case, the language Mr. Rauf employed to criticize a newly appointed judge and the system that appointed JAB was intentionally designed to be a personal attack, to draw the reader in, and to persuade the reader of Mr. Rauf's viewpoint, that JAB is not worthy of the title "honourable," that her appointment is a "disgrace" and that it is "laughable" that she should be called "the Honourable JAB." He wanted the legal community to accept as fact his opinion that JAB was "ethically challenged" and that those who appointed her were poor judges of her character.

201. In so doing, he used his firm's letterhead, invoked his extensive legal experience and used a medium of broad dissemination. The Letter was originally intended for publication in a major newspaper. When that approach failed, Mr. Rauf instead opted for broad delivery by personal distribution. He provided the Letter to many lawyers. He left copies of the Letter at the Edmonton Courthouse. The full extent of the distribution is unknown. Mr. Rauf engaged his professional standing to accomplish his ends.

202. The Hearing Committee considered the evidence before it. The Hearing Committee was alive to the need to balance freedom of expression against a lawyer's obligations of civility. The Letter, on its face, was an uncivil communication and a personal attack on the character, honour and ethics of a newly appointed judge. When faced with a legitimate concern over the tone, language and content of the Letter, Mr. Rauf responded in a way that undermined his *bona fides* and belied his motives instead of explaining them.

203. In responding with biting sarcasm, in writing a letter to report himself for complimentary letters, in invoking Lord Denning's obligation to speak while simultaneously calling the equivalent Rule in the Code of Conduct bad and immoral, Mr. Rauf provided ample additional evidence that further supported the Hearing Committee's findings on the important question of bad faith.

204. Mr. Rauf's evidence on his views that the Code's obligation to report misconduct is immoral and should not be obeyed was relevant evidence on good faith because the very premise of Mr. Rauf's defence was that he was morally compelled to speak out against JAB's appointment. This stark inconsistency was never adequately explained. The Hearing Committee did not breach the principles of natural justice in considering the evidence. Nor did it conflate the evidence. The evidence was all directed at and considered under the single citation of conduct deserving of sanction.

205. The Accusations in the Letter may have formed a reasonable basis for Mr. Rauf's personal opinion. However, the Accusations were not the issue nor would it have been proper, in this context, to effectively put JAB on trial for her actions, some of which happened more than ten years prior. The lack of good faith was the driving force behind the citation and the Decision. Given the bad faith finding, the question of a reasonable basis for Mr. Rauf's opinions falls away.

206. Had Mr. Rauf's true intent been to improve the administration of justice, a myriad of options were at his disposal. A timely complaint, with its attendant due process, was one option. Public discourse was another. Mr. Rauf was entitled to hold and express his opinions. He was not entitled to express them in the manner he did. The Hearing Committee had ample evidence to find that Mr. Rauf wrote the Letter in bad faith to lash out at a lawyer, now appointed judge, that he disrespected. He intended to attack JAB's character and the appointment process. Although allegations of prosecutorial misconduct inherently involve strong statements, Mr. Rauf's tone, language, and delivery crossed the line. Mr. Rauf breached each of the Rules set out in the single citation. His criticisms were neither made in good faith nor were they expressed with dignified restraint. This was conduct deserving of sanction.

207. The Decision is confirmed. The appeal is dismissed.

208. Mr. Rauf will have time to pay the costs of this matter in the sum of $23,452.50. Payment must be made within one year of this decision.

209. 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 Law Society of Alberta.

Dated at Edmonton, Alberta, January 27, 2021

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Kathleen Ryan, QC – Chair

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Elizabeth Hak – Lay Bencher

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Jim Lutz – Bencher

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Barbara McKinley – Lay Bencher

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Bud Melnyk – Bencher

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Corinne Petersen – Bencher

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Margaret Unsworth, QC – Bencher

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Louise Wasylenko – Lay Bencher