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

AND

IN THE MATTER OF AN APPEAL
REGARDING C. MICHAEL SMITH
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Appeal to the Benchers Panel

Scott Matheson – Chair/Bencher
Glen Buick – Lay Bencher
Stephanie Dobson - Bencher
Levonne Louie – Lay Bencher
Bud Melnyk, KC - Bencher
Kelsey Meyer – Bencher
Nicole Stewart – Bencher
David Tupper – Bencher

Appearances

Shanna Hunka – Counsel for the Law Society of Alberta (LSA)
C. Michael Smith – Self-represented

Hearing Date

March 17, 2025

Hearing Location

Virtual Hearing

APPEAL PANEL DECISION

Overview

1. C. Michael Smith's daughter lived with her husband and baby in a rented bungalow on a quiet residential street on the north side of Calgary. One day the landlords gave notice that they were going to list the property for sale. Mr. Smith acted for his family and disputed the landlords' right to list the home and terminate the tenancy.[1]

2. As the tenants' father as well as their lawyer, Mr. Smith played an unusually active role. When the landlord and realtor appeared, there was a standoff on Thorncliffe Drive. Mr. Smith stood firm on the front lawn and declared, "I have been practicing 40 years at the bar and I know the law, and you guys are out of luck – so get lost."[2] After the realtor put

[1] Mr. Smith denied representing the tenants on the dates at issue, an argument we consider below.
[2] Exhibit 6, Hearing Record.

up a For Sale sign, Smith took matters into his own hands, by personally tearing it down.[3]

3. Litigation inevitably followed. Mr. Smith was aggressive with opposing counsel, accusing him of suborning perjury by the landlords and breaching the LSA's Code of Conduct (Code).

4. The landlords lodged a complaint against Mr. Smith, leading to the LSA's investigation and an order from the Conduct Committee directing a hearing on three citations:

    1) It is alleged that C. M. Smith engaged in conduct that brings the legal profession into disrepute by removing and damaging a realtor's lawn sign and that such conduct is deserving of sanction.

    2) It is alleged that C. M. Smith failed to act with courtesy and civility and that such conduct is deserving of sanction.

    3) It is alleged that C. M. Smith failed to respond fully and substantively to inquiries from the Law Society and that such conduct is deserving of sanction.

5. After five pre-hearing conferences, the Hearing Committee (Committee) convened, virtually, on September 26, 27, and 28, 2023 (Merits Hearing). Mr. Smith was self-represented. When the hearing started, he made two preliminary applications. He objected to a virtual hearing, arguing that it impaired his ability to cross-examine witnesses.[4] He also took issue with the citations, claiming that they were not adequately particularized.[5]

6. The Committee dismissed both motions. The proceeding went ahead, and in a decision on November 24, 2023 (Merits Decision), the Committee found Citations 2 and 3 had been proven – Mr. Smith failed to act with courtesy and civility with the landlord's counsel, and he did not respond fully and completely to the LSA's investigation. After a further hearing on April 10, 2024 (Sanction Hearing), the Committee issued its sanction decision on May 22, 2024 (Sanction Decision) delivering a reprimand, a $2,500.00 fine on each proven citation, and an award of $20,000.00 in costs, all of which was stayed pending Mr. Smith's timely appeal of both the Merits Decision and Sanction Decision to this Appeal Panel under section 76 of the *Legal Profession Act* (*Act*)

7. Mr. Smith raises three grounds of appeal:[6]

[3] Exhibit 7, Hearing Record.
[4] Hearing Transcript, page 17-18.
[5] Hearing Transcript, page 20.
[6] The LSA's Response Brief characterizes the grounds of appeal using different language, at paragraph 2, which helpfully includes reference to whether the decisions below were unreasonable, but the differences from Mr. Smith's framing are otherwise minor.

1) "The extent to which the Law Society can restrain or direct the advocacy of the member on behalf of clients", in respect of the citation regarding Mr. Smith's allegedly uncivil communications with opposing counsel.[7]

2) "The extent to which the Law Society may demand information about his or her private life and sanction the member for any failure to cooperate in that regard", in relation to the LSA's questions to him about the videos of him encountering the landlords and removing the sign.[8]

3) "The extent to which the Law Society can impose costs 'sanctions' on a member exercising his right to require the Law Society to prove its case and, incident to that, whether the fine was appropriate."[9]

8. The first question asks us to consider when rudeness becomes sanctionable. Because Mr. Smith took a confrontational approach to the LSA's investigator and conduct counsel, in deciding the second ground of appeal we must decide how cooperative lawyers need to be when they are being investigated.

Preliminary Matters

9. There were no objections to the constitution of the Appeal Panel or its jurisdiction when the appointments were sent out to the parties in January 2025, or at the outset of the hearing. A private hearing was not requested, so it went ahead in public, virtually, before an eight-Bencher Appeal Panel.

10. During the appeal hearing, certain submissions were made by both parties which mentioned the name of a law firm at which one of the Appeal Panel members practices. The Chair took the opportunity to raise the fact that while the firm had been mentioned, the Appeal Panel member had no previous interactions with Mr. Smith, and no knowledge of the matters touched upon in the submissions regarding the firm. Both the LSA and Mr. Smith confirmed that, having been so advised, they had no objection to the Appeal Panel's constitution. Mr. Smith, having declined to challenge the Appeal Panel composition, submitted it is up to any Appeal Panel member *sua sponte* to decide if grounds exist for recusal. The Appeal Panel is not aware of any basis on which an informed person, viewing the matter realistically and practically, would conclude there is a reasonable apprehension of bias by any Appeal Panel member.[10]

[7] Appellant's Brief, paragraph 5.
[8] Appellant's Brief, paragraph 6.
[9] Appellant's Brief, paragraph 7.
[10] See generally *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

Standard of Review

11. The leading recent Alberta Court of Appeal cases on standard of review for internal professional disciplinary appeals[11] were driven by a review of the specific statutory language for the regulators involved. Since they do not involve the *Act*, they are instructive but not dispositive.

12. In determining what scrutiny to apply the Appeal Panel is guided by our statutory mandate in section 76 of the *Act*[12], which provides that this is not a *de novo* hearing. Instead, it is conducted on the record, meaning this appeal is not a second bite at the apple – it is an examination, on a reasonableness standard, to ensure fairness, logic, and adherence to professional standards.

13. We are mindful of the guidelines for internal appeal panels which the Court of Appeal outlined in *Yee*, at paragraph 35, and repeated in *Muradov*, at paragraph 11, and *Chartered Professional Accountants of Alberta (Complaints Inquiry Committee) v Mathison*.[13] Those principles counsel a deferential approach to a hearing committee's findings of fact and inferences drawn from them. Legal conclusions—especially those setting professional standards – merit closer scrutiny. An Appeal Panel may "independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained," and can reverse when it "perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening."[14] When setting standards of conduct, we are entitled to apply our own expertise and make findings about what constitutes professional misconduct.[15]

Analysis

Citation 2 – Failing to Act with Courtesy and Civility

14. Citation 2 had two elements, laid out in the LSA's December 2022 statement of particulars. The first concerned Mr. Smith's interactions with the landlord, WS. The second involved his communications with opposing counsel, CS. The Committee found the citation proven only as to the communications with opposing counsel.

15. The Committee heard evidence on and considered the emails from Mr. Smith in Exhibits 10, 11, 12, and 13, which were sent between November 24, 2020, and December 3,

[11] See *Zuk v Alberta Dental Association and College*, 2018 ABCA 270, paragraph 73; *Byun v Alberta Dental Association and College*, 2021 ABCA 272, paragraph 21; *Muradov v College of Naturopathic Doctors of Alberta*, 2024 ABCA 224, paragraph 11 (Strekaf and Grosse, JJA), and paragraph 41 (Fagnan, JA, dissenting but not on this point); *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98, paragraphs 29-35 (Slatter JA, concurring). See also the discussion of internal standards of review in a related context in *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraphs 41-84.
[12] *Law Society of Alberta v Faul*, 2024 ABLS 17, paragraph 47.
[13] *Chartered Professional Accountants of Alberta (Complaints Inquiry Committee) v Mathison,* 2024 ABCA 33, paragraph 20.
[14] *Muradov*, supra paragraph 11(d).
[15] *Muradov*, supra paragraph 11(d).

2020. The pertinent portions of the emails include the following statements from Mr. Smith to CS, which were sent during Mr. Smith's representation of the tenants in their litigation with the landlord[16]:

> **November 24, 2020:**
>
> I also draw your attention to your obligations under the Code of Professional Conduct Rule 5.1-2 (d), (g), (i) and (j) in case you have either forgotten them or perhaps never knew about them. [WS] knowingly gave false evidence in his Affidavit of October 16, 2020, which I remind you was commissioned by you. How he could have done this after receiving competent legal advice is an interesting question of and in itself.
>
> **December 1, 2020:**
>
> If you would care to send me the copy of the Affidavit you say you received from us and the covering email you say it came with I might form a different opinion of your personal ethical standards. I believe [WS] has lied under oath in the affidavit you commissioned and that you made no reasonable effort to check whether he was telling the truth or not. It seems [WS] is not the only person involved in this case who has a cavalier attitude to the truth. As of right now in my opinion you have knowingly or been willfully blindly (which frankly seems unlikely) made a factual misrepresentation to the Court.
>
> **December 2, 2020:**
>
> So you admit to carelessly misrepresenting the facts to the Court. You purported to read to the Court from the [AD] affidavit that you also claimed had no attached exhibits. You made no effort to ensure that your information was correct before you did so, contradicting me in open Court in the process.
>
> Now you compound that scurrilous act by implying some sort of wrongdoing on my part. Your resemblance to the lame duck POTUS continues to impress me. I frankly have no idea what you are talking about when you suggest I commented on material not yet received from your office. Perhaps you should review the exchange of correspondence more carefully and if you still somehow believe you are correct be a bit more specific as to dates and what was communicated. I have good reason to understand that I possess powers of perception and analysis that are not normal but I am assured they are not paranormal. I do not expect to hear further from you on that point, whatever it may be, as I do not expect any apology given your dismal track record in that regard.
>
> In the meantime I ask you to carefully consider your ethical obligations when putting perjury before the Court. You represent three landlords and at least two of them have different versions of the facts to tell. Radically different. How can you continue to represent more than one of the landlords under such conditions?

[16] These are excerpts, not the full emails. We have opted not to include "[sic]" notations.

December 2, 2020

I fail to understand to what you may be referring. To what "serious and offensive accusations" are you referring. I recall making no such accusations. It is a fact that [WS] has given false testimony, in his affidavit as I pointed out and under cross examination. The false statements are obvious. The question is do you intend to ask the Court to rely upon perjured evidence? You cannot avoid dealing with this problem indefinitely but it seems you are intent on doing so. I again draw your attention to your obligations under the Code of Professional Conduct Rule 5.1-2 (d), (g), (i) and (j).

… [WS]'s testimony is rife with perjury, some of which is compounded perjury upon cross examination. That is a very serious matter. You have ready access to the truth. I should be very careful in making argument before the Court if I were you.

December 3, 2020

I had previously only seen a tv actor in a law drama (perhaps it was really a comedy) try this routine. It is unethical to suggest you know of specifically applicable precedent when you know there is no such thing.

I look forward to receiving the case law you do intend to rely upon prior to the December 18'20 hearing. You cannot ignore the perjury. If you present perjured testimony to the Court asserting that it is reliable there will be consequences. That is specifically prohibited by the Code of Professional Conduct.

16. Mr. Smith made several notable arguments on this citation before the Committee. First, he relied on a leading Supreme Court case regarding discipline for incivility, *Groia v Law Society of Upper Canada*.[17] Second, he claimed section 7.2 of the Code only applies to public statements, taking the position that lawyers are not required to be civil in their non-public communications with other members of the Bar. Third, he said his remarks were driven by his honest belief CS had breached the Code, and that he had an obligation to prevent the presentation of false evidence.

The Committee's Decision on Citation 2

17. The Committee considered these emails at paragraphs 88 to 99 of its Merits Decision. It described them as Mr. Smith "attempt[ing] to litigate the matter outside of Court by insisting that CS accept his legal position" and characterized the emails as having "called CS a liar and suggested he was incompetent and unethical." Ultimately the Committee considered the emails uncivil and discourteous and found the citation had been proven.

[17] *Groia v Law Society of Upper Canada*, 2018 SCC 27.

Grounds of Appeal on Citation 2

18. On appeal, Mr. Smith challenges the Committee's finding on several bases, but they can be boiled down to two issues:

    1) That the civility rules do not apply to private communications between counsel;

    2) That even if civility rules do apply, the Committee's decision impermissibly "restrain[s] or direct[s] the advocacy of the member on behalf of clients".

First Ground of Appeal on Citation 2 – Civility Rules Apply to Private Communications

19. Mr. Smith's argument is unfounded. Section 7.1-1 of the Code says: "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." Section 7.2-6 states: "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." On their face these provisions are not restricted to public or courtroom interaction. Nothing more is required to apply them than a plain reading. Mr. Smith's interactions with CS came in the course of Mr. Smith's advocacy for his clients.

20. If more were needed, it is clear from *Doré v. Barreau du Québec* (and myriad other cases before and since) that civility rules apply to lawyers' communications in respect of a legal proceeding even when made outside the courtroom.[18] In Alberta, the civility rules have been applied by LSA hearing committees to emails and letters sent to a client, an opposing party, and an unrepresented party;[19] to verbal statements made by members to prison guards;[20] and to letters distributed in the courthouse cafeteria.[21] Alberta courts have approvingly cited the civility rules, too. In *R v Boudreau*, for example, Justice F.K. MacDonald noted the courtesy sections of the Code in rebuking a senior Crown prosecutor for berating a junior defence lawyer in a private meeting.[22]

21. This understanding comports with the rationale behind civility rules. They are intended to promote public confidence in the profession, and the administration of justice more generally, and try to maintain minimal professional norms which allow all lawyers to practice in a reasonable environment. A set of rules which applied only in the courtroom, as Mr. Smith suggests, to the exclusion of all other legal work, would mean that solicitors, for example, could savagely scream and swear at coworkers or counsel, without regard for any professional consequences. This is not a plausible reading of a Code which applies to every member of the bar.

[18] *Doré v. Barreau du Québec*, 2012 SCC 12.
[19] *Law Society of Alberta v. Forsyth-Nicholson*, 2013 ABLS 24.
[20] *Law Society of Alberta v Rauf*, 2021 ABLS 24.
[21] *Law Society of Alberta v Rauf*, 2018 ABLS 13.
[22] *R v Boudreau*, 2021 ABPC 175, at paragraph 28.

22. Regarding Mr. Smith's second argument on Citation 2, the Appeal Panel is not unanimous in its decision. The decision of the majority of the Appeal Panel (Majority) and the dissent on this issue are each set out separately below.

Citation 3 – Failing to Respond Fully and Substantively

23. The citation reads:

> 3) It is alleged that C. M. Smith failed to respond fully and substantively to inquiries from the Law Society and that such conduct is deserving of sanction.

24. The particulars of the citation were that Mr. Smith was "not responsive and cooperative" with LSA conduct counsel, CM, and the LSA investigator, SF.

25. In setting out the relevant test, the Committee cited with approval the Ontario Court of Appeal's decision in *Law Society of Ontario v. Diamond*.[23] In that case, the Law Society of Ontario (LSO) investigated fee issues at Diamond's firm. While "there was a great deal of back-and-forth communication between the appellant's counsel at the time and the Law Society," "the requested documents and information were not fully produced until approximately eight and a half months after the initial request was made." The LSO issued citations for misconduct by failing to "reply promptly and completely."

26. The Ontario Court of Appeal found that in assessing the requirement that a licensee "reply promptly and completely the following considerations emerge: (a) all of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries; (b) good faith requires the licensee to be honest, open, and helpful to the Law Society; (c) good faith is more than an absence of bad faith; and (d) a licensee's uninformed ignorance […] cannot constitute a "good faith explanation" of the basis for the delay.[24]

27. Alberta's Code contains an essentially identical provision requiring that a lawyer "reply promptly and completely to any communication from the Society." (Code, section 7.1-1, emphasis added), and Rule 85 of the Rules of the LSA (Rules) requires a member subject to a complaint to "cooperate fully with the Society…" and "respond fully and substantively to any request to answer any inquiries…" [emphasis added].

28. Ontario's policy considerations apply equally here. The LSA's duties to protect the public through self-regulation require a full measure of active cooperation from members, for the LSA has limited resources and powers.

[23] *Law Society of Ontario v Diamond*, 2021 ONCA 255.
[24] *Diamond,* supra, paragraph 50.

29. The Committee considered the evidence of Mr. Smith's interactions with conduct counsel and the investigator and found the test in *Diamond* to be satisfied. That decision was reasonable, in the Appeal Panel's view: Mr. Smith was curt, argumentative, and obfuscating. He did not respond "completely", "fully and substantively," or "cooperate fully". Often, he refused to respond at all, even to basic questions.

30. To explain why the Committee's decision was reasonable it is necessary to back up and review the evidence before the Committee related to the citation. The videos entered as Exhibits 6, 7, and 8 were taken at Mr. Smith's clients' home. Exhibit 6 shows Mr. Smith, speaking, in full view.

31. Mr. Smith is clearly the person in the video. It is obvious on its face. He is depicted in crisp resolution, in broad daylight, on his clients' lawn on October 7, 2020. He is speaking, throughout the video. Mr. Smith admits he was there at the time and said the words recorded, and testified to by the LSA witnesses, who identified him.

32. Exhibits 7 and 8 need to be viewed together. Exhibit 8 is a doorbell camera video which shows Mr. Smith, in a blue, long-sleeved shirt, dark pants, and short-brimmed hat, going into his clients' house on October 9, 2020.

33. Again, it is unmistakably Mr. Smith in Exhibit 8. He is in plain, clear view coming within a few feet of the camera, in daylight. Exhibit 7 then shows the same man (Mr. Smith) dislodge and remove the realtor's sign from the lawn and drop it down on the grassy boulevard. Mr. Smith admits that he removed the sign, on that day.

34. Mr. Smith's uncooperative approach to the LSA's investigation, and in particular the video evidence, was foreshadowed in his May 26, 2021 response letter. Rather than engage with the substance of the video and what it showed him doing – arguing with the landlord and realtor and tearing down a sign – he instead averred that the video was "unlawfully obtained."[25]

35. On June 3, 2021, conduct counsel, CM, emailed Mr. Smith asking him to, "please provide us with a further response specifically addressing the allegation that you removed and/or damaged the realtor's For Sale sign that was placed on the property on two occasions." Mr. Smith replied, "I am not able to answer that question." CM responded, on June 7, 2021, "Could you please advise why you are unable to address this allegation?" Rather than answer, Mr. Smith shot back, "On what possible legal basis can the Law Society make that particular inquiry?" After CM explained that basis, correctly and in some detail, Mr. Smith again did not answer. He wrote on June 9, 2021, *inter alia*, "Put another way, my private life is not a matter about which the Law Society can compel me to cooperate. Just because somebody complains about a lawyer does

[25] Exhibit 17, Hearing Record.

not automatically afford the Law Society the right to insist I respond to every question the Law Society may choose to put to me. The Law Society is concerned with and only authorized to inquire about matters of professional practice. Your question does not fall within that category and is therefore not a permitted question I have to respond to."[26]

36. CM described the grounds for her question, which were proper, and again Mr. Smith on June 15, 2021, refused to respond and instead argued with her. When she replied for the third or fourth time stating the legal basis for her question, about having "removed and/or damaged" the sign, he answered only, "I did not damage any realtor's sign", deliberately avoiding any response to the question of whether he had removed it.[27]

37. In the course of these emails, Mr. Smith also stated that he was "not acting in a representative capacity" at the time (October 7, 2020) and only "began acting on this file on October 20, 2020."[28]

38. Mr. Smith renews on appeal this argument that he had no duty to cooperate because the LSA's investigation was "completely unwarranted and far beyond any jurisdiction the Law Society has been granted by the legislation." He claims "the private actions of a member are none of the Law Society's business" so he was not obliged to answer questions.[29]

39. Although the *Act* requires and empowers the LSA to discipline conduct deserving of sanction, "whether or not that conduct relates to the member's practice as a barrister and solicitor" (section 49), in this case it certainly *did* arise in the course of practice in addition to his role as a father. As of October 6 and 7, 2020, Mr. Smith had been representing his daughter and son-in-law for "four or five years", including by giving advice on the initial lease and its renewal.[30] At the time of the October 7 confrontation, the owners had given notice that they intended to list the property, the tenants disputed that, and Mr. Smith, their counsel, was acting for them: Mr. Smith's daughter texted the landlords to say "if you want to go down this road have your lawyer call my lawyer. He's my dad."[31] When the landlords asked the tenants for their lawyer's contact information, they replied with Mr. Smith's email address and phone number.[32] As Exhibit 6 shows, on October 7, he was standing on the lawn of the residence of his clients telling the realtor and owner, "I have been practicing 40 years at the bar and I know the law and you guys are out of luck, so get lost." And he went on to continue to represent his clients in the litigation which ensued. His statement to CM that he was not acting for the tenants until October 20 was therefore false, and his suggestion that the investigation was being

[26] Exhibit 15, Hearing Record.
[27] Exhibit 15, Hearing Record.
[28] Exhibit 15, Hearing Record.
[29] Appellant's Brief, paragraphs 17 and 47.
[30] Exhibit 16, page 52.
[31] Hearing Transcript, pages 132-133.
[32] Hearing Transcript, pages 132-133.

made into his "private life" had no foundation.[33] It cannot reasonably be doubted that Mr. Smith was acting as the tenants' lawyer.

40. Mr. Smith's responses to CM were improperly argumentative, misleading, and uncooperative. Rather than being "open, honest, and helpful", the responses disputed the basis for the question and reflected the kind of cat-and-mouse evasion disapproved of in *Diamond*.

41. This willful refusal to respond "completely" to the LSA continued and worsened. On August 11, 2021, an LSA investigator, SF, interviewed Mr. Smith. To explain our conclusions we must, unfortunately, quote the interview at length.

> [SF]: Okay. In this video [Exhibit 6], who are you speaking to? Who's on the other side of the camera?
>
> MR. C.M. SMITH: I have no way of knowing that at this stage.
>
> [SF]: You don't recall from the voices or from the circumstances?
>
> MR. C.M. SMITH: Not from this video.
>
> [SF]: Okay. Well, what – I guess, what are you discussing on the video, then, sir?
>
> MR. C.M. SMITH: Well, isn't it self-evident? You've got the recording. Presumably you already have the information from whoever took the video. But I have no way of verifying that.
>
> […]
>
> [SF]: That is you in the video?
>
> MR. C.M. SMITH: I have no way of answering that question accurately.
>
> [SF]: By looking at that image, sir, you can't tell me that that's you? Or you don't have any recollection that that's you in that video?
>
> MR. C.M. SMITH: Well, that's two different questions.
>
> [SF]: Yes.
>
> MR. C.M. SMITH: I'm not able to answer the question.
>
> [SF]: Why not, sir?

[33] Mr. Smith has renewed this argument on appeal, claiming he was not acting as a lawyer for the tenants when the lawn confrontation and sign removal incidents occurred. That is wrong, for the reasons explained above.

MR. C.M. SMITH: Not able to answer that one either.

[SF]: Why are you not able to?

MR. C.M. SMITH: Well, that's the same question that I just said I can't answer.

[SF]: So I'm trying to understand why you're not able to answer that question. I mean, I look at the video, that appears to be you in the image. Is that not you? Or –

MR. C.M. SMITH: You're entitled to your interpretation of the image, as is anyone, but I decline to interpret the image.

[SF]: Okay. But I still don't understand why you're unable to answer the question as to the circumstances of that video.

MR. C.M. SMITH: Well, if you understood human psychology, it would be very easy for you to understand it, but I'm not gonna explain that to you.

[…]

[SF]: What do you hear in the video, sir?

MR. C.M. SMITH: I don't think I have to answer that.

[SF]: Okay. Well, on my end, I can hear it quite clearly that you appear to be indicating that they do not have access. They do not have right to access. You're telling them they don't have that right. And you subsequently tell them to get lost. Does that accurately portray what occurred in that video?

MR. C.M. SMITH: I can't comment on the accuracy of the video, as I've said.

[…]

[SF]: Okay. And this is you, sir?

MR. C.M. SMITH: I have no way of answering that question.

[SF]: How do you not have any way of answering that question? Explain that to me, please?

MR. C.M. SMITH: Can't answer that one either.

[SF]: Why not, sir?

MR. C.M. SMITH: I'm sorry?

[SF]: Why not? Why can't you answer that?

MR. C.M. SMITH: I can't answer that question either. I think I've pointed out that a rudimentary understanding of human psychology would inform you as to why someone might not be able to answer that question. I'm not gonna explain that to you.

[SF]: I'm asking you why *you* can't answer.

MR. C.M. SMITH: And I'm saying I can't answer that either.

[…]

[SF]: Who is that gentleman that just entered the house, sir?

MR. C.M. SMITH: That's my son-in-law, [AD].

[SF]: Okay. And who is this, sir?

MR. C.M. SMITH: I have no way to answer that question.

[SF]: I put it to you that that is you, sir. Is that not correct?

MR. C.M. SMITH: I have no way to answer that question.

[SF]: You don't recognize yourself on the video, sir.

MR. C.M. SMITH: That is correct.

[SF]: Really? 'Cause I'm looking at you on the screen and I'm looking at that image and listening to your voice, and I would come to the conclusion that that is you, sir.

MR. C.M. SMITH: That's your [laughs] – fine.

[SF]: So, are you denying that that is you?

MR. C.M. SMITH: I have no way to answer that question.

[SF]: On the basis of reviewing this video – and these videos that you have seen before – you're telling me you have come to no conclusion as to whether that is you or not.

MR. C.M. SMITH: No, I didn't say that. I just said I have no way of identifying the image in this video as being that of me. This is pretty elementary stuff.

[SF]: Well, sir, I believe that is you on the video. And everybody else who has viewed that video would share the same opinion.

MR. C.M. SMITH: Well, that should answer your question as to why I can't verify that opinion, but apparently it doesn't.

[SF]: Is that a video of you removing the realtor sign, sir?

MR. C.M. SMITH: I have no way to answer that question.

[SF]: And what did you pick up after the sign was removed. What did you bend up [sic] and pick up that you're walking over towards the hedge with?

MR. C.M. SMITH: I have no idea.

[…]

[SF]: Okay. When you were asked by Ms. Milne about damage in relation to the sign, there was an email exchange between the two of you, I'll just put a copy up here. So she is asking you about the removal and damage to the realtor sign that was placed on the property on two occasions. You responded that you were not able to answer that question. Why are you – were you not able to answer that question, sir?

MR. C.M. SMITH: I can't answer that question.

[SF]: Why not?

MR. C.M. SMITH: I can't answer that question either [laughs]. It's the same question.

[SF]: Well, and I'm not understanding, sir. Please enlighten me. Why can't you answer that question?

MR. C.M. SMITH: I can't answer the question that you're asking me.

[SF]: Why can you not answer? Why can you physically not answer? I understand if you -

MR. C.M. SMITH: Well, answering a question is not a physical process. Answering a question is a mental process.

[SF]: Okay. So why are you unable to use your mental process to answer the question, sir?

MR. C.M. SMITH: I can't answer that question.

[SF]: Because you're not able to access the information? Or –

[…]

[SF]: So, why are you not able to answer this question?

MR. C.M. SMITH: I'm not able to answer that question.

[SF]: Because -?

MR. C.M. SMITH: I feel we're going around in circles.

[SF]: Well, as do I. But Ms. Milne asked you a direct question here. You have said you are not able to answer that question. I'm asking –

MR. C.M. SMITH: [42:03 overtalking] direct answer to the question.

[SF]: I'm asking you to explain why you can't answer that question.

MR. C.M. SMITH: I can't answer that question

[SF]: So you're not going to provide me an explanation as to why you can't answer the question?

MR. C.M. SMITH: No, I'm not able to provide you with an explanation.

[SF]: Why are you not able, sir?

MR. C.M. SMITH: Can't answer that question either.

[SF]: Well, what would be the reason why you're not able to?

MR. C.M. SMITH: I feel I have been around the block in my profession a few times that I do know how to ask questions and I do know what proper answers to questions are. Doing my best here. Just asking the same question again and again is not going to trip me up into answering a question differently that you've asked me before, and I've answered. Doing the best I can to answer your questions, which is all I'm obliged to do.

42. The transcript speaks for itself. Mr. Smith's non-answers amount to refusals. They are not "open, honest and helpful." The Committee's finding was reasonable, considering both the substance of Mr. Smith's position and the obstinate and evasive manner in which Mr. Smith addressed the investigator's questions.

43. Regarding Mr. Smith's underlying argument about *why* he would not answer, we note that the investigator began by asking about Exhibit 6. Mr. Smith admits his presence on the lawn, on October 7, 2020. He acknowledges that he had an interaction with the realtor and owner. He admits saying "get lost". In short, he admits that the events recorded occurred on that day in that place.

44. Yet, when the investigator played the clear video showing Mr. Smith there, making those statements, he would not answer simple questions like “that is you in the video?” He replied, “I have no way of answering that correctly.” In response to the many reasonable follow-up questions, he offered the following explanation for that position: “Well, if you understood human psychology, it would be very easy for you to understand it, but I’m not gonna explain that to you […] I think I’ve pointed out that a rudimentary understanding of human psychology would inform you as to why someone might not be able to answer that question. I’m not gonna explain that to you.” When pressed further about why he couldn’t answer, Mr. Smith mused, “Well, answering a question is not a physical process. Answering a question is a mental process.”

45. During the Merits Hearing, Mr. Smith expanded further on his theory that human cognition does not allow for self-recognition. He insisted that, due to the limitations of perception, he could not identify himself in the footage – pleading what might be called auto-prosopagnosia – an inability to recognize his own face.[34] He said, and again we must quote him at length[35]:

> That is correct, and -- well, strictly speaking, under the right circumstances, you can know it's you, but those circumstances would not apply in this situation because there's no videographer.
>
> I mean, I'm being pilloried for being really exact in my responses to the Law Society investigator, which I'm obliged to do. I have looked at this for, it must be 50 years now, this whole area of cognition. And this is pretty useful stuff if you're a cross-examiner, I have to tell you.
>
> So it's just an area of study of interest, you know, you read the anthropologist, the famous one who did the Fiji experiments and so on, and if you do know all of that, then it's pretty clear that you cannot actually identify yourself in a picture or a video but you just think you can. And that's because of the surrounding circumstances that key you in to realize that must be you. But that is not the same thing.
>
> I don't know why he asked it that way. All he had to do is ask was I there and what did I do, and I would have just said I was there and I removed the sign, and then we would have been done. I don't know why anyone wants me to identify myself in a video.
>
> Okay, if you believe that you can identify yourself looking in the mirror or your driver's licence photograph, that's your right. But scientifically, that is not substantiated. That is not how the human brain works.
>
> So was I supposed to explain all that to [SF], when really the purpose of his investigation was to see whether I did or did not do X, Y and Z? And I don't know

[34] We recognize the citation only covered his exchanges with conduct counsel and the investigator, and our decision is made on that basis. The fact he persisted in this line of argument at hearing and on appeal is, however, relevant to costs.
[35] Hearing Transcript, pages 417-419 and 517-519.

whether he asked me that first or afterwards, but I think I was pretty plain. I didn't evade any of the questions that I could answer.

[…]

Q: Surely, Mr. Smith, at some point in your life you have seen photographs of yourself where you recognize yourself in photographs?

A: Well this is my point, is no you don't recognize yourself in the way, in fact, you think you do.

Q: I asked you, do you? Have you ever recognized yourself in a photograph of yourself?

A: Well if I take the photograph, then I know it's me, but that's not the same thing as recognizing the photograph as me. If someone else takes the photograph, it's someone I know, and I remember the event and I'm there, I can assume that the photograph is accurate. Although I don't look at myself in photographs. I see myself in the mirror, my face, and that's it. Last time I remember seeing myself in a video was at about age 15 in an 8-milimetre thing. Since that time, I have not seen myself, to my recollection, in a video which would allow me to form a recognition-type pattern, if you like.

[…]

In terms of the video, I at no time denied anything about the video. This committee apparently believes that you can identify yourself from a video, and I do not believe that you can. That's a difference of opinion for which there is actually no scientific certainty either way.
I will tell you that the biological process by which we purportedly recognize ourselves is not understood. We do know that human beings can do it. We suspect some other animals can do it, but it's very difficult to prove.

But what does that actually mean? Until a child is between the ages of 2 and 3, they do not recognize themselves. So that tells you that a different part of the brain is involved in facial recognition than is involved in self-recognition.

And it's the concept of self-awareness which people are deluded into thinking is recognition. If you look at yourself in the mirror, you think that you recognize the person in the mirror. Well, you do not. You recognize that you are the person in the mirror because you have a part of your brain that allows you to be aware that you have a brain, which a dog does not.

And so I'm entitled to that opinion. I'm entitled to hold the view that if you are called upon to swear the truth that you recognize yourself in a video, you cannot do so. Had I been asked, can you identify the person in the video, I would say no, of course, because you do not recognize the person in the video the way you recognize everybody else in the universe. So I was acting from my own personal opinion about the science of self-recognition.

46. Mr. Smith has persisted in this argument on appeal. His appeal brief, from paragraph 54 to 57 states:

> This video is used exclusively to sanction the member for failing to identify himself in the video. The Hearing Committee completely ignored the member's stated reasons for failing to identify himself, as did the investigator. By doing so the Hearing Committee and the investigator imposed their own personal beliefs about this area of human perception and cognition upon the member without any scientific basis for doing so. In fact it is well known that even computers have great difficulty identifying video images accurately. They certainly cannot do so as reliably as human witnesses. The important aspect of this is that it is the experience of litigators that: human eye witnesses are notoriously unreliable.
>
> It is a scientific fact that we do not know how human's recognize other humans. It is also fact that we do not know how humans recognize themselves. We do know that these are different mental processes if only because infants are known to recognize other humans long before they sense that they recognize themselves. Also we know that the lower orders of animals do not ever recognize themselves even though they prove adept at recognizing other members of their own species. Dogs in particular are adept at recognizing both other dogs and humans and routinely differentiate between their own group of dogs and humans as opposed to other groups of dogs or humans. The point raised by the member was that recognition of others, so called facial recognition, involves a different mental process to "recognizing" oneself. Otherwise all animals capable of identifying other members of their own species would ipso facto be able to recognize themselves. Science does not know how "self recognition" works but it is not a process of facial recognition. Consciousness is required. Recognition of oneself is not at all the same thing as identification of oneself from a depiction. The member does not say the Hearing Committee isn't entitled to their own view of this process. The member asserts that his view is superior to that of the average person including the Hearing Committee. The member is entitled to hold that opinion and such justified the evidence failing to identify himself in a remotely recorded video.
>
> There is also the related issue of point of view. A person in a video cannot be a witness to what that person is doing in the video. This is in contradistinction to being able to confirm what others may be doing in the same video. The maker of the video cannot also witness himself or herself doing whatever may be depicted in the video. The person making the video isn't in the video. This simple explanation should readily illuminate the serious difficulties in expecting a person to identify himself in a video as opposed to possibly recognizing that the person was present when the video was recorded which is a different mental process.
>
> There was no basis for the Hearing Committee nor the investigator to doubt the genuine belief expressed by the member that he could not identify himself in the video. Common knowledge in that regard is simply incorrect. More importantly, the member did not at any time deny his involvement in the removal of the sign purportedly recorded. The removal was legally irrelevant to the proceedings in any event. Other persons were apparently able to identify the member from the

video. That was not in issue at any point in time from the filing of the original complaint. The Hearing Committee said as much but found that the member was not candid by failing to identify himself. This is wrong in law.

47. This argument is unserious. The videos' provenance was established. The individual depicted was identified by others and, in effect, by Mr. Smith himself when he admitted to both the lawn confrontation and removing the sign. It is self-evident to any fact-finder viewing the videos that the person depicted is Mr. Smith. The claim that he *cannot* recognize himself is, at best, disingenuous and, at worst, an exercise in bad faith obstruction. Lawyers owe the Law Society frankness and honesty, not sophistry. Advancing a theory that humans cannot identify themselves in photos or videos, on the basis of half-remembered reading about "Fiji experiments", is unworthy of a member of the bar.[36] Mr. Smith claims he does believe this.[37] But even if that is so, the Law Society cannot countenance "callow subjectivity, where a lawyer can purchase immunity simply by demonstrating his or her own sincerity of belief in an otherwise preposterous argument."[38] Lawyers are not entitled to manufacture metaphysical doubt to avoid regulatory oversight.[39]

48. Mr. Smith makes two other arguments on appeal about the videos. He says they were inadmissible because they resulted from a breach of a reasonable expectation of privacy – his and the tenants'.[40] He also claims the videos – both the doorbell camera and the cellphone video – were not properly authenticated to ensure "the reliability of the recording either as originally recorded or subsequently stored and reproduced for the Hearing Committee to use."[41]

49. Citation 1, alleging that Mr. Smith engaged in misconduct by removing and damaging the sign, was dismissed. So was the portion of Citation 2 which dealt with the lawn encounter captured in part in Exhibit 6. To the extent any of Mr. Smith's subsidiary arguments about the videos are marginally relevant to Citation 3, they fail. Exhibit 6 was taken in public on Mr. Smith's clients' front lawn and sidewalk, by the owner and the realtor. Mr. Smith's clients are not depicted. The person who took the video authenticated it at the hearing. As to Exhibits 7 and 8, the doorbell camera records *outward* and depicts a public street, in broad daylight. The salient portion of it shows Mr. Smith, who does not live in the house, removing the sign. The witnesses described how the video was obtained from the camera and put into the record.

---

[36] All barristers and solicitors swear an oath which includes a promise not to "promote suits upon frivolous pretences." See *Wirring v Law Society of Alberta*, 2023 ABKB 580 (on appeal, but not on this issue).
[37] Hearing Transcript, page 517: "And so I'm entitled to that opinion. I'm entitled to hold the view that if you are called upon to swear the truth that you recognize yourself in a video, you cannot do so."
[38] Sanford Levinson, "Frivolous Cases: Do Lawyers Really Know Anything at All?." *Osgoode Hall Law Journal* 24.2 (1986), page 369.
[39] It should not need to be said, but humans can readily identify themselves in photos and videos. Mr. Smith's view has no support in modern science. Indeed the inability to recognize oneself is a diagnostic criteria for serious neurological and psychiatric conditions like dementia.
[40] Appellant's Brief, paragraphs 49-53.
[41] Appellant's Brief, paragraphs 49-53.

50. Even if the Committee were bound by the strictest rules of evidence applicable to judicial proceedings, which as the Merits Decision in paragraph 42 correctly noted, it is not, in these circumstances no plausible claim can be made that the videos breach anyone's reasonable expectations of privacy, nor that they are inauthentic or unreliable in any way.

51. The substance of Mr. Smith's objections to the videos aside, the passages above quoting his interactions with CM and SF about their contents show he repeatedly refused to answer direct and simple questions, and then when asked why he could not answer, refused to answer those, too. Mr. Smith's unwillingness to be frank and open with the LSA frustrates its ability to carry out its statutory mandate. We endorse the LSA's argument, at paragraph 123 of its appeal brief:

> While Mr. Smith may think his evasiveness or non-cooperation as something trivial, these actions impact a professional regulatory body's ability to function. The LSA is a self-governing body. Its ability to regulate and govern lawyers in accordance with its statutory mandate is obstructed when lawyers are uncooperative and do not respond to inquiries. Furthermore, the LSA cannot protect the public, which is its ultimate mandate, in any meaningful way when it is not provided accurate, complete and candid information concerning its members.

52. The Committee reasonably concluded that Mr. Smith failed to respond fully and substantively, correctly applying the test in *Diamond*. This ground of appeal is dismissed.

Appeal of Procedural Rulings

53. We take Mr. Smith's brief to indicate that he is appealing the Committee's rulings on his two procedural motions. To the extent these raise allegations of procedural fairness, they are subject to correctness review.[42]

54. For the videoconference motion, the Committee noted that virtual hearings were procedurally fair and are the presumptive mode under the Rules of the LSA. Citing the LSA's Virtual Hearing Guideline, it found the factors for an in-person hearing were not met.[43]

55. On appeal, Mr. Smith argues:

> A related although different issue arises from the reliance upon video "hearings" and meetings in the mistaken belief that these are as effective as in person meetings and therefore more efficient. There is no scientific basis for this belief. There is a growing body of evidence that this belief is unfounded and wrong. The

[42] *Muradov*, paragraph 13, citing *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.
[43] Merits Decision, paragraph 18.

> evidence appears to be that human perception of facial and body messages humans use and which evolved along with our social behaviour are not correctly observed and interpreted in a video environment. A parallel phenomenon is observed in the case of cell phone use while driving. This evidence supports the idea that even hands free cell phone use is equally dangerous to handheld use when driving. These mistaken beliefs held by people not experienced or knowledgeable about how the human brain actually operates, particularly in conjunction with our senses, is a very real danger to the correct operation of our judicial and quasi judicial systems, not to mention mundane things like business meetings.

56. The Committee was correct in its assessment of the Virtual Hearing Guideline and its factors. We note that Rule 2.5 of the Rules prescribes that hearings are presumptively virtual. Modern tribunals routinely conduct virtual proceedings without sacrificing fairness or accuracy, even when cross-examination is occurring. When witnesses, parties, adjudicators, and counsel may be in different places – as was the case below, and at many tribunals – this hearing mode is more effective and economical. Mr. Smith's stated basis, that an in-person hearing was required for him to adequately cross-examine witnesses, was not sustainable. Hearing committees are fully able to see, hear, and evaluate testimony by video.

57. No prejudice arose for Mr. Smith. He was able to cross-examine the witnesses at great length. To the extent these examinations were ineffective that was the result of Mr. Smith's many digressions about the underlying merits about the lawsuit between the landlord and tenants. For long periods of the transcript his questions had no relationship to the citations. He cross-examined freely and at length, including detouring into irrelevant domestic appliance inquiries. We also observe that credibility was not a major issue in the proceeding, given the emails and video recordings, so to the limited extent that in-person cross-examination can be justified, for particular witnesses, in matters where credibility is key, that was not the case here.

58. Mr. Smith's pseudoscientific arguments on appeal about video hearings – like "hands free cell phone use is equally dangerous to handheld use when driving" – are so meritless and irrelevant as to give rise to adverse costs consequences.

59. Mr. Smith's objection to the hearing mode was, moreover, untimely. There were five pre-hearing conferences in this matter. As far as we are aware, he made no motion at any of them for an in-person hearing. It should have been obvious to Mr. Smith that waiting to raise this motion until the morning of the proceeding, when witnesses had already been arranged to attend by video, was late, prejudicial, and would have led to an unnecessary adjournment.

60. For the particulars application, the Committee observed that the standard for particulars in professional discipline matters is not the same as criminal proceedings; Mr. Smith had

been provided full disclosure; there were several pre-hearing conferences; and the materials exchanged had given Mr. Smith fair notice of the case that he needs to meet and defend.[44]

61. More importantly, sufficient particulars *had* been given. The "Particulars of Citations" delivered in December 2022, well before the hearing, and marked as Exhibit 18 before the Committee, contain specific details of the dates, people, communications and events at issue in the citations.

62. On appeal, Mr. Smith takes issue with Citation 2 and argues in general that the particulars provided to him for that citation were insufficient. We endorse the Committee's reasons for denying the application. In addition to those given, we note that the complaint itself made clear to Mr. Smith what conduct was at issue – his confrontation on the lawn on October 7, 2020; his removal of the sign; his emails with opposing counsel; and his emails and interview with the LSA. He was given fair notice and made aware of the case he had to meet.

63. With respect to "bifurcation", it is common for a citation about the breach of the Code provision to include multiple factual elements. There is no legal basis for Mr. Smith's suggestion that each of these requires its own independent citation. The case cited, *R v Precision Diversified Oilfield Services Corp*, was a regulatory prosecution with different standards to be met, but, in any event, the test restated that there is a "golden rule" that particulars must be sufficient to make the accused "reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."[45] Mr. Smith was. The December 2022 particulars are thorough.

64. The Committee's decisions about the virtual hearing and particulars motions were correct. No breach of procedural fairness occurred. The appeals of the rulings are dismissed.

Sanction

65. After providing the Merits Decision, the Committee considered the relevant principles for sanction, citing the Pre-Hearing and Hearing Guideline and the cases provided by counsel for parity purposes. Weighing the relevant factors, the Committee ordered a reprimand and a fine of $2,500.00 for each citation.[46]

66. Having dismissed the appeal on the citations, we nonetheless consider Mr. Smith's challenge to the sanction, noting that it is reviewable for reasonableness.

[44] Merits Decision, paragraph 11.
[45] 2018 ABCA 273, paragraph 57.
[46] Sanction Decision, paragraph 33.

67. In our view the Committee's analysis of the propriety of a fine and the quantum levied was reasonable and fairly applied the relevant factors. The cases cited for parity purposes, particularly *Rauf*[47] and *Lee*[48], indicate that these fines are within a reasonable range. The extent of Mr. Smith's non-cooperation with the LSA, and the disingenuous arguments behind it, provide ample basis for the sanction, and the amount is at the low end of a potential range. In making our decision about sanction, and costs, we are careful to distinguish between the non-cooperation giving rise to the citation – which took place in the interactions with conduct counsel and the investigator – and Mr. Smith's conduct in the hearing below and here, so as not to engage in any double-counting.

68. A reprimand remains appropriate, since Mr. Smith does not accept that his conduct with the LSA was wrong. It conveys unequivocal disapproval – a necessary corrective response to Smith's incivility and defiant non-cooperation. It is important for the Appeal Panel to express, and for Mr. Smith to hear, our conclusion that he acted dishonourably and his actions reflect poorly on the profession.

69. A reprimand, although mild in comparison to a fine, suspension, or disbarment, remains a significant professional rebuke. It serves not merely as punishment, but as a clear message to Mr. Smith and his fellow professionals: evasive behaviour towards the LSA is unworthy and unacceptable. It demonstrates to the public and the Bar that the LSA takes seriously its expectation that lawyers facing discipline must be, in their interactions with the LSA, open, honest, helpful, and frank.

Hearing Costs

70. The Committee awarded $20,000.00 in costs against Mr. Smith. His third ground of appeal asks whether the LSA can impose costs at all. He questions "the extent to which the Law Society can impose costs 'sanctions' on a member exercising his right to require the Law Society to prove its case." He cites *Jinnah v Alberta Dental Association and College*, which, he says, "stands for the proposition that costs ought not to be awarded against members of a profession absent reprehensible conduct by that member during the proceedings."[49] He then goes on to contest the substantive grounds on which costs were awarded, including his opposition to agreed facts and exhibits; who should bear the costs of the PHCs; who bore responsibility for the length of the hearing; and the relative success and failure of the parties, since one citation was dismissed entirely and on another, the element concerning WS was not proven.

71. Permission to reconsider *Jinnah* was recently granted. The relevant appeal, by a five-justice panel, was heard on March 7, 2025.[50] As Mr. Smith observes, however, hearing committees apply the law as it is, not as it may be in the future: "Decisions the Court of

[47] *Law Society of Alberta v Rauf*, 2021 ABLS 24.
[48] *Law Society of Alberta v. Lee*, 2009 ABLS 31.
[49] *Jinnah v Alberta Dental Association and College,* 2022 ABCA 336.
[50] *Charkhandeh v College of Dental Surgeons of Alberta* (2403-0027AC).

Appeal might make are not proper argument."[51] In that regard, we note that virtually every hearing committee since *Jinnah* has addressed it and endeavoured to apply the law of costs fairly.[52] A seven-Bencher panel in *Law Society of Alberta v Beaver*[53] found that *Jinnah* applied only to professions regulated under the *Health Professions Act*. The Court of Appeal dismissed an appeal from that decision and declined to comment about whether *Jinnah* applied to proceedings under the *Legal Profession Act*.[54]

72. For present purposes it is not necessary to wade past the ankles into the various authorities our predecessor panel ably summarized in *Beaver*, since Mr. Smith meets the test in *Jinnah*. He is not a serial offender, and his proven conduct did not harm a client. However, his breaches were in our view nonetheless serious when taken together. In particular, the extent of his obstreperous non-cooperation, and the absurdity of his underlying rationale, brings the profession into disrepute.

73. More importantly for costs purposes, Mr. Smith engaged in prolonged hearing misconduct. As we described in detail above, his position before the Committee was obstinate. The position he was advancing – that human cognition does not allow him to identify himself in a clear video – was baseless to the point of being unprofessional, as were his arguments that the videos were doctored or an invasion of his privacy. We repeat and adopt our description of that behaviour in coming to our conclusion on costs. It justified a significant award. His insistent, digressive cross-examination of the LSA witnesses on issues in the underlying litigation, unconnected with the citations, provides a further justification for substantial costs. The length of the hearing was to a large degree of Mr. Smith's own making, including his choice of a let-me-tell-you-a-story method of submission.[55] The Committee adequately scrutinized the LSA's Estimated Statement of Costs, which totaled $33,058.68 (of which $7,416.15 was disbursements), and the amount ordered, $20,000.00, was within an acceptable range.

74. Finally, we must address one element of Mr. Smith's appeal argument which deserves further comment. He takes issue with the following submissions made by LSA counsel during the hearing when addressing costs:

> I have heard from members of the Bar in reaction to the merits decision expressing gratitude, and I will quote: (as read)
>
> "The description of his communications in that decision are literally every single file with him. In fact, I'm sure I've seen much worse from him over the years."

[51] Appellant's Brief, paragraph 59.
[52] See, for example, the thorough, recent discussion of the evolution of costs in *Law Society of Alberta v Baig*, 2024 ABLS 23.
[53] *Law Society of Alberta v Beaver,* 2023 ABLS 4.
[54] *Beaver v Law Society of Alberta,* 2024 ABCA 354, paragraph 158.
[55] E.g. Hearing Transcript, pages 348-353. Smith: "Fortunately, the Crown understood that I needed to talk to this guy, and so she joined in my application, I assured the Court that my consultation with this person would in no way adversely effect the administration of justice and my friend the Crown prosecutor agreed that that was the case. And so then, bla, blah, whatever."

> That's from a partner at [B Firm], that particular quote. I'll leave that. It's evidence it goes beyond.[56]

75. This submission should not have been made. The suggestion that other lawyers expressed "gratitude" for the Merits Decision, and the purported allegation from the unnamed partner about Mr. Smith's uncharged conduct on other unrelated matters, was anonymous, not in evidence, not part of a citation, never proven, and irrelevant. Mr. Smith had no fair opportunity to contest it. While a hearing committee is not bound to strict rules of evidence, it nonetheless takes a principled approach to them, and it does not permit the admission of mere anonymous gossip. Properly, the Committee did not rely on it in their decision on costs, and neither do we.

Decision and Concluding Matters

76. The appeal is dismissed. The fines, reprimand, and costs award below are not disturbed.

77. As to costs of the appeal, the parties shall provide their written submissions on costs of the appeal, and any time needed to pay such costs in the event costs are ordered payable by the Appeal Panel, to us within one month of this decision. The Appeal Panel will render its decision on costs thereafter.

78. The exhibits, other hearing materials, and this report, will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than Mr. Smith will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 101(3)).

Dated May 15, 2025.

Scott Matheson

Glen Buick

Stephanie Dobson

Levonne Louie

[56] Hearing Transcript, page 523.

Bud Melnyk, KC

Kelsey Meyer

Nicole Stewart

David Tupper

Decision of the Majority on Citation 2

(Reasons of the Majority on finding of guilt on citation 2, Kelsey Meyer, Glen Buick, Stephanie Dobson, Levonne Louie, Bud Melnyk, KC, Nicole Stewart and David Tupper concurring)

Second Ground of Appeal –The Test for Incivility

79. Mr. Smith's second ground of appeal on Citation 2 is that even if civility rules do apply to communications between counsel (which we have held they do), the Committee's decision impermissibly "restrain[s] or direct[s] the advocacy of the member on behalf of clients".

80. The Committee found that Mr. Smith's communications with CS were uncivil and discourteous and in breach of Code sections 7.2-1 and 7.2-6, which state as follows:

> Courtesy and Good Faith
>
> 7.2-1 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.
>
> Commentary
>
> [1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.
>
> [2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The

> presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.
>
> [3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.
> …
>
> Communications
>
> 7.2-6 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.

81. The Committee found the Commentary under Code section 7.2-1 especially informative and relevant, noting it is in the public interest for matters to be "dealt with effectively and expeditiously", that lawyers['] "fair and courteous" dealing with each other contributes to this end, and that the Commentary notes the "personal remarks or personally abusive tactics interfere with the orderly administration of justice."[57] The Committee held that "Mr. Smith's manner of dealing with CS, particularly in his communications, has the tone of incivility, discourteousness and frankly, appears to have engaged in belittling CS and intimidating tactics." The Committee stated that it "failed to understand how, other than stalling, Mr. Smith's tactics furthered the public interest and the administration of justice."[58]

The Importance of Civility in the Legal Profession

82. In *Groia*, Moldaver J. for the majority confirmed the importance of civility to the legal profession, noting four ways in which incivility is damaging to the administration of justice:

1) Incivility can prejudice a client's cause:

> Overly aggressive, sarcastic, or demeaning courtroom language may lead triers of fact, be they judge or jury, to view the lawyer – and therefore the client's case – unfavourably. Uncivil communications with opposing counsel can cause a breakdown in the relationship, eliminating any prospect of settlement and

[57] Merits Decision, paragraph 95.
[58] Merits Decision, paragraph 96.

> increasing the client's legal costs by forcing unnecessary court proceedings to adjudicate disputes that could have been resolved with a simple phone call.[59]

2) Incivility is distracting - to the lawyers and to triers of fact.[60]

3) Incivility adversely impacts other justice system participants.[61]

4) Incivility can erode public confidence in the administration of justice – a vital component of an effective justice system:

> Inappropriate vitriol, sarcasm and baseless allegations of impropriety in a courtroom can cause the parties, and the public at large, to question the reliability of the result. … Incivility thus diminishes the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism.[62]

[*citations omitted*]

83. In his dissent, Mr. Matheson addresses academic articles of Professor (now Justice) Alice Woolley and others questioning the role of civility in the legal profession. Of note, Code sections 7.2-1 and 7.2-6 and the Commentary thereon form part of the Code and apply to Mr. Smith and all other LSA members. There was no challenge before the Committee, or before this Appeal Panel, to the propriety of the sections of the Code. As noted above, in *Groia* and also in *Doré*, the Supreme Court of Canada has confirmed that there is a legitimate public expectation that lawyers will behave with civility – and that this applies both inside and outside of the courtroom.[63]

84. Indeed, as was pointed out by the Disciplinary Council of the Barreau du Québec in *Doré*, Mr. Smith, like Mr. Doré, has willingly joined a profession that is subject to rules of discipline that he knew, or ought to have known, would limit his freedom of expression, which are made in exchange for "the privileges conferred on lawyers as members of an 'exclusive profession'".[64]

Civility Cannot Compromise Resolute Advocacy

85. The majority decision in *Groia* emphasized that civility cannot compromise a lawyer's duty of resolute advocacy,[65] noting that the importance of resolute advocacy cannot be

[59] *Groia*, supra, paragraph 64.
[60] *Groia*, supra, paragraph 65.
[61] *Groia*, supra, paragraph 66.
[62] *Groia*, supra, paragraph 67.
[63] *Doré*, supra, paragraphs 61, 65, 68, 71-72.
[64] *Doré*, supra, paragraph 17.
[65] *Groia,* supra, paragraphs 70-71.

overstated and is a key component of the lawyer's commitment to the client's cause, and a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[66] Moldaver J. held for the majority:

> Resolute advocacy requires lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case: Federation of Law Societies of Canada, *Model Code of Professional Conduct* (online), r. 5.1-1 commentary 1. This is no small order. Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable. These submissions can be met with harsh criticism – from the public, the bar, and even the court. Lawyers must stand resolute in the fact of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary.[67]

86. However, Moldaver J. also confirmed that he "should not be taken as endorsing incivility in the name of resolute advocacy", noting that civility and resolute advocacy are not incompatible, and that civility is often the most effective form of advocacy. With respect to the balancing of the same, he held:

> Nevertheless, when defining incivility and assessing whether a lawyer's behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client's cause.[68]

The Proper Approach

87. The majority in *Groia* approved the approach that had been taken by the Appeal Panel of the Disciplinary Council of the Barreau du Québec, being a contextual and fact-specific approach that allows for the necessary flexibility to assess behaviour arising from the diverse array of situations in which lawyers find themselves, but also involves weighing a list of factors – specifically stated not to be a closed list – on a case-by-case basis, thus ensuring precision with respect to the standard of civility.[69] Those factors included: (1) what the lawyer said; (2) the manner and frequency of the lawyer's behaviour; (3) the trial judge's reaction, and (4) a proportionate balancing of the lawyer's expressive rights (which may engage section 2(b) of the *Charter*[70] and the law society's statutory mandate.[71]

---

[66] *Groia,* supra, paragraph 72, citing *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at paragraphs 83-84.
[67] *Groia,* supra, paragraph 73.
[68] *Groia,* supra, paragraph 76.
[69] *Groia,* supra, paragraphs 77-80.
[70] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), c 11.
[71] *Groia,* supra, paragraphs 80-120.

88. With respect to what the lawyer said, the majority in *Groia* confirmed that allegations of professional misconduct or other challenges to opposing counsel's integrity must be made in good faith and have a reasonable basis.[72] Moldaver J. also held that in some circumstances, bad faith allegations or allegations that lack a reasonable basis may, on their own, warrant a finding of professional misconduct.[73]

89. With respect to the manner and frequency of the lawyer's behaviour, the majority in *Groia* held that a single outburst would not usually attract sanction, but "this does not mean a solitary bout of incivility is beyond reproach."[74] Strong language will regularly be necessary to challenge another lawyer's integrity. Repetitive attacks on opposing counsel are more likely to cross the line; a "repetitive stream of invective" or a "sarcastic and biting tone" in challenges made to a lawyer's integrity are inappropriate.[75]

90. Moldaver J. summarized the approach as follows:

> Considering the unique circumstances in each case – such as what the lawyer said, the context in which he or she said it and the reason it was said – enables the law society disciplinary tribunals to accurately gauge the value of the impugned speech. This, in turn, allows for a decision, both with respect to a finding of professional misconduct and any penalty imposed, that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.[76]

91. In his dissent, Mr. Matheson asserts that the relevant factors associated with the contextual and fact-specific approach set out in *Groia* "*must* include what the comments actually were; the manner and frequency of the remarks; the context in which they were made; and whether the lawyer had an honest, good faith belief in her comments."[77]

92. With respect, in *Groia*, the majority decision does not indicate "whether the lawyer had an honest, good faith belief in her comments" to be a mandatory factor to be considered in assessing a lawyer's behaviour, nor does it indicate that any of the four factors are mandatory considerations. Indeed, one of the factors listed in *Groia* is the trial judge's reaction; however, alleged uncivil and discourteous conduct can occur outside of trial. Rather, in the context of the factors "that a disciplinary panel ought generally to consider when evaluating a lawyer's conduct", noting that the list is not closed and the weight assigned to each factor will vary case-by-case,[78] the first factor of 'what the lawyer said' involves consideration of whether allegations of prosecutorial misconduct are made in bad faith or without a reasonable basis as "simply one piece of the "fundamentally

[72] *Groia,* supra, paragraph 97.
[73] *Groia,* supra, paragraph 83.
[74] *Groia,* supra, paragraphs 98 and 100.
[75] *Groia,* supra, paragraphs 98 and 100.
[76] *Groia,* supra, paragraph 118.
[77] This decision, dissent, paragraphs 129 and 136.
[78] *Groia*, supra, paragraph 80.

contextual and fact specific" analysis for determining whether a lawyer's behaviour amounts to professional misconduct."[79]

93. Mr. Matheson refers to the British Columbia Court of Appeal decision in *Law Society of British Columbia v Harding*.[80] While that decision does indeed require consideration of the full context of a lawyer's statements, and a broad range of contextual factors, in determining whether a lawyer's conduct is uncivil, it is not prescriptive of a list of factors that *must* be considered.[81]

Analysis

94. The Majority of this Appeal Panel finds that the Merits Decision that Mr. Smith's communications with CS contravened Code sections 7.2-1 and 7.2-6 was reasonable, in accordance with the law, and should be upheld.

95. The Merits Decision sets out the text of what Mr. Smith said in his impugned communications with CS. The Merits Decision also sets out the factual context, including that CS had incorrectly represented to the Court on December 1, 2020 that he had not received exhibits to an affidavit tendered by Mr. Smith. The next day, upon realizing that this was incorrect, CS emailed Mr. Smith to advise of and explain his error and advised that he would correct the record before the Court at the next appearance on December 18, 2020. CS did so at the commencement of the December 18, 2020 Court application. Mr. Smith's emails to CS thereafter included continued belittling, intimidation, bullying and accusations.

96. The contextual analysis undertaken by the Committee also included CS's evidence that he interpreted Mr. Smith's November 24, 2020 communications and references to the Code provisions as Mr. Smith intimidating him with threats that if CS proceeded with the lawsuit on behalf of his clients (the landlords), that CS may be subject to regulatory or even criminal sanction, for perjury.[82] Mr. Smith's email of November 24, 2020 stated:

> … I also draw your attention to your obligations under the Code of Professional Conduct Rule 5.1-2(d), (g), (i) and (j) in case you have either forgotten them or perhaps never knew about them.
>
> [WS] knowingly gave false evidence in his Affidavit of October 16, 2020, which I remind you was commissioned by you.
> …
> How he could have done this after receiving competent legal advice is an interesting question of and in itself …

[79] *Groia,* supra, paragraph 82.
[80] *Law Society of British Columbia v Harding*, 2022 BCCA 229 (*Harding* Appeal).
[81] *Harding* Appeal*,* supra, paragraphs 74 and 83.
[82] Merits Decision, paragraph 65.

97. The Committee found that Mr. Smith called CS a liar, suggested CS was incompetent and unethical, and tried to intimidate and bully CS.[83] In so finding, it applied a contextual approach that accounted for the relationship between civility and resolute advocacy, recognizing that Mr. Smith's lack of civility was compromising a lawyer's duty of resolute advocacy – CS's duty, not Mr. Smith's. Mr. Smith was trying to intimidate and bully CS by suggesting that he would complain about CS to the LSA.

98. The Committee noted that it is in the public interest for matters to be dealt with effectively and expeditiously, and that lawyers' fair and courteous dealings with each other contribute to that end. It held that personal remarks or personally abusive tactics interfere with the orderly administration of justice. It held that Mr. Smith's "manner of dealing with CS, particularly in his communications, has the tone of incivility, discourteousness and frankly, appears to have engaged in belittling CS and intimidating tactics." And it noted its failure to understand how, other than stalling, Mr. Smith's tactics furthered the public interest and the administration of justice.[84]

99. The Committee thus appropriately considered the dynamics, complexity and particular burdens and stakes of the proceedings[85] between Mr. Smith's and CS's clients. The Committee reasonably found, on a balance of probabilities, that Mr. Smith's communications with CS were uncivil and discourteous and in breach of the Code sections 7.2-1 and 7.2-6.[86]

100. The Majority of this Appeal Panel agrees that standards of civility cannot compromise a lawyer's duty of resolute advocacy. This situation, however, demonstrates that there is another chilling effect that must be considered – the chilling effect of incivility upon other participants in the judicial system. Where a contextual analysis reveals bullying, threats and intimidation used by a lawyer to delay, interfere with, or prevent the administration of justice, it is reasonable for a decision-maker to determine that such conduct is uncivil, discourteous, and deserving of sanction. Indeed, such conduct goes to the root of the four ways Moldaver J. identified in *Groia* as to how incivility damages the administration of justice.[87]

101. In his dissent, Mr. Matheson asserts that the Committee erred in failing to address whether the statements made by Mr. Smith were made in good faith and whether Mr. Smith had a reasonable basis for the allegations, noting the Committee's statement that it "does not find that it is necessary for it to assess whether Mr. Smith's position was

[83] Merits Decision, paragraphs 91-92.
[84] Merits Decision, paragraphs 95-96.
[85] *Groia,* supra, paragraph 79.
[86] Merits Decision, paragraph 98.
[87] *Groia,* supra, paragraphs 63-67.

legally sound or correct. The Committee is of the view that the communication itself is what requires its attention."[88]

102. Mr. Matheson also asserts that the Committee did not adequately conduct the balancing of the lawyer's expressive rights with the LSA's statutory mandate.

103. The Merits Decision establishes that the Committee did take a contextual, fact-specific approach. It was reasonable for the Committee to find that it was not necessary for it to assess whether Mr. Smith's position in his communications with CS was legally sound or correct, and to find that the communication itself is what requires attention, in the circumstances where, *regardless* of whether Mr. Smith's position was legally sound, Mr. Smith's comments were bullying, intimidating and threatening, and interfered with the administration of justice.

104. The Committee's findings that it was not necessary for it to assess whether Mr. Smith's accusations of misconduct and challenges to CS's integrity were legally sound or correct were made in the context where the Committee determined, in looking at what Mr. Smith said, that Mr. Smith was trying to intimidate and bully CS. For example, Mr. Smith's email correspondence to CS asserts that CS's client, WS, knowingly gave false affidavit evidence – but instead of advancing the administration of justice by cross-examining WS on that affidavit, Mr. Smith instead suggested (without any reasonable or stated basis) that CS knew the evidence was false, and Mr. Smith attempted to bully and intimidate CS. The Committee's consideration of this context demonstrates that it was reasonable for it to conclude that Mr. Smith was not acting in good faith nor on a reasonable basis in his communications with CS; rather, he was acting in an effort to bully and intimidate CS and to interfere with the administration of justice.

105. With respect to the manner and frequency of Mr. Smith's behaviour, the Merits Decision reflects that Mr. Smith's offensive conduct and efforts at bullying and intimidating CS continued throughout the entirety of CS's dealings with Mr. Smith. Mr. Smith continued berating CS regarding his mistaken representation to the Court, notwithstanding that CS corrected and explained the mistake to Mr. Smith the following day, said he would address before the Court at the next appearance on December 18, 2020, and indeed did so on that date.

106. This is another example that demonstrates that Mr. Smith's comments were not made in good faith or on a reasonable basis. It was reasonable for the Committee to determine it unnecessary to assess whether Mr. Smith's position that CS had made a misrepresentation to the Court was legally sound or correct in the context where CS had acknowledged the same to Mr. Smith the day after the Court appearance, and where CS advised the Court of the same at the next Court appearance, as he had told Mr. Smith he would. Here again, it was reasonable for the Committee to conclude that Mr. Smith's

[88] Merits Decision, paragraph 94(b).

communications were intended to bully, intimidate and threaten CS, and not for any legitimate purpose – and that such communications constituted uncivil and discourteous conduct deserving of sanction.

107. In the Merits Decision the Committee applied a context-specific analysis that was flexible enough to assess Mr. Smith's behaviour, but also sufficiently precise to delineate an appropriate boundary past which behaviour warrants a professional misconduct finding. Specifically, it found that bullying, intimidating, and threatening conduct that seeks to chill resolute advocacy by opposing counsel interferes with the administration of justice, does nothing to further the public interest, and is conduct deserving of sanction.

108. Finally, and noting that Mr. Smith's conduct complained of occurred outside of Court, such that the third *Groia* factor does not apply, the Merits Decision reasonably balanced Mr. Smith's expressive rights with the LSA's statutory mandate, as required by the fourth *Groia* factor.

109. In *Doré*, Abella J. for the majority held that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values.[89] This involves balancing the *Charter* values with the statutory objectives. First, the decision-maker considers the statutory objectives. Then, the decision-maker asks how the *Charter* value at issue will best be protected in view of the statutory objectives, which requires balancing the severity of the interference of the *Charter* protection with the statutory objectives.

110. In *Doré*, the Court balanced the duty of civility imposed on lawyers with the expressive rights guaranteed by the *Charter* and in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular.[90] Unlike the situation in Doré , Mr. Smith's impugned comments relate to CS as opposing counsel, not the judicial system or a judge. However, as held by Moldaver J. in *Groia*, lawyers play an integral role in holding all justice system participants accountable; reasonable criticism enhances the transparency and fairness of the system as a whole, thereby serving the interests of justice.[91]

111. As set out above with respect to the importance of civility, the statutory objectives of the LSA with regard to Code sections 7.2-1 and 7.2-6 are to avoid prejudice to a client's cause, to avoid distraction, to avoid adverse impacts to other justice system participants, and to instill public confidence in the administration of justice.[92] In his dissent, Mr. Matheson notes that courtesy rules may improve the public's perception of the profession and decrease costs for clients, and enforcing civility rules may reveal to a law

[89] *Doré,* supra, paragraphs 24 and 35.
[90] *Doré,* supra, paragraph 63.
[91] *Groia,* supra, paragraph 115.
[92] *Groia,* paragraphs 64-67.

society other dangerous issues with the member's practice.[93] *Doré* confirms that in the context of disciplinary hearings, criticism (in that case of a judge or the judicial system) will be measured against the public's reasonable expectations of a lawyer's professionalism.[94]

112. In the present case, the Committee reasonably held that Mr. Smith tried to intimidate and bully CS, finding that Mr. Smith's tactics failed to further the public interest and the administration of justice. The Majority disagrees with Mr. Matheson's dissenting finding that this Citation 2 does not involve harm to a client, the public at large, or the administration of justice; efforts to bully, threaten and intimidate opposing counsel, to stall, and to interfere with the administration of justice indeed harm, and have the potential to harm, all of those parties, and serve no protected expressive rights. The Committee recognized a lawyer's responsibility to express himself or herself but noted that Code sections 7.2-1 and 7.2-6 make clear that there is an expectation on lawyers that communication shall not be uncivil or abusive.[95]

113. The Committee's finding of guilt of conduct deserving of sanction on Citation 2 was reasonable and is upheld.

Dated May 15, 2025

Kelsey Meyer

Glen Buick

Stephanie Dobson

Levonne Louie

Bud Melnyk, KC

Nicole Stewart

[93] This decision, dissent, paragraph 147.
[94] *Doré,* paragraph 69.
[95] Merits Decision, paragraphs 94(c), 95 and 96.

David Tupper

Partial Dissent

(Reasons for the dissent on Citation 2, Scott Matheson)

114. Policing civility in the Bar is thankless work. Correspondence between counsel spans a spectrum from collegial pleasantries to bare-knuckle antagonism, along which a hearing committee must try, perhaps in vain, to draw a bright line where communication becomes unprofessional.

115. And the stakes are important. A courtesy rule that's fuzzy in definition but strict in application hurts clients and the public by hobbling forceful lawyering.[96] It can even backfire by creating openings for bad-faith tactical complaints, where lawyers weaponize the courtesy rules against each other, wasting the LSA's limited disciplinary resources on minor civility issues at the expense of matters with tangible harm to clients. Subjective debates about how-impolite-is-too-impolite may distract from a mandate of public protection.

116. In applying civility rules the law requires regulators to conduct a delicate balancing of *Charter* values of freedom of expression and zealous advocacy with the regulator's mandate. Where one lawyer rudely accuses another of misconduct, that task includes considering whether the lawyer flinging the accusation had a reasonable good faith basis for thinking it was true. Robust advocacy necessarily allows room for criticism – even if it is harsh or unpleasant – when a lawyer honestly believes misconduct has occurred. Regulators must ensure sanctions apply only when the lawyer's communication truly undermines professional integrity or public confidence – not just because we wish counsel would be nicer.[97]

117. The appellant, Mr. Smith, is not an easy lawyer to get along with. His emails to opposing counsel were patronizing, pompous, and full of accusations of misconduct. But tone alone is not dispositive, and counsel should not necessarily be disciplined for mere bad manners. After all, many lawyers are annoying, aggressive, or sarcastic. Sometimes they should be.

118. The Appeal Panel unanimously agrees on all other issues in this appeal. Only on the second ground of appeal relating to Citation 2 do I part ways. In my respectful view the Committee did not apply the test mandated by the Supreme Court of Canada to the evidence before it. That constitutes an error in principle sufficient to render the decision unreasonable and warrant appellate intervention.

[96] *Groia*, supra, paragraphs 77-80.
[97] As one scholar put it, "what advocates of mandatory civility codes have in common seems to be an idea that uncivil lawyers should be prevented from acting in ways that annoy other lawyers": Katherine Sylvester, "I'm Rubber, You're Sued: Should Uncivil Lawyers Receive Ethical Sanctions", 26 *Geo. J. Legal Ethics* 1015 (2013), pg. 1028.

Second Ground of Appeal –The Test for Incivility

119. The Supreme Court of Canada set out a test for incivility in two landmark cases, *Doré* and *Groia*.

120. Gilles Doré was a prominent criminal defence lawyer in Montreal. In 2001 he was acting for an alleged Hell's Angels gang member in a prosecution in the Superior Court of Québec. He made an application to Justice Jean-Guy Boilard seeking a stay of proceedings, or, alternatively, release of his client on bail. Justice Boilard had harsh words for Doré, saying "an insolent lawyer is rarely of use to his client." He accused Doré of "bombastic rhetoric and hyperbole" and said that the court must "put aside" Doré's "impudence". Justice Boilard characterized Doré's request for a stay as "totally ridiculous" and one of his arguments as "idle quibbling". (The Canadian Judicial Council subsequently admonished Boilard).

121. After receiving the decision, Doré reacted impulsively, writing a scathing letter to Justice Boilard the same day. A complaint against Doré at the Disciplinary Council of the Barreau du Québec led to a finding of misconduct for incivility. He appealed internally, then to the Superior Court of Québec, the Québec Court of Appeal, and the Supreme Court of Canada, to consider whether the disciplinary decision for the letter violated his freedom of expression under section 2(b) of the *Charter*, and whether the decision properly balanced the lawyer's right to freedom of expression against the need to maintain civility and respect in the profession.

122. Although the unanimous Supreme Court dismissed Doré's appeal, it set out important principles for regulators to apply in civility cases. In particular, decisionmakers must consider the relevant statutory objectives of civility rules, then ask how the *Charter* value at issue will be "best protected in view of the statutory objectives." This "requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives." The Court warned that "proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism." It found that:

> 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.

123. After engaging in the balancing exercise it mandated, the Court concluded that "excessive degree of vituperation in the letter's context and tone" meant Doré's discipline was reasonable.

124. Joe Groia defended a senior officer of Bre-X, the failed minerals firm, in a contentious securities fraud prosecution. Throughout the trial, Groia repeatedly accused the

prosecutors of abuse of process and prosecutorial misconduct. His allegations were both serious and inflammatory, and redolent of the accusations levelled by Mr. Smith. For example, Groia alleged the prosecutors were "operating under a serious misapprehension of [their] disclosure obligation[s]", were "unable or unwilling . . . to recognize their responsibilities", and had a "a 'win at any costs' mentality" which demonstrated "a shocking disregard for [the accused's] rights."[98] His more aggressive statements included:

- "the Government isn't prepared to stand by its representations to this Court" because the prosecutors "don't live up to their promises"

- "My friend doesn't like the fact that he is being held to statements he made in open court. I am sorry. He made those submissions"

- "Is my friend ever going to explain to this Court, or God forbid, ever apologize to this Court for the Government's conduct in this case?"

- "I am heartened to see that Your Honour is no more able to get a straight answer out of the prosecutor than the defence has been"

125. His style was perceived by some as excessively combative and unprofessional, leading to a complaint to the Law Society of Upper Canada, which found his courtroom behaviour sanctionably uncivil. He appealed internally and lost. He then appealed to the Divisional Court and lost again, and once again at the Ontario Court of Appeal.

126. The Supreme Court of Canada reversed, in a 5-1-3 decision, where the single justice concurred on the merits and wrote separately only as to the applicable standard of review. The majority judgment by Justice Moldaver, joined by McLachlin CJ, Abella and Brown JJ, and Wagner J as he then was, emphasized counsel's obligations of zealous advocacy, even if it is confrontational or critical. It cited the Federation of Law Societies' Model Code's exhortation that lawyers must "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case," admitting, "this is no small order. Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable. These submissions can be met with harsh criticism – from the public, the bar, and even the court. Lawyers must stand resolute in the face of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary."[99]

127. In explaining how to weigh the relevant factors, the Court's decision put meat on the bones of *Doré*'s "contextual analysis". It ruled that relevant considerations *must* include what the comments actually were; the manner and frequency of the remarks; the context in which they were made; and whether the lawyer had an honest, good faith belief in her

[98] *Groia*, supra, paragraph 13-26 and 203 (in dissent).
[99] *Groia*, supra, paragraph 73.

comments. The Court cautioned that "branding a lawyer as uncivil for nothing more than advancing good faith allegations of impropriety that stem from a sincerely held legal mistake is a highly excessive and unwarranted response."[100] Importantly, the tone of the communications is just one of several elements required to be considered and weighed. While "demeaning, sarcastic, or otherwise inappropriate language [is] more likely to warrant disciplinary action," lawyers "should not be punished for "a few ill-chosen, sarcastic, or even nasty comments": paragraphs 99 and100. The rest of the factors must still be considered and applied.

128. Though evidently not raised below, I would also note *Harding*.[101] In that case the member, acting for the plaintiff in a personal injury trial, made several inflammatory accusations about the defence. During the hearing he repeatedly accused the defence of having improperly alleged the plaintiff was lying, presenting "insinuations and nasty suggestions", and making statements with "no truth to any of that whatsoever." Harding also gave an interview to a newspaper conveying similar sentiments. His comments could be and were construed as accusing defence counsel of misconduct.

129. After a complaint, the Law Society of British Columbia (LSBC) issued citations for, *inter alia*, Mr. Harding having:

1) implied that opposing counsel were not forthright or honest;

2) knowingly and intentionally made an expert witness an object of derision and ridicule;

3) asserted directly or indirectly that the expert was dishonest and had falsified measurements, misrepresented evidence or misquoted scientific literature, without any evidentiary foundation;

4) mischaracterized the issues before the jury […];

130. The tribunal found the citations proven.[102] In respect of Mr. Harding's allegation that opposing counsel was dishonest, it concluded Mr. Harding's comments, "demonstrate[d] an ongoing lack of civility on the part of the Respondent towards the participants in the trial process. Lawyers ought not to be the subject of personal attacks when they are advancing positions of their clients. The Respondent was implying that counsel had not been candid in the courtroom. Honesty and candour are cornerstone duties of a lawyer, and the suggestion that a lawyer has not fulfilled those duties carries with it serious consequences. … The Respondent may have disagreed with the Insurance Corporation of British Columbia's defence to his client's case; however, it was not

[100] *Groia*, supra, paragraph 90.
[101] *Harding* Appeal*,* supra, 2022 BCCA 229.
[102] *Harding (Re),* 2021 LSBC 8.

acceptable that the Respondent accused counsel of disingenuous conduct without evidence to support that extraordinary claim."

131. On appeal to the British Columbia Court of Appeal, a three-justice panel unanimously reversed. It found the LSBC had, "failed to follow the approach in *Groia*, which required it to consider a broad range of contextual factors, including: whether the statements were made in good faith and on a reasonable basis."[103] While the LSBC had duly cited *Groia*, "it did not apply the approach mandated by *Groia*, of considering the full context of the lawyer's statements."[104] The LSBC erred in failing to consider the importance of independent advocacy and in not weighing Harding's possible good faith (but mistaken) legal position.[105] The Court emphasized that, post-*Doré*, "the test for professional misconduct in relation to statements made by a lawyer is no longer simply whether the facts disclose a marked departure from the conduct the Law Society expects of its members"—rather, a proper balancing of Charter interests and the regulator's mandate is required, which the LSBC had not conducted.[106]

132. The Court of Appeal noted sarcasm is not necessarily grounds for discipline: "Certainly a lawyer's use of mockery and sarcasm will often be poor advocacy because it can come across as insulting and arrogant, turning the listener against the lawyer, and creating sympathy towards the witness being victimized by the lawyer. But humour and sarcasm have been used by many great trial lawyers and speakers over the course of history to illustrate the weakness of a witness's evidence or the outrageousness of a position."[107]

133. Although *Groia* involved in-court statements, and characterized these as raising the most acute concerns about resolute advocacy, the judgment has been applied to communications made outside of court but within a lawyer's practice.[108] When read together, these cases suggest that statements in court have the greatest protection and are least subject to second-guessing by regulators, as long as they were made in good faith. As the context expands out and away from the courtroom the lawyer's protection wanes, slowly. Communications in the course of a legal proceeding, but out of court, remain covered by *Groia* and subject to the same test. Correspondence about legal matters which are not being litigated, like a corporate deal, engage similar concerns and remain subject to the contextual analysis in *Groia*. At a certain point, the lawyer's communications become purely personal and not connected with practice. There, where the lawyer is not advocating for a client, her private speech rights are at their zenith, and the regulator's interest at its nadir. They may even be outside the regulator's powers to police. That would align with a common-sense approach to civility—good-faith criticism

[103] *Harding* Appeal, supra, paragraph 74.
[104] *Harding* Appeal, supra, paragraph 83.
[105] *Harding* Appeal, supra, paragraph 116.
[106] *Harding* Appeal, supra, paragraphs 139-140.
[107] *Harding* Appeal, supra, paragraph 91.
[108] *Harding* Appeal, supra. Also *Law Society of Newfoundland and Labrador v Buckingham*, 2023 NLCA 17, leave to the Supreme Court of Canada denied April 4, 2024, 2024 CanLII 27905.

in a proceeding should be protected even if harsh; a lawyer being rude at the grocery store, not subject to regulation at all.

134. The combined effect of these cases is to require a hearing committee to consider a series of questions:

a) In what context were the statements made?

b) What did the lawyer say?

c) What was the manner and frequency of the lawyer's behaviour?

d) Were the statements made in good faith?

e) If the statement was made in court, how did the judge react?[109]

f) Did the lawyer have a reasonable basis for the statements (even if she was mistaken)?

Balancing *Charter* Rights and The Regulator's Duties

135. After answering those questions, the regulator must carefully balance the lawyer's freedom of expression guaranteed by the *Charter* against the obligation of civility. In conducting this balancing exercise, the decisionmaker must give effect, as fully as possible, to the *Charter* protections at stake.[110]

136. That is harder than it sounds. Disciplining discourteous speech always has facial appeal. No lawyer wants to deal with rude opposing counsel. And the task requires temperance and dispassion from the Committee – after all, it is emotionally satisfying to rebuke a rude lawyer, especially when they persist in their obstinance during the hearing.

137. But this kind of discipline poses serious risks, including waving aside important *Charter* values. Civility rules may be vague or overbroad, allowing for selective enforcement and chilling robust advocacy, even if it uses sharp language or criticism. In practice, such rules may not be applied fairly. Some convincing research has even concluded that comparable uncivil acts by lawyers are not disciplined equitably and the inequity is "disproportionately associated with the status of the lawyers or their clients."[111]

138. The most prominent Canadian critic of mandatory civility rules was then-Professor, now Justice of the Court of Appeal, Alice Woolley. In her articles "Does Civility Matter?", and a follow-up five years later, "Uncivil by Too Much Civility: Critiquing Five More Years of

[109] This is not a relevant factor in the context of this case.
[110] *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, paragraph 142, citing *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.
[111] Amy Mashburn, "Making Civility Democratic", 47 *Hous. L. Rev.* 1147 (2010-2011), page 1220.

Civility, Regulation in Canada", she argued that where regulation is directed at rudeness, and lawyers who impolitely express legitimate positions or criticize the conduct of other lawyers (or judges), it has the capacity to undermine lawyer zeal and the principle of self-regulation.[112] She warned that "identifying when rudeness reaches the point of professional misconduct is also susceptible to undue subjectivity, with the assessment of impropriety (colourful or uncivil?) tending to lie in the eye of the beholder." Her 2008 article was cited with approval by the majority in *Groia*, where Justice Woolley had acted as an independent expert retained by Mr. Groia. The Court observed that "overemphasizing civility has the potential to thwart this good by chilling well-founded criticism", reflecting Justice Woolley's argument that, "civility movements create perverse incentives in relation to lawyers' satisfaction of their core ethical obligations, in particular zealous advocacy and fidelity to law. When law societies discipline lawyers who do the right thing in the "wrong" way, imposing both official sanction and unofficial disgrace, they create the possibility that lawyers will forego doing the right thing for fear that they, too, will be seen to have gone about it in the wrong way."

139. Justice Woolley also raises the important concern that civility regulation, in addition to chilling advocacy, may dissuade lawyers from being a vital check on other lawyers' misconduct. She asks:

> What sort of lawyers do we want? Do we want lawyers who call out other lawyers for misconduct? Or do we want lawyers who fail to do so for fear that their criticisms will be sanctionable? Law societies may prefer the latter; they may believe that the reputation of the profession will be best preserved if lawyers act with decorum or silence in the face of other lawyers' misbehaviour. But the argument here is that the only hope for retaining public respect is if the public believes that lawyers and the legal profession will protect them from wrongdoing by other lawyers through formal regulation and through informal social sanctions like shaming and shunning. The law societies should be rewarding the lawyers who have the courage and determination to take on that task rather than sanctioning them for their choice of words.

140. In making that argument in her 2013 article, Justice Woolley reviews reported cases and concludes that sometimes, when a lawyer rudely accuses another of misconduct, regulators focus only on whether the accusation was made intemperately rather than whether it had a basis in fact. Often, as is the case here, the only disciplinary proceeding brought is against the accuser for civility violations and no investigation or discipline occurs with respect to the conduct of opposing counsel from which the accusations arose. That was the case in both *Groia* and *Harding*. There is something unseemly about punishing a lawyer for alleging misconduct without investigating if the other lawyer was indeed out of line.

141. Strict application of a courtesy standard can also create dangerous incentives. If one lawyer becomes "annoyed with another for whatever reason, it would be easy to accuse

[112] *Osgoode Hall Law Journal* 46.1 (2008): 175-188; 36 *Dalhousie L.J.* 239 (2013).

that other attorney of being uncivil. If serious consequences, or even time-intensive investigations, follow these accusations, attorneys with bad motivations may be able to seriously inconvenience opposing counsel."[113]

142. Justice Woolley suggests that the bar ought not to take too narrow a view of the "good" lawyer, noting that "a legal profession committed to substantive justice could accommodate lawyers with a greater degree of crudity and colour… Further, refusing to countenance that sort of variety in practice may only legislate a higher class of insult, allowing lawyers to be cutting or rude provided they use the right sort of language. Fiddlesticks, yes; fuck, no." Mr. Smith in his defence made arguments along the same lines. Before both the Committee and the Appeal Panel he repeatedly referred to an incident in which a lawyer in private practice, who later became Chief Justice of the Court of King's Bench of Alberta, wrote a letter saying opposing counsel's position was "much sound and fury", a *Macbeth* quote that intentionally evokes the unsaid preceding line: "it is a tale told by an idiot."[114] Smith's point was that clever insults may be used even by eminent counsel.

143. Justice Woolley is not the only Canadian critic of civility rules. Adam Dodek and Emily Alderson of the University of Ottawa have expressed concern that law societies' focus on civility is "problematic in two respects". First, "because it is difficult to identify the harm to the public or to clients that such regulation intends to address." In many cases, as here, there is no identifiable harm to the clients or the public from intemperate correspondence from one lawyer to another, apart from potentially pushing the sides further from resolution. Second "and much more significant, is the opportunity cost involved in such prosecutions. Law societies' attention on civility distracts them from focusing on other behaviour that is arguably more harmful to clients or to the public."[115] That is indeed a salient worry. Law societies have limited disciplinary resources. They typically only have a small investigative staff, for example, and if the matters proceed to hearing, the adjudicators are unpaid volunteers. Hearings consume large helpings from a thinly-stocked cabinet, including counsel time, pre-hearing conferences, the hearing itself, and decision writing. A law society can only run so many hearings. Is the best use of that scarce time and money pursuing civility at the expense of matters with greater risk of public or client harm?

144. True courtesy among the Bar is hard to achieve by coercion and punishment. If lawyers play nice only at the threat of discipline, are they merely smiling through gritted teeth? "A society so regulated and so coerced is not civil; it merely looks that way."[116] As Justice Woolley warns in the conclusion of her 2013 article, "Law societies do not need to remove civility requirements from their largely aspirational codes of conduct, and they may wish to continue to promote the virtues of civility amongst their membership. They

[113] Sylvester, supra, page 1024.
[114] Hearing Transcript, pages 289, 290 and 409; Appeal Transcript, page 25.
[115] Adam Dodek & Emily Alderson, "Risk Regulation for the Legal Profession", 55 *Alta. L. Rev*. 621 (2018).
[116] Robert B. Pippin, *The Persistence Of Subjectivity* 228 (2005).

should also, however… be cautious when attempting to create through operation of law the society and class of lawyers of which they dream."

145. On the other hand, fake civility is better than real priggishness from the standpoint of the receiving lawyer's mental health. And courtesy rules have other salutary benefits. They may improve the public's perception of the profession; decrease costs for clients if lawyers are more civil in their approach; and enforcing civility rules may reveal to a law society other dangerous issues with the member's practice, including substance abuse or breach of other law society rules.[117] Justice Woolley referred to these cases as "civility canaries", where civility is "a red flag allowing regulators to identify lawyers whose legal practices generally violate ethical and legal standards. Lawyers who routinely and consistently act with rudeness and incivility towards others may be at higher risk of different sorts of professional misconduct; their incivility, and regulators' concern with it, may help regulators address expeditiously their more substantive misconduct." She admitted in her 2013 follow up that "this suggests a more productive role for civility regulation than was apparent from my prior review of the cases," acknowledging that "this use of incivility as a heuristic for identifying lawyers whose practices have fallen into disarray, and as a trigger for investigation of those lawyers, seems like a justifiable use of law society regulatory power."

146. In short, when applying the balancing test in *Doré*, regulators must give thorough and weighty consideration to freedom of expression, even where that means condoning unpleasant conduct.

The Committee Did Not Apply the Correct Test

147. The key passages of the Committee's opinion on this element of the citation in the Merits Decision at paragraphs 91 to 96 were:

> In Mr. Smith's communications with CS, he called CS a liar and suggested he was incompetent and unethical.
>
> Mr. Smith tried to intimidate and bully CS. His comments and communications were offensive.
>
> […]
>
> Mr. Smith puts a lot of emphasis on argument that he was relying on facts in his communications to CS. The Committee does not find that it is necessary for it to assess whether Mr. Smith's position was legally sound or correct. The Committee is of the view the communication itself is what requires its attention.
>
> The Committee does recognize a lawyer's responsibility to express themselves, however, the Code provisions (7.2-1 including commentary and 7.2-6) make

[117] For example, during the investigation Mr. Smith told the LSA he never uses retainer agreements because "they're a pointless exercise": Exhibit 16, page 74.

> clear that there is an expectation on lawyers that communication shall not be uncivil or abusive.
>
> The Committee finds the Commentary under Rule 7.2-1 especially informative and relevant. The Commentary notes that it is in the public interest for matters to be "dealt with effectively and expeditiously" and that lawyers "fair and courteous" dealing with each other contributes to this end. Further, the Commentary notes that "personal remarks or personally abusive tactics interfere with the orderly administration of justice."
>
> While Mr. Smith has pointed to his years of experience, his manner of dealing with CS, particularly in his communications, has the tone of incivility, discourteousness and frankly, appears to have engaged in belittling CS and intimidating tactics. The Committee fails to understand how, other than stalling, his tactics furthered the public interest and the administration of justice.

148. With the greatest of respect, the Committee fell into error. It did not properly apply the test for incivility, for two reasons.

149. First, the Committee did not address two of the elements of incivility *Groia* required them to consider: were the statements made in good faith, and did the lawyer have a reasonable basis for the allegations? Rather, the Committee took the view that it was not required to address those elements, stating, "the Committee does not find that it is necessary for it to assess whether Mr. Smith's position was legally sound or correct. The Committee is of the view the communication itself is what requires its attention." In effect the Committee concluded the statements were sanctionable *per se*, without regard to the *Groia* factors. This is the view of the *Groia* dissent, see paragraphs 222 to 227, not the majority. Determining that the tone of the communications was inappropriate does not permit a panel to short-circuit and ignore the other parts of the test set out in Justice Moldaver's controlling opinion. While there is a discretionary element to weighing the relevant factors, *Harding* demonstrates that it is an error in principle not to consider them at all, particularly when the member had affirmatively asserted, in his defence, that he did have a reasonable, good faith belief in the allegations he was making.

150. This error may have resulted from the Committee's reliance on *Forsyth-Nicholson*: see the lengthy excerpt at paragraph 97 of the Merits Decision. That is a 2013 judgment of a prior hearing committee, which does not refer to *Doré* and predates both *Groia* and *Harding*. In one passage that the Committee quoted, the *Forsyth-Nicholson* panel wrote, "our duty of zealous advocacy of your client's position does not necessarily obligate you to believe every fantastic story they tell you, make accusations based on those stories, or say hurtful and intemperate things to opposing parties <u>even when potentially justified by legal or factual differences of opinion</u>." [Emphasis added]. That is not an accurate statement of the law. *Forsyth-Nicholson* does not accord with *Groia* or *Harding*, because it explicitly rejects any consideration of the potential justification for the member's harsh statements, and refuses to conduct the contextual balancing exercise, instead permitting

discipline based on the statements *per se*, so long as the tone is "hurtful or intemperate." Again, it reflects the view of the dissent in *Groia* rather than the majority.

151. The Majority opinion accurately notes that the factors set out in *Groia* are not a closed list – there may be others – and some of the listed ones may not be applicable in every circumstance. For example, as the Majority opinion says, the reaction of the trial judge is not a pertinent consideration for out-of-court communications. Likewise, it is true that *Groia* does not explicitly say it is mandatory for a decisionmaker to address each applicable factor. And I acknowledge the contextual balancing is done on a case-by-case basis.

152. However, what is implicit in *Groia*'s reasoning, and made explicit in *Harding*, is that a decisionmaker cannot choose to ignore one of the applicable criteria and discipline a lawyer by concluding that rudeness *per se* is sanctionable. The Committee here made clear it was not addressing whether Mr. Smith had a reasonable good faith basis for his accusations, and expressly found it unnecessary to do so, because "the communication itself is what requires its attention." Permitting this mode of analysis flouts *Groia*'s ratio. *Groia* divided the Supreme Court because the six-justice majority thought that even when communications are abjectly rude, it is vital to nonetheless thoroughly consider whether the accusations were reasonable and made in good faith – since even intemperate communications may be acceptable if there was a solid basis. It is on this point that the three dissenters in *Groia* most vehemently disagreed with their colleagues, see paragraphs 222 to 227 (Karakatsanis, Gascon, Rowe, JJ). The Majority opinion adopts a legal rule—that the use of invective in alleging misconduct is sanctionable *per se* even if expressed in good faith and with a reasonable basis – which six justices in *Groia* rejected.

153. *Harding* stands for the principle that it is an error of law to short-circuit *Groia'*s contextual factors. Although the Majority opinion correctly notes that *Harding* does not express a *prescriptive* list of the factors which must be considered, in that case the Court of Appeal did, in the result, find that the LSBC's failure to consider a reasonable good faith basis for the allegations is an error of law. The weighing of that factor is, to that extent, effectively mandatory.

154. The Majority opinion also contends that the Committee did in fact "take a contextual, fact-specific approach," and endorses the view that it is acceptable for a Committee not to consider the reasonable good faith basis for the accusations "in the circumstances where [the] comments were bullying, intimidating and threatening, and interfered with the administration of justice." Respectfully, I would suggest the Committee's reasons express clearly that they intentionally chose not to address, weigh, or decide whether Smith had a potential good faith reasonable basis. Although the Committee did review other contextual elements, like the allegation that his communication amounted to bullying or threatening CS, the deliberate decision not to consider the key factor in *Groia* is an error in principle. To the extent the Majority opinion suggests that "bullying,

intimidating and threatening" communications can be sanctioned on their face without regard to any good faith reasonable basis for them, again that is the view of the dissent in *Groia*, not the majority. There is no foundation in Justice Moldaver's majority reasons for a "bullying" exception. Indeed, various adjudicators below in *Groia* had described him in terms synonymous with bullying or intimidation ("guerilla" advocacy; "repetitive stream of invective"; "sustained and sarcastic personal attacks"; "appallingly unrestrained"). Challenges to another lawyer's integrity "are by their very nature personal attacks", see *Groia* paragraph 101, akin to bullying or intimidating. "Strong language that, in other contexts, might well be viewed as rude and insulting will regularly be necessary to bring forward allegations of prosecutorial misconduct or other challenges to a lawyer's integrity. Care must be taken not to conflate the strong language necessary to challenge another lawyer's integrity with the type of communications that warrant a professional misconduct finding": ibid. Similarly, the Majority opinion's contention that Mr. Smith's use of invective undermined the administration of justice was the *dissenting* view in *Groia*, see paragraphs 228 to 231.

155. Second, as in *Harding*, the Committee's decision did not adequately conduct the balancing exercise required. It did not cite the *Charter* or consider freedom of expression, apart from noting in passing that "the Committee does recognize a lawyer's responsibility to express themselves…" The duty of zealous advocacy was not addressed. I would contrast this treatment with the thorough analysis of the issue by the Appeal Panel in *Rauf* (though in substance that case sites uneasily with *Groia* and *Harding*).[118] The strength of a decision's reasoning is not weighed by the pound, but the Committee allocated just ten words to expression rights – hardly a balanced scale. I also note the Committee did not consider that the communications were made squarely in an advocacy context, between opposing counsel, unlike *Rauf* (outburst in prison; letter in the courthouse cafeteria) or *Doré* (extraneous letter to a judge).

156. For the reasons expressed by the British Columbia Court of Appeal in *Harding* I would find the Committee did not adequately apply the test and balancing exercise the Supreme Court of Canada mandated in *Doré* and *Groia* and it thereby fell into error.

Applying The Correct Test to the Facts

157. Under section 77 of the *Act,* if an Appeal Panel grants an appeal, it can either send the matter back to a hearing committee or replace it with its own conclusion. In my view Citation 2 is not sufficiently egregious to warrant the time and expense of a second hearing, so I would instead apply the correct test for Citation 2 to the facts proven.

158. *In what context were the statements made?* The five emails at issue were sent by Mr. Smith to CS in the professional context of chambers practice about the listing and eviction of the tenants. No one else was copied. There was no impugned in person or in

[118] *Law Society of Alberta v. Rauf,* 2021 ABLS 3.

court behaviour. The communications took place in an environment which was close to the core of Mr. Smith's advocacy activity, and were directly tied to those proceedings, unlike, for example, the extraneous personal letter to the judge in *Groia* or the op-ed letter distributed in the cafeteria in *Rauf*.

159. The Committee characterized the emails as an "attempt[] to litigate the matter outside of Court by insisting that CS accept his legal position." With respect, a large chunk of the day-to-day legal work on all litigation matters occurs "outside of court" in letters and emails between counsel. Putting Mr. Smith's tone aside, what he was doing here – writing to opposing counsel insisting his client was right and the other side was wrong – ais commonplace and unobjectionable. If the LSA disciplined lawyers for trying to insist opposing counsel agree with them we would not have any lawyers left.

160. *What did the lawyer say?* Mr. Smith cited the Code, in condescending and aggressive language. That included mentioning relevant provisions, "in case you have either forgotten them or perhaps never knew about them"; musing rhetorically about a purportedly false affidavit, "How he could have done this after receiving competent legal advice is an interesting question of and in itself"; stating "I might form a different opinion of your personal ethical standards"; asserting CS had "a cavalier attitude to the truth"; claiming he made a factual misrepresentation to the Court, a "scurrilous act"; asserting a "resemblance to the lame duck POTUS"; and saying, "I had previously only seen a tv actor in a law drama (perhaps it was really a comedy) try this routine." No vulgarity was used.

161. The tone of the emails is pushy, arrogant, and accusatory. They are, however, all tied directly to the thrust of the allegation that CS had knowingly tendered false evidence. The substance of the allegations against CS is similar to that in *Groia* – who was eventually exonerated – but the words used here were, if anything, somewhat less inflammatory than in *Groia*. They were much more tempered than in *Doré*, or *Histed v Law Society of Manitoba*, for example, where counsel alleged the Crown had driven a witness to suicide. In terms of severity, the statements are at roughly the same level as those made in *Harding*, and the point is the same – an allegation that opposing counsel was dishonest.[119]

162. *What was the manner and frequency of the lawyer's behaviour*? There were five emails over a ten-day period. They came in a back-and-forth exchange rather than a unilateral, unanswered series. No one received them apart from CS; they were not publicly distributed; neither side's clients were copied, nor was the Court.

163. *Were the statements made in good faith?* This is a difficult question to answer. Mr. Smith has adamantly asserted a good faith belief that CS had knowingly tendered false evidence.

[119] *Histed v Law Society of Manitoba*, supra, 2021 MBCA 70.

164. But Mr. Smith's own conduct during this period creates some reason for skepticism. Mr. Smith drafted and commissioned an affidavit for his son-in-law client, dated November 24, 2020, the same day as the first email in which Mr. Smith made his allegations against CS. That affidavit says, in part, at paragraph 13: "Incidentally, we did not remove the realtor's sign."

165. This statement is misleading to the point of falsity, because Mr. Smith well knew who had removed the sign – him. The sentence implies that AD does not know who removed the sign; if he did, presumably he would have said. But AD did know, and Mr. Smith knew that. And in any event the use of the word "we" in the sentence could be fairly read to include the affiant's lawyer, Mr. Smith. (Under cross-examination, Mr. Smith drew a hairsplitting distinction to explain the use of the word "we": "I removed the sign; [AD] did not.")[120] The fact Mr. Smith included this assertion in the affidavit knowing *he himself* had removed the sign, the same day he emailed CS alleging he was suborning perjury, provides some basis to doubt that his allegation was made in good faith.

166. *Did the lawyer have a reasonable basis for the statements*? CS admitted in the correspondence that he had made inadvertent errors in his representations in Court, which he said were caused by not seeing attachments to an email from Mr. Smith. His correspondence does not acknowledge knowingly tendering false evidence in his clients' affidavits, and I reiterate that CS appears to have acted properly and professionally in responding to Mr. Smith. When CS testified before the Committee, he noted that his knowledge of the underlying facts came from his clients and he was not in a position to know if it was false; I agree.[121] There was also no judicial finding that the evidence was false. (The original Master's decision, in the landlords' favour, was set aside by consent order without reasons).

167. Given CS's acknowledgement regarding his inadvertent misrepresentation in Court, there is *some* basis for Mr. Smith's allegations. While undoubtedly abrasive, they were not concocted from thin air. Mr. Smith thought the landlords had presented false and inconsistent evidence in an attempt not just to list the property but to go further and evict them without any grounds. But the extent of his accusations, including suggesting criminal perjury, went well beyond the modest basis for suspicion available to him. As in *Harding* and *Groia*, Mr. Smith was likely mistaken about his accusation.

168. While Mr. Smith was probably mistaken, and the record demonstrates CS promptly and responsibly corrected his error about the exhibits, I would suggest that given the nature of the inquiry in *Groia*, it is essential, when evaluating the civility of a lawyer's communications about alleged misconduct by opposing counsel, to assume for a moment that the allegation was true. If opposing counsel in a contentious, important matter *did* knowingly tender false evidence, would not an angry, accusatory tone

[120] Hearing Transcript, page 391.
[121] Hearing Transcript, page 150.

sometimes be warranted? What if the evidence wrongly put someone in jail?[122] If the allegation was true, would using phrases like “scurrilous act” and “cavalier attitude to the truth” be out of line, or an accurate description of gross misconduct?[123] That is why the consideration of the presence or absence of a good faith, reasonable basis for the statement is a critical component which cannot be skipped.

169. This context in mind, one must proportionately balance Mr. Smith’s rights to expression with the regulator’s statutory obligations.

170. The primary objective of the LSA’s discipline process is public protection. This citation does not involve harm to a client, the public at large, or the administration of justice. It came in back-and-forth private emails with opposing counsel, involving a core advocacy activity. Although Mr. Smith’s sarcasm and invective was not *effective* advocacy, *Harding* counsels this is not necessarily misconduct, particularly where, as in *Groia* and *Harding*, there is a plausible good faith basis for the accusations made, even if they are mistaken. Discouraging lawyers from raising arguable allegations of misconduct chills an important check on bad behaviour.

171. While the emails were not vulgar and amounted to thinly-veiled insults delivered in the course of accusing counsel of misconduct, rather than the sort of aggressive, over the top language in *Doré*, they were certainly contrary to the profession’s ideals. CS deserved ordinary respect; he did not get it from Mr. Smith.

Conclusion

172. By not applying the test in *Groia* and *Harding*, the Committee erred in principle. When the appropriate test is applied to the civility citation, though this is a close case, I would find that Mr. Smith is not guilty of conduct deserving of sanction on Citation 2.

173. Mr. Smith is rude and disagreeable. But a civility rule which sweeps so broadly as to pick up his emails goes too far at too great a risk – to chilling advocacy, discouraging potentially-legitimate reporting of misconduct by other lawyers, and taking resources away from more pressing Law Society priorities. I respectfully dissent.

Dated May 15, 2025.

Scott Matheson

[122] See, e.g., *Dix v. Canada (Attorney General)*, 2002 ABQB 580.
[123] Woolley JA discussed the notion that occasionally an abrasive tone is warranted in her 2018 follow up to her earlier articles: https://www.slaw.ca/2018/09/05/does-civility-matter/.