2019 LSBC 24
Decision issued: July 8, 2019
Citation issued: April 17, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

JOHN (JACK) JOSEPH JACOB HITTRICH

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	March 4, 5 and April 12, 2019
Panel:	Phil Riddell, QC, Chair Linda Michaluk, Public representative Shona Moore, QC, Lawyer
Discipline Counsel:	Peter R. Senkpiel and Julia K. Lockhart
Counsel for the Respondent:	Peter Leask, QC, Russell S. Tretiak, QC and Rasjovan S. Dale

INTRODUCTION

[1] John (Jack) Joseph Jacob Hittrich (the "Respondent") has been a practising lawyer since 1986.

[2] The conduct at issue in this case arose during the Respondent's representation of the foster parents of a child of Métis heritage who retained him after the Director of Child, Family and Community Services (the "Director") refused to consent to the foster parents' adoption of SS. What followed was difficult and protracted litigation during which the Respondent wrote to counsel for the Director to make a

proposal that, if accepted would secure a settlement of the dispute in favour of the foster parents. The Respondent's decision to send the letter and whether it constituted an improper threat for an improper purpose is the focus of the citation that was authorized on April 5, 2018 and issued on April 17, 2018.

[3] The citation alleges that the Respondent engaged in professional misconduct as follows:

> 1. In approximately September 2016, in the course of representing your client in a proceeding against the Director of Children, Family and Community Services (the "Director") in the Supreme Court of British Columbia, Docket [number], Vancouver Registry, you attempted to resolve litigation in favour of your clients through improper means, by doing one or more of the following:
>
> (a) in a letter dated September 5, 2016 to counsel for the Director, in an attempt to gain a benefit for your clients, threatening to expose alleged perjury by representatives of the Director in related proceedings unless the Director agreed to settle the litigation as your clients proposed; and
>
> (b) through the threat described in the preceding sub-paragraph, attempting to influence the Director to exercise her statutory decision-making authority for an improper purpose.
>
> This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[4] The Respondent admitted service of the citation.

FACTS

Background

[5] Much of the background of this matter was set out in the Notices to Admit filed by the Law Society and the Respondent.

[6] SS, who is of Métis heritage, was born on October 21, 2013 to JS and AS (the "Birth Parents"). SS was removed from the Birth Parents by the Director on October 22, 2013 and placed in the care of LM and RB (the "Foster Parents") the next day.

[7] SS had two older siblings who had been removed at an earlier point in time and who were in the care of a family in Ontario (the "Ontario Adults").

[8] In the summer of 2015, the Director refused to consent to the Foster Parents adopting SS on the basis that it was in the best interests of SS to be reunited with her siblings in Ontario.

[9] In August 2015 the Foster Parents retained the Respondent to act as their counsel with regard to various proceedings related to their attempts to adopt SS, and in September, the Respondent commenced a petition on behalf of the Foster Parents in which relief was sought, including the adoption of SS ("Petition No. 1"). On December 3, 2015 Petition No. 1 was dismissed and on December 4, 2015 an appeal was filed from this order.

[10] On January 4, 2016 the Respondent filed a second petition on behalf of the Foster Parents, with SS added as a Petitioner, seeking the same relief as sought in Petition No. 1, but adding alternate grounds for relief under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") ("Petition No. 2").

[11] On February 22, 2016 Petition No. 2 was struck out in its entirety as *res judicata* and an abuse of process. The next day, the Respondent filed an appeal from the dismissal of Petition No. 2 and sought an interim order prohibiting the Director from removing SS from the custody of the Foster Parents pending the hearing of the appeals of Petition No. 1 and Petition No. 2.

[12] On March 4, 2016 Newbury JA granted an interim order prohibiting the Director from removing SS from the custody of the Foster Parents until the appeals of Petition No. 1 and Petition No. 2 were heard.

[13] In May 2016 the Respondent sought the assistance of another lawyer, NG, to act for the Birth Parents.

[14] On May 3, 2016 the Director arranged for SS to participate in a video conference with her sisters and the Ontario Adults (the "Video Conference"). The Foster Parents were not allowed to attend the Video Conference; rather, social workers attended with SS.

[15] Unknown to the Respondent at the time, RB, one of the Foster Parents, placed a recording device on SS, and made a surreptitious audio recording of the Video Conference (the "Audio Recording").

[16] After the Video Conference the Foster Parents told the Respondent that the social workers had referred to the Ontario Adults as "mommy" and "daddy"; however, they did not tell the Respondent that they had the Audio Recording. This was extremely important information for the Foster Parents as they considered it

evidenced a *de facto* decision to remove SS from the Foster Parents' care and, potentially, a breach of Newbury JA's order.

[17] On May 30, 2016 NG filed a petition on behalf of the Birth Parents against the Director seeking to overturn SS's removal from the Birth Parents and allowing the Birth Parents to decide to place SS with the Foster Parents for adoption ("Petition No. 3"). The Respondent was not involved in drafting Petition No. 3.

[18] On June 15, 2016 the appeals from Petition No. 1 and No. 2 were heard by a five justice division of the Court of Appeal. Decision was reserved.

[19] In mid-July 2016 the Respondent raised with LG, counsel for the Director, that social workers at the Video Conference had referred to the Ontario Adults as "mommy" and "daddy" and that this was a breach of the order of Newbury JA. On July 20, 2016 LG advised the Respondent that "the social workers and SS did not refer to the adults in Ontario as "mommy" and "daddy".

[20] On approximately August 4, 2016 the Foster Parents told the Respondent that they had made an Audio Recording of the video conference. That same day, the Respondent wrote to LG seeking, amongst other things, sworn statements from the social workers at the Video Conference that the Ontario Adults had not been referred to as "mommy" and "daddy". The Respondent did not advise LG of the existence of the Audio Recording.

[21] On August 8, 2016 the Foster Parents provided the Respondent with a transcript of the Audio Recording that had been prepared by LM (the "Unofficial Transcript"), which recorded the social workers referring to the Ontario Adults as "mommy" and "daddy".

[22] What followed were a series of strategic steps taken by the Respondent.

[23] On the same day, the Respondent filed a motion in the Court of Appeal seeking clarification of the order of Newbury JA that referring to the Ontario Adults as "mommy" and "daddy" was prohibited. The Director brought a cross-application supported by affidavits from social workers in which they affirmed that the Ontario Adults had not been referred to as "mommy" and "daddy" in the Video Conference.

[24] On August 12, 2016, the Respondent and NG filed a petition on behalf of the Foster Parents, the Birth Parents and the BC Métis Federation against the Director, seeking a declaration that SS had already been adopted by the Foster Parents by way of a Métis custom adoption ("Petition No. 4").

[25] The Director applied to strike Petitions No. 3 and No. 4 as an abuse of process.

[26] The application filed by the Respondent to clarify the order of Newbury JA and the application of the Director were heard by Dickson JA on August 17, 2018. The Foster Parents' application was dismissed. The Respondent admits at paragraph 45 of the Notice to Admit:

> Neither the audio recording nor the transcript were [sic] put into evidence by the Respondent on these applications. Rather, because of concerns about the accuracy of the transcript held by the Respondent and about the lawfulness of the manner in which the recording was obtained, only an affidavit from RB stating that SS had reported that the social workers had referred to the Ontario Adults as "mommy" and "daddy" was entered into evidence. The Respondent did not tell the Court of Appeal or the Director that the audio recording or transcript existed.

Facts giving rise to the citation

[27] On August 31, 2016 the Foster Parents provided the Respondent with the Audio Recording, and on September 2, 2016 the Respondent had a court reporter prepare a transcript of the Audio Recording (the "Official Transcript"). The Official Transcript confirmed that the social workers at the Video Conference had referred to the Ontario Adults as "mommy" and "daddy".

[28] On September 5, 2016 the Respondent decided to write a letter to the Director and circulated drafts of the letter to the Foster Parents, the father of LM, NG and his associate (the "Team").

[29] The draft circulated at 1:06 pm stated, among other things:

> Yesterday, I reviewed a transcript prepared by a Court Reporter of a digital audio recording of the May 3, 2016 Skype/Facetime conversation between … where both … clearly refer to the [Ontario Adults] as "mommy" and "daddy";
>
> Given the foregoing evidence of perjury by at least 2 social workers, the Director is acting in bad faith. This is critical information which should be made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent justice hearing any further matter in these and all related proceedings; and
>
> I have instructions from my clients and counsel for the birth parents that if the Director is prepared to consent to my clients adopting SS by 4:00 pm this Thursday September 8, 2016, they and the birth parents are prepared

> to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption ….

[30] In an email at 7:15 pm, the Respondent advised the Team that he had kept the draft letter "very clean and minimalistic for tactical reasons." The 7:15 draft shortened the time for acceptance to 10:00 am September 7.

[31] By email at 8:04 pm on September 5, 2016, the Respondent sent the following correspondence to LG, counsel for the Director (the "Letter"):

> **Without prejudice except for costs**
>
> **Re: L.M. et al v. Director et al; and all legal proceedings relating to SS and her birth parents**
>
> Further to our last contact, it is clear that [social worker 1] has lied in her Court of Appeal Affidavit, sworn August 8, 2016, specifically paragraph 7, where she deposes that "Neither [social worker 2], nor I, ever referred to the Ontario adults as 'mommy' or 'daddy'… It would not be proper to refer to the Ontario adults as mommy or daddy in relation to SS and, that certainly did not occur".
>
> Earlier today, I reviewed a transcript prepared by a Court Reporter of the May 3, 2016 Skype/Facetime conversation between SS and the [Ontario Adults] where both [social worker 2] and [social worker 1] clearly refer to the [Ontario Adults] as "mommy" and "daddy". [Social worker 2] says "Do you want to see Mommy, [name] and Daddy [name] to". The SS [sic] responds "Yeah". Then [social worker 2] says: "Yeah, she would like to see Mommy and Daddy. There's Mommy [name], there's Daddy [name]."
>
> Later on [social worker 1] says: "What about for Mommy [name]".
>
> [Social worker 3] also clearly misled the Court of Appeal in her August 8, 2016 Affidavit, paragraph 20, where she deposes that the transition planning was stopped following the decision of Madam Justice Newbury.
>
> I also note the [social worker 2] also swore a false Affidavit on August 23, 2016 in the proceedings initiated by the Birth Parents, specifically par. 11, where she deposes that "we stopped the transitioning process on or around 4 March 2016".

> Given the foregoing evidence of perjury by 3 social workers, the Director is certainly acting in bad faith. This is critical information which should be made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent Justice hearing any further matter in these and all related proceedings. Should the contested litigation continue, appropriate sanctions may be appropriate against the 3 social workers and the Director.
>
> I have instructions from my clients, counsel for the birth parents, and the President of the BC Metis Federation, that if the Director is prepared to consent to my clients adopting SS **by 10:00 a.m. this Wednesday, September 7, 2016,** my clients, the birth parents, and the BC Metis Federation are prepared to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption, and will enter into comprehensive releases involving all of the parties with respect to any and all possible legal outstanding matters.
>
> Please review the foregoing and advise by no later than 10:00 a.m. Wednesday, September 7, 2016. Please note that notwithstanding that this letter is written on a without prejudice basis we reserve the right to be able to use this letter at a later date to claim costs against the Director, in the event that there is no settlement and it is deemed necessary by us.
>
> Looking forward to your considered response. Time is of the essence.

The letter was copied to the Respondent's clients, NG, counsel for the Birth Parents, and the President of the BC Métis Federation.

[32] On September 5, and before the letter was sent to the Director, the Respondent spoke to NG on at least two occasions. NG expressed a concern that the proposed correspondence to the Director might be considered blackmail. The Respondent's response to this concern was that the correspondence was more in the nature of "whitemail" since its purpose was to expose the truth for the "proper purpose" of having SS adopted by the Foster Parents.

[33] LG had not been provided with the Audio Recording, the Unofficial Transcript or the Official Transcript prior to or at the time of receiving the Letter.

[34] On September 7, 2016 the Director rejected the settlement offer set out in the Letter. LG requested copies of the Official Transcript and the Audio Recording.

[35] On September 7, 2016 the Respondent wrote to the Deputy Registrar of the Court of Appeal seeking a further hearing before Dickson JA. He stated in that correspondence:

> This matter was before Madam Justice Dickson on August 17, 2016, when a decision was made on false evidence provided by social workers for the Respondents. My clients now have official transcriptions of recordings of conversations between the social workers and the child SS, which show that social workers were not truthful in their affidavits and were acting in bad faith.

The Deputy Registrar advised by letter on September 8 that judgment was to be released on September 13 and asking if the Respondent wished to proceed with the application set out in his letter of September 7. The Respondent responded advising that the application may not be necessary but that his correspondence be filed "and if possible, the panel be made aware of their content."

[36] On September 13, 2016 the Court of Appeal dismissed the appeals arising from Petitions No. 1 and No. 2.

[37] The Respondent did not make an application to Court of Appeal to admit fresh evidence.

[38] On September 28, 2016 Petitions No. 3 and No. 4 were struck as an abuse of process. On December 21, 2016 the Director applied for special costs against the Respondent and NG arising out of Petitions No. 3 and No. 4 and the Letter. On July 10, 2017, Fisher J. ordered special costs of Petition No. 4, allocating 75 per cent to the Respondent and 25 per cent to NG.

The Law Society investigation

[39] The Court's reasons for decision concerning special costs came to the Law Society's attention, and it began an investigation into the reasons concerning special costs. On July 18 the Law Society contacted the Respondent who advised the Law Society that he was preparing a self-report arising from the reasons for the order by Fisher J.

[40] In the course of the Law Society investigation the Respondent, by way of his letter of October 16, 2017, responded to the complaint triggered by the Letter. He stated:

> This was the background to my September 5 letter. I had by that time spent over 500 hours working on my clients' case, many of those hours at

> a discounted hourly rate. I was *emotionally involved* in my clients' cause and passionately believed it was in S.S.'s best interests to reside with my clients and that the Ministry and the bureaucracy were unfairly and mistakenly acting contrary to her best interests. In my letter, I wanted to disclose the fact of the recording while protecting my clients by not disclosing the actual transcript or recording.
>
> At the time, I thought my letter was within the bounds of proper settlement negotiations. I was attempting to reach a fair settlement by using the fact that if the proceedings went to trial, the social workers' misconduct would likely be exposed. I saw my efforts as being no different to using similar tactics to persuade any other party to litigation to settle to avoid public expose [sic] at trial of their misconduct or dishonesty.
>
> [emphasis added]

And later, this paragraph in the same letter (the "Paragraph"):

> *What I failed to appreciate at that time was that the Director was not just any party. It had an independent duty to act in what it perceived to be the child's best interests, regardless of the consequences to its social workers.* As such, I simply did not see the "threat" in my letter as improper at the time. If I had, I would not have sent the letter in the first place or state on its face that it may be admissible on a costs application.
>
> [emphasis added]

[41] During his oral evidence, the Respondent made various attempts to distance himself from this last paragraph, which we will address in detail when we turn to the Respondent's oral evidence.

[42] The Respondent was examined under Rule 3-5(7) of the Law Society Rules on January 10, 2018 (the "Interview"), during which he made various admissions, including:

> I over identified with my – my clients and their cause, and I fundamentally believed that this little girl should stay with the only home she had ever known…"[1]

[43] In dealing with the Letter, the Respondent was asked the following questions and provided the following responses:

[1] Q. 181

Q 248: Right. Now, looking at the last paragraph on the first page, you refer there to:

> Evidence of perjury by three social workers.
>
> I assume you understood at the time that perjury is a *Criminal Code* offence.

A: Correct. I should never have used those words.

Q 250: Oh, the last sentence on the first page:

> Should be [sic] contested litigation continue appropriate sanctions.
>
> By "appropriate sanctions" you meant civil or criminal consequences of perjury?

A: No I wasn't actually thinking of criminal; I was more thinking of special costs or – I didn't – wasn't really thinking criminal.

Q 251: But, you'll agree with me – you'll agree with me that it could include criminal?

A: I suppose so. I certainly didn't view it criminal – in the criminal context. I can only tell you what I meant, but I understand that that could be interpreted as criminal. I can see that. And again, that was a mistake. Without any reservation I can say that.

Q 257: What I want to clarify is what – there – what do you understand to be your error in writing this letter?

A: Oh, where do I begin? I messed up big time. Number 1, I never should have made any threat in this form. What I should have perhaps done is picked up the phone and said to [LH] is, look we've got some evidence – I – here's the problem: I felt that this was very important information, obviously, that could have led to a speedy resolution resulting in this little girl would have stayed with my clients…

[44] Chapter 3.2-5 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*") provides that a lawyer "must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten: (a) to initiate or proceed with a criminal or quasi-criminal charge; or (b) to make a complaint to a regulatory authority." When directed to this rule, the Respondent was asked and he responded:

Q 265 Would you acknowledge that this letter is inconsistent with the spirit of that rule?

A: It could run afoul of that rule: yes, I appreciate that. And I very much regret not turning my mind to that issue.

The hearing

[45] The Respondent testified at the hearing.

[46] During his testimony, he summarized the position the Foster Parents faced in their attempt to adopt SS. The Respondent's view was that the Foster Parents were in a position in which they could only have the court invoke its *parens patriae* jurisdiction and apply the best interests of the child test where there was a gap in the legislation or upon showing bad faith on the part of the Director. Once the Court of Appeal dismissed Petitions No. 1 and No. 2 and found there was no gap in the legislation, the only remaining way to engage the "best interests of the child" test was to show bad faith on behalf of the Director.

[47] During his evidence, the Respondent repeatedly reaffirmed his belief that it was in the best interests of SS to be adopted by the Foster Parents. He "vehemently disagreed" with the position of the Director that it was in the best interest of SS to be adopted by the Ontario Adults.

[48] The Respondent viewed the Audio Recording as a way in which bad faith on behalf of the Director could be proved and the court could then determine if it was in the best interests of SS to be adopted by the Foster Parents. He acknowledged that, when he learned of the Audio Recording and obtained the Unofficial Transcript, he took steps to elicit affidavits from the social workers, who were in attendance at the Video Conference, denying the use of the terms "mommy" and "daddy" with regard to the Ontario Adults.

[49] During cross-examination, the Respondent resiled from the response that he had given in the Interview that he had "over identified" with his client. Rather, he took the position that he had not over identified with his client but that he believed it was in the best interests of SS to be adopted by the Foster Parents, and he could not understand why the Director was opposing the efforts of the Foster Parents to adopt SS.

[50] Throughout his evidence, the Respondent took the position that the Director was acting in bad faith, unreasonably and/or capriciously in refusing to decide that the best interests of SS were best dealt with by allowing the Foster Parents to adopt.

[51] The Respondent was steadfast in his position that, although the Director had a duty to act in SS's best interest, he was not certain the Director was acting accordingly and that there was a lack of judicial oversight.

[52] The Respondent's view was that an application of the best interests test would have led to a high likelihood that the court would approve SS's adoption by the Foster Parents. High likelihood was defined as greater than 50 percent.

[53] The Respondent was cross-examined with regard to his letter to the Law Society of October 16, 2017 and was taken to his statement: "I should have obtained written irrevocable consent from my clients to disclose the transcript and recording, *and I never should have written the September 5, 2016 letter*." [emphasis added]. During the hearing, the Respondent testified that he wanted to amend the statement by saying he regretted not sending the transcript.

[54] He acknowledged that the Audio Recording presented risks to the Foster Parents and to RB in particular, including: criminal prosecution; criminal conviction; and the Director calling into question the suitability of the Foster Parents as adoptive parents if she learned that they had "bugged" SS.

[55] The Respondent was aware that, by making the Audio Recording, RB could have being charged criminally. He had consulted with an associate in his office, who had some familiarity with criminal law about this issue.

[56] During his evidence, the Respondent acknowledged that NG had contacted him on September 5, before the Letter was sent out, with a concern that the Letter might constitute blackmail. The Respondent denied that blackmail was extortion. He did not necessarily know that there was a legal definition of blackmail. He took the view that he was using information to get the "right" result. He did not view the Letter as blackmail. He took the view that the Letter was "whitemail" – exposing the truth for a proper purpose.

[57] The Respondent made various attempts to distance himself from the Paragraph. Two attempts stand out:

(a) When asked about the first sentence: "What I failed to appreciate at that time was that the Director was not just any party," he stated those words were inserted by his then counsel and that he was not entirely comfortable with that sentence. He said that, when he sent the Letter, he knew that the Director could not settle unless the Director was acting in the best interests of SS, and he did not sincerely believe the Director was acting in this way; and

(b) At the start of the second day of the hearing, the Respondent wanted to make a further statement about the Paragraph and was advised by the Panel that he was not present to make statements, but to answer questions. Later, in cross-examination, the Respondent made a concerted effort to parse the Paragraph to the extent that it would have read: "I simply did not see the "threat" in my letter as improper at the time. If I had, I would not have sent the letter in the first place or state on its face that it may be admissible on a costs application."

[58] The Respondent sought to blame his previous counsel for his answer to Question 265.

[59] The Respondent did not think that blackmail was extortion. He did acknowledge that blackmail was bad. He then engaged in some rather tortured logic in which he concluded that the Director could have concluded the Letter to be "whitemail", but if the Director disagreed with his view it could be considered "blackmail".

[60] The Respondent agreed that the Letter could be interpreted as a threat.

[61] The Respondent agreed that the sentence: "Should the contested litigation continue, appropriate sanctions may be appropriate against the 3 social workers and the Director," was inserted into the final draft of the Letter without input from the Team.

[62] The Respondent viewed "sanctions" to be damages and special costs.

[63] The Letter called for the adoption of SS by the Foster Parents, and not for a hearing on the merits as to whether it was in the best interests of SS to be adopted by the Foster Parents.

[64] In assessing the Respondent's evidence there is a requirement to assess his credibility. After a careful review of all of the evidence before us, including the testimony of the Respondent at the hearing, the Panel is unable to find the Respondent credible. He has provided answers that are inconsistent with previous statements he has provided. He has provided evidence that is logically inconsistent. He has minimized his responsibility for various acts. For example:

(a) He repeatedly attempted to distance himself from the Paragraph. He blamed his previous counsel for the contents of much of the Paragraph, although the Paragraph is contained in a letter that the Respondent signed and directed to the Law Society;

(b) He blamed his previous counsel for an answer he provided to the Law Society in the Interview;

(c) He had previously acknowledged over identifying with his client, but later denied that when he gave evidence at the hearing. In his evidence he was convinced of that he and his client were correct in their position regarding the best interests of SS. He characterized the Letter as "whitemail" since he was acting for proper purpose. His evidence displayed that he lost his objectivity, and rather than being an advocate for his clients, he became their champion. He lost his objectivity;

(d) His position that he did not appreciate that perjury was a criminal offence at the time he sent the Letter is not credible. This is particularly so in light of the concerns raised by NG and the fact that he had his associate examining potential criminal consequences of the acts of RB;

(e) His response to questioning about perjury is instructive of the Respondent's tendency to deny a logical proposition and then, when backed into a position, concede that proposition. The Respondent was evasive. When asked about the use of the word "perjury" in the Letter, he said that he did not appreciate that perjury was a criminal offence. He then stated that he was aware that perjury is a criminal offence, but he did not consider it in this context; and

(f) When asked about what he meant by "sanctions" he initially said "costs and maybe damages." He was then asked why he mentioned the three social workers personally if he was only seeking special costs. He then denied that he added the language specifically to threaten the social workers. Sanctions meant more than special costs, but he had not turned his mind to civil contempt. In our view, this explanation is not worthy of credit.

[65] Where the evidence of the Respondent is contradicted by the evidence found in the Notices to Admit, we reject the evidence of the Respondent on those points. We reject the evidence of the Respondent that he did not use the word perjury to convey the threat of possible criminal prosecution or an attempt to commence a criminal prosecution. We reject the evidence of the Respondent that he did not think that blackmail was extortion when NG contacted and expressed his concern that the letter was blackmail.

[66] We accept that the Respondent had a subjective belief that SS's best interest would be served by her adoption by the Foster Parents and that he and the Foster Parents

knew better than the Director. The question before us is whether that belief could be objectively held.

ANALYSIS

[67] The Law Society bears the onus of proof on the balance of probabilities: *Foo v. Law Society of BC.*[2]

[68] The Respondent has argued that the decision of the Supreme Court of Canada in *Groia v. Law Society of Upper Canada*[3] has changed the law of professional misconduct where a mistake of law is involved. The Respondent's written submissions state: "[t]he proper test for a lawyer acting in good faith was the presence of a reasonable basis for acting on his erroneous view of the law."

[69] The pre-*Groia* test for professional misconduct is that set out in *Law Society of BC v. Martin*[4]:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

An examination of the test for professional misconduct requires the Panel to ask:

> … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."[5]

[70] *Groia* dealt with an allegation of uncivility arising in the course of a trial. Moldaver J. (for the majority of the court) made the following observations, which define the scope of *Groia*:

> [56] *To be clear, the location of the impugned behaviour is unquestionably relevant to the misconduct analysis itself.* As I will explain, the fact that the behaviour occurs in a courtroom is an important contextual factor that must be taken into account when evaluating whether that behaviour amounted to professional misconduct; but it does not impact on the standard of review.

[2] 2017 BCCA 151, para. 63
[3] 2018 SCC 27
[4] 2005 LSBC 16, para. 154
[5] *Martin*, para. 171

…

[88] That said, the reasonable basis requirement is not an exacting standard. I understand the Appeal Panel to have meant that allegations made without a reasonable basis are those that are speculative or entirely lacking a factual foundation. Crucially, as the Appeal Panel noted, allegations do not lack a reasonable basis simply because they are based on legal error: at para. 280. *In other words, it is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.*

[89] *Nor is it professional misconduct to advance a novel legal argument that is ultimately rejected by the court.* Many legal principles we now consider foundational were once controversial ideas that were fearlessly raised by lawyers. Such innovative advocacy ought to be encouraged — not stymied by the threat of being labelled, after the fact, as "unreasonable".

[90] *In my view, there are two reasons why law societies cannot use a lawyer's legal errors to conclude that his or her allegations lack a reasonable basis.* First, a finding of professional misconduct against a lawyer can itself be damaging to that lawyer's reputation. 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.

[91] *Second, inquiring into the legal merit of a lawyer's position to conclude that his or her allegations lack a reasonable basis would discourage lawyers from raising well-founded allegations, impairing the lawyer's duty of resolute advocacy.* Prosecutorial abuse of process is extraordinarily serious. It impairs trial fairness and compromises the integrity of the justice system: R. v. *Anderson*, 2014 SCC 41, at paras. 49-50; *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411, at paras. 62-63. Defence lawyers play an integral role in preventing these dire consequences and holding other justice system participants accountable by raising reasonable allegations. *Finding a lawyer guilty of professional misconduct on the basis of incivility for making an abuse of process argument that is based on a sincerely held but mistaken legal position discourages lawyers from raising these allegations, frustrating the duty of resolute advocacy and the client's right to make full answer and defence.*

…

[112] Law society decisions that discipline lawyers for what they say may engage lawyers' expressive freedom under s. 2(*b*) of the *Charter*: *Doré v. Barreau du Québec*, 2012 SCC 12, at paras. 59, 63 and 65-68. This is true regardless of whether the impugned speech occurs inside or outside a courtroom. *Courtroom lawyers are engaged in expressive activity, the method and location of the speech do not remove the expressive activity from the scope of protected expression, and law society decisions sanctioning lawyers for what they say in the courtroom have the effect of restricting their expression*: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, at p. 978; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141, at paras. 56 and 82.

…

[116] When the impugned behaviour *occurs in a courtroom*, lawyers' expressive freedom takes on additional significance. In that arena, the lawyer's primary function is to advocate resolutely on his or her client's behalf. As I discuss above at paras. 74-75, resolute advocacy in the criminal context allows the client to meaningfully exercise his or her constitutional right to make full answer and defence. *Law society tribunals must account for this unique aspect of lawyers' expressive rights when arriving at a disciplinary decision arising out of in-court behaviour.*

…

[132] In each of these passages, the Appeal Panel concluded that Mr. Groia's allegations lacked a reasonable basis because the OSC prosecutors were right in law. Put another way, the Appeal Panel concluded that Mr. Groia's allegations lacked a reasonable basis because he was wrong in law. This was unreasonable. *As I have explained, allegations of prosecutorial misconduct based on a sincerely held but mistaken legal belief will be reasonably based* ***as long as they have a sufficient factual foundation****. The question for incivility purposes is not whether Mr. Groia was right or wrong on the law. Rather, the question is whether, based on* ***his*** *understanding of the law, his allegations of prosecutorial misconduct, which the Appeal Panel found were made in good faith, had a factual foundation.* In this case, they did.

[133] As indicated, had Mr. Groia's views on the role of the prosecutor and the law of evidence been correct, he would have been justified in alleging abuse of process. His submissions regarding professional misconduct

> would not only have had a reasonable basis; they may well have been accepted. The prosecution repeatedly and intentionally failed to tender all relevant documents, despite Mr. Groia's repeated requests. It also objected to Mr. Groia presenting any relevant document of his choosing to a Crown witness. *Viewed this way, it is apparent that Mr. Groia's allegations, based as they were on his sincerely held but mistaken legal beliefs, had ample factual foundation.*
>
> …
>
> [159] The Appeal Panel's finding of professional misconduct against Mr. Groia was unreasonable. The Appeal Panel used Mr. Groia's sincerely held but mistaken legal beliefs to conclude that his allegations of prosecutorial misconduct lacked a reasonable basis. But, as I have explained, Mr. Groia's legal errors — in conjunction with the OSC prosecutor's conduct — ***formed*** the reasonable basis upon which his allegations rested. In these circumstances, it was not open to the Appeal Panel to conclude that Mr. Groia's allegations lacked a reasonable basis. *And because the Appeal Panel accepted that the allegations were made in good faith, it was not reasonably open for it to find Mr. Groia guilty of professional misconduct based on what he said.* The Appeal Panel also failed to account for the evolving abuse of process law, the trial judge's reaction to Mr. Groia's behaviour, and Mr. Groia's response — all factors which suggest Mr. Groia's behaviour was not worthy of professional discipline on account of incivility. The finding of professional misconduct against him was therefore unreasonable.
>
> [emphasis in boldface in original; other emphasis added]

[71] A review of *Groia* leads to the conclusion that:

(a) The test that statements made, based on factual basis, that are made in good faith based upon a mistake in law do not constitute professional misconduct;

(b) The rationale for the test is that statements that satisfy the test do not constitute professional misconduct in order to ensure that counsel are not stifled in being vigorous advocates for their clients; and

(c) It is clear, as Moldaver J. has stated, that the test set out in *Groia* is a test that is applicable to in-court activities of counsel.

[72] While there is no doubt that *Groia* is of great significance in the area of professional discipline, it sets forth a test dealing with the assessment of in-court conduct by counsel. It does not change the generally applicable standard to be applied in all other cases of alleged professional misconduct.

[73] In *Law Society of BC v. Harding*,[6] the panel dealt with the test for professional misconduct as set out in *Martin* and stated:

> [76] In our view, given all the cases and the guiding principles from *Stevens v. Law Society (Upper Canada)* (1979), 55 OR (2d) 405 (Div. Ct.), and the marked departure test from *Martin, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure*. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.
>
> [77] As *Stevens* and *Re: Lawyer 12* (both the single-bencher (2011 LSBC 11) and the review decision (2011 LSBC 35)) make clear the panel must look at all of the circumstances. In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:
>
> (a) the gravity of the misconduct;
>
> (b) the duration of the misconduct;
>
> (c) the number of breaches;
>
> (d) the presence or absence of *mala fides*; and
>
> (e) the harm caused.
>
> [78] The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.
>
> [79] Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. *Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative.* While such evidence is relevant as

[6] 2014 LSBC 52

> part of the circumstances as a whole to be considered, *absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds*.
>
> [emphasis added]

[74] While the presence of *bona fides* will not excuse conduct that is otherwise professional misconduct, advertence or *mala fides* is not required to prove professional misconduct.

[75] The Review Panel in *Law Society of BC v. Foo*[7] dealt with a factual situation in which the applicant who normally represented parents of children who had been apprehended by the Ministry of Children and Family Development, saw a Ministry social worker ("AM"), whom he had never met, in a hallway of the Quesnel courthouse and asked "Are you 'AM' … the social worker?" The social worker answered "maybe – who's asking?" The Applicant then said "I should shoot you … you take away too many kids."[8]

[76] The Review Panel found that the respondent did not have to intend that the statement be interpreted as a threat, and said at paras. 16 and 17:

> It is the Review Panel's decision that the hearing panel did not err on the issue of the comment being a threat and merely joke. Although "I should shoot you …. You take away too many kids" was not meant as a threat, in AM's interview with the Law Society, (admitted as evidence at the hearing on Fact and Determination) AM admitted taking Mr. Foo's comments as a threat, although she did not believe the Applicant would act on that threat. Said the panel:
>
> > Even if the Respondent did not intend to intimidate or threaten AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where

[7] 2015 LSBC 34
[8] *Foo*, para. 2

> parents are in conflict with the Ministry and where others outside the courtroom would overhear his comments.

We agree with the position of the Law Society, namely, that it is not necessary to prove that the words were intended to be threatening in order to prove professional misconduct.

[77] There is further support for the position that for a lawyer to have committed professional misconduct by uttering words which were not subjectively intended to be threatening in *Law Society of BC v. Harding*[9] where the Review Panel stated:

> It is this Review Board's view that the hearing panel erred by reasoning that, since the crowbar comment was not a threat, its utterance was therefore not professional misconduct. One further step in the analysis was required. The words of the review panel in *Berge* are apt here:
>
> [37] The Benchers specifically reject the Applicant's submission that only conduct that is criminal or overtly dishonest should warrant investigation as conduct unbecoming and potential sanction.
>
> [38] … Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes "any act of any member that will seriously compromise the body of the profession in the public estimation." See *Hands v. Law Society of Upper Canada* (1889), 16 OR 625.
>
> There is no misconduct in calling for the assistance of the police to deal with a dispute. However, the reason given to the police in order to encourage them to attend is another matter.
>
> In *Foo*, at paragraph 49 the hearing panel held:
>
> > ***Even if the Respondent did not intend to intimidate or threaten*** AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where parents are in conflict with the Ministry and where others outside the courtroom would overhear his comments.
> >
> > [emphasis added (by *Harding* review panel)]

[9] 2015 LSBC 45, paras. 39-45

> The hearing panel should have asked: accepting the Respondent's explanation, and even if this comment was not intended as a threat, in the context in which these words were said was it ***a marked departure from that conduct the Law Society expects of its members?***
>
> It is arguable that the hearing panel did implicitly make the above analysis. If so, this Review Board disagrees with their conclusion that this conduct, in context, is not professional misconduct.
>
> As in *Foo* the words said by the Respondent were found by the hearing panel to be irresponsible. Unlike *Foo*, where the hearing panel in that decision found that Foo "***did not adequately consider the impact of his words***," *the Respondent knew full well what the impact of his words would be – it would cause the police to attend when they otherwise may not have, or may have come at a later time. This is the problem with the Respondent's comment and the intention behind those words: one cannot say whatever one likes in order to motivate, or manipulate, a person or entity, such as a peace officer, to do something they may not have otherwise done. You cannot yell "fire" in a crowded theatre when there is no fire.*
>
> The Respondent knew full well that raising the possibility of violence, even if he did not actually intend any violence, would cause the police to attend. This is wrong, and it is difficult to see how this is not professional misconduct. A lawyer not getting his way and then behaving in a manner that is described as "aggressive and rude" and "aggressive and condescending," in and of itself, may or may not "cross the line." However, if in addition to that the lawyer then escalates the situation by raising the spectre of violence by saying something (the "crowbar" comment) that is "ill-considered," "ill-advised" and "should not have been made" with the intent of causing the police to attend, this is "a marked departure from that conduct the Law Society expects of its members."
>
> [emphasis in boldface in original; other emphasis added]

[78] The Law Society has referred to Chapter 3.2-5 of the *BC Code* which states:

> Threatening criminal or regulatory proceedings
>
> A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

[79] The Letter must be viewed objectively, from the perspective of the reasonable person. This is the approach that is proposed by both parties. The Respondent has proposed that the reasonable person be clarified using as guidance the comments in *R. v. S. (R.D.)*[10]: "[t]he person postulated is not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case." For the purpose of the analysis our reasonable reader will have these attributes.

[80] The analysis of the Letter from the perspective of the reasonable reader must begin with an understanding of the background in this matter and requires that the Letter be read as a whole and not parsed. The intended audience for the Letter is LH, counsel for the Director who has been involved in protracted litigation with the Respondent as opposing counsel.

[81] We note that the Letter sets out the following, in the order in which they occur in the Letter:

(a) "[Social worker 1] has lied in her Court of Appeal affidavit";

(b) The Respondent has reviewed the Official Transcript and points to specific instances where [social worker 2] used the terms "mommy" and "daddy" in referring to the Ontario Adults. This is inconsistent with the sworn affidavit of [social worker 1] in which she says [social worker 2] did not use these terms;

(c) The Respondent, in referring to the Official Transcript, then refers to [social worker 1] using the terms "mommy" and "daddy" with regard to the Ontario Adults. This is inconsistent with [social worker 1's] sworn affidavit.

(d) "[Social worker 3] also clearly misled the Court of Appeal in her August 8, 2016 affidavit";

(e) "I also note that [social worker 2] also swore a false Affidavit on August 23, 2016 in the proceeding initiated by the Birth Parents";

(f) "Given the foregoing evidence of perjury by 3 social workers …";

[10] [1997] 3 SCR 484 at para. 36

(g) "Should the contested litigation continue, appropriate sanctions may be appropriate against the 3 social workers and the Director";

(h) "I have instructions from my clients, counsel for the Birth Parents, and the President of the BC Métis Federation, that if the Director is prepared to consent to my clients adopting SS…".

[82] In our view, the plain reading of the letter is that social worker 1 "lied" in her affidavit filed in the Court of Appeal, social worker 3 "misled the Court of Appeal" in her affidavit, and social worker 2 swore a "false affidavit" in the Petition No. 3 proceeding. The Respondent had access to a transcript prepared by a Court Reporter. The reference to the Court Reporter, to the reasonable reader, necessarily implies that this is a transcript that is certified to be accurate by a Court Reporter. This gives the transcript an "official" status. The Official Transcript then forms "evidence of perjury". The Letter is clear in stating the Respondent possesses evidence by way of the Official Transcript that the three social workers have lied, misled or sworn a false affidavit with regard to affidavits sworn and filed in court dealing with material facts. That this evidence is evidence of "perjury" and that "appropriate sanctions may be appropriate against the 3 social workers and the Director" unless the Director consents to the Foster Parents adoption of SS within one and a half days of the sending of the Letter.

[83] NG had communicated with the Respondent that the earlier draft versions of the Letter might be considered blackmail. If blackmail is demanding something from another in exchange for not revealing information, concerns about blackmail can be considered prophetic. What the Respondent does say to the Director, through her counsel, is: regardless of your statutory duty to act in the best interests of SS you will consent to the Foster Parents adopting; otherwise I will use the Official Transcript to show your three social workers have perjured themselves.

[84] While counsel for the Respondent spent some time in submissions addressing whether or not the offence of perjury could be proved against the three social workers, or if the offence would even be charged by Crown Counsel, the evil sought to be addressed by Chapter 3.2-5 is making the threat to commence a criminal or regulatory proceeding to gain a benefit. The reasonable reader would find that, on the balance of probabilities, the Letter was an attempt to induce the Director to consent to the adoption of SS by the Foster Parents or steps would be taken to have the social workers charged criminally.

[85] Based upon the analysis in the *Harding* review, the Respondent's use of the Letter was an escalation and a use of language to induce the Director to do something she could not: that is, consent to an adoption in circumstances where she was not

satisfied that the adoption of SS by the Foster Parents was in the best interests of the child.

[86] The finding that the letter on an objective basis constituted the use of a threat in order to induce another to act does not end the analysis as to whether or not the Law Society has proved professional misconduct on the balance of probabilities. The factors referred to in *Lyons* should be considered, although not all factors are present in every case:

(a) For the reasons set out above, the Letter was a threat to take a course of action to induce the holder of an office with a statutory duty to act contrary to that duty. This is magnified by the fact that the duty sought to be breached was to act in the best interests of SS. This is misconduct that is serious;

(b) The sending of the Letter was one act, but it was an act that was deliberate. There were a number of drafts sent to the Team. NG had advised the Respondent regarding his concern that the earlier draft of the Letter might be considered blackmail. It should be noted that, after this concern was expressed by NG, the Respondent added the sentence containing the phrase "appropriate sanctions may be appropriate." The Letter was drafted to be "minimalistic for tactical reasons." The Letter was not drafted in the heat of the moment but was thought out;

(c) This is a case of a single act of the sending of the Letter;

(d) The Respondent has argued throughout that he was acting in good faith and believed he was acting in the best interests of SS. The difficulty in part with this is that, while in the Paragraph he stated that he did not appreciate the special position of Director, in his *viva voce* evidence, he took steps to distance himself from this statement. The Respondent is a lawyer with more than 30 years' experience in the practice of family law. It is difficult to accept that he did not understand the role of the Director. The absence of *mala fides* does not necessarily mean the presence of *bona fides*;

(e) There was no harm caused directly by the Letter in that it was not successful in inducing the conduct sought. The harm done was to the reputation of the profession resulting in a lawyer using the tactics as set out in the Letter to induce a statutory officer to act contrary to her duty. The harm to the reputation of the profession is great.

[87] We are satisfied that, upon application of the test for professional misconduct as set out in *Martin*, the preparation and sending of the Letter constituted a marked departure from the standard of conduct the Law Society expects of lawyers. In particular, the Letter contains a threat to commence a process in which the allegation that the three social workers committed perjury would be brought to the attention of the prosecution. The reference to perjury was a threat to commence a criminal proceeding. The *quid pro quo* for not commencing a criminal proceeding was the Director consenting to the Foster Parents adopting SS. The line of reasoning set out in the *Harding* review is equally applicable to find professional misconduct. Lawyers cannot say whatever they feel like in order to motivate or induce others to do things that they would not otherwise do. The threat of "sanctions" being sought against social workers arising from allegations of perjury, unless the Director acts contrary to her statutory duty also leads to a finding of professional misconduct. On both theories for culpability set forth by the Law Society, professional misconduct can be found.

DECISION

[88] After considering all of the evidence, we are satisfied that the Respondent, by his preparation and sending of the Letter to LH, exhibited conduct that was a marked departure from the standard of conduct the Law Society expects of lawyers. Accordingly, we find that the Law Society has proved on a balance of probabilities that the Respondent committed professional misconduct in the manner set out in the citation.

ORDER PROTECTING DISCLOSURE

[89] The exhibits and transcripts in this proceeding contain names of the Birth Parents, the Foster Parents, the Ontario Adults and SS. These names are protected under the *Child, Family and Community Service Act,* RSBC 1996 c. 46. The panel orders under Rule 5-8(2) that:

(a) If any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, the names of the Birth Parents, Foster Parents, Ontario Adults, SS and the social workers, identifying information concerning the Birth Parents, Foster Parents, Ontario Adults, SS and the social workers, and any information protected by solicitor-client privilege be redacted from the exhibit before it is disclosed to that person; and

(b) If any person, other than a party, seeks to obtain a copy of the transcript of these proceedings, the names of the Birth Parents, Foster Parents, Ontario Adults, SS and the social workers, identifying information concerning the Birth Parents, Foster Parents, Ontario Adults, SS and the social workers, and any information protected by solicitor-client privilege be redacted from the transcript before it is disclosed to that person.