

2020 LSBC 26
Decision issued: June 5, 2020
Citation issued: November 19, 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 date[s]: December 16 and 17, 2019

Panel: Steven McKoen, QC, Chair
Anita Dalakoti, Public representative
Gavin Hume, QC, Lawyer

Discipline Counsel: Julia Lockhart
Counsel for the Respondent: Russell Tretiak, QC and Mason Heller

BACKGROUND

[1] On November 19, 2018, a citation was issued against the Respondent (the “Citation”) pursuant to the *Legal Profession Act* and Rule 4-17 of the Law Society Rules.

[2] The Citation directed that this Panel inquire into the Respondent’s conduct as follows:

1. In or between approximately November 2015 and July 2017, in the course of representing your clients, LG and CW, in proceedings concerning access to their infant former foster daughter, you acted improperly in relation to transcripts from proceedings under the *Child, Family and Community Service*

Act (the “Transcripts”), when neither you nor your clients had obtained a valid court order permitting access to the Transcripts, contrary to one or more of rules 2.1-1(a), 2.1-2(a), 2.2-1, 3.1-2, 5.1-1 and 5.1-2(i) of the *Code of Professional Conduct for British Columbia*, by doing one or more of the following:

- (a) on or between March 21, 2016 and April 4, 2016, aiding, counselling, or assisting your clients to act contrary to the law by ordering and accessing the Transcripts;
- (b) on or about June 1, 2016, filing, in court proceedings, the affidavit of one of your clients, attaching the Transcripts as exhibits;
- (c) on or about June 14, 2016, in representing your clients in court, you misled the court about the ability to rely upon the Transcripts and failed to inform the court about the provisions of the *Child, Family and Community Service Act*, the related Provincial Court Rules and the notations on the face of the Transcripts in regards to the proper procedure for obtaining access to the Transcripts;
- (d) on or about April 5, 2017, filing Appeal Books on behalf of your clients, and including the Transcripts in these materials; and
- (e) on or between July 6, 2017 and July 25, 2017, aiding, counselling, or assisting your clients to act contrary to the law, by providing a copy of the Appeal Books to Dr. Peggy Koopman, R. Psych.

[3] The conduct alleged was stated to constitute professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

FACTS

[4] The Respondent was called and admitted as a member of the Law Society of British Columbia on August 1, 1986 and currently practises primarily at a family law firm in Surrey, BC

[5] The matter that gave rise to the Citation was a series of hearings related to the Respondent’s clients, LG and CW (the “Foster Parents) and certain matters related to their former foster daughter, EM.

[6] The Foster Parents are the adoptive parents of KG, a young boy.

- [7] EM and KG are siblings and their biological mother is NB.
- [8] Between July 2014 and December 23, 2015, the Foster Parents fostered EM.
- [9] In November and December 2015, a hearing was held under the *Child, Family and Community Service Act* (“CFCSA”) before Judge Chettiar to consider care of EM (the “Child Protection Trial”).
- [10] The Foster Parents were not parties to the Child Protection Trial, but sought to become parties.
- [11] On December 21, 2015, the Respondent’s assistant attended the Child Protection Trial in the public gallery.
- [12] On December 22, 2015, the Respondent filed an application in the Provincial Court for an order of guardianship of EM and joinder of that proceeding with the Child Protection Trial.
- [13] Judge Chettiar heard that application on December 23, 2015 and declined both to add the Foster Parents as parties to the Child Protection Trial and the order for guardianship of EM.
- [14] Instead, Judge Chettiar ordered that EM be returned to the care of her mother, NB.
- [15] The Respondent made further applications related to this matter on January 18, 2016, February 9, 2016 and March 7, 2016, all related to EM, including the Foster Parents’ access to EM.
- [16] In the March 7, 2016 application, the Foster Parents sought access to the files of the Director of Child, Family and Community Services concerning EM and NB. The Director subsequently advised the Respondent that the Director would oppose that application. The Respondent did not pursue that application further.
- [17] On March 18, 2016, Master MacNaughton, as she then was, heard the March 7, 2016 application and ordered that the Foster Parents have some access to EM. The Master further ordered that the parties appear back before her in three months.
- [18] During that hearing, Master MacNaughton asked questions of counsel for NB as to why a transition plan for EM’s move from the Foster Parents’ care to NB’s care was not ordered by Judge Chettiar. After counsel’s response to those questions, the Master stated: “Well, frankly, the transcript of the proceedings or a written decision from Judge Chettiar should have been before me.” (Transcript, page 37, Lines 23-25)

- [19] On March 21, 2016, the Foster Parents contacted the Respondent's office to enquire as to whether they could obtain transcripts of the Child Protection Trial.
- [20] On March 22, 2016, the Foster Parents indicated to the Respondent's legal assistant by email that they were interested in obtaining the transcript only of the last day of the hearing, December 23, 2015, when Judge Chettiar heard their joinder application.
- [21] Later on March 22, 2016, the Respondent's legal assistant advised the Foster Parents by email that they could apply for the transcripts themselves, "even as laypersons."
- [22] Still later on March 22, 2016, the legal assistant emailed the Foster Parents and stated: "Jack is of the opinion that because you were involved, to some degree, in the CFCSA proceedings (i.e. Jack actually addressed the Court), you should be able to obtain the transcript." It is not clear on the evidence whether the legal assistant was referring to the transcript of the entire proceeding or simply the last day of the proceeding in that email; however, at that point only December 23, 2015 had been discussed in the written correspondence.
- [23] The Foster Parents replied to that email in an email that stated that they would now like to receive the transcripts from December 21, 2015, as well.
- [24] On March 30, 2016, in a letter to the transcription service, the Respondent's assistant confirmed that the transcripts for both December 21 and December 23, 2015 were being requested.
- [25] On June 1, 2016, the Respondent filed a Notice of Application, to be heard on June 14, 2016, on behalf of the Foster Parents requesting further access to EM.
- [26] In support of that application, the Respondent filed an affidavit of one of the Foster Parents, which had attached to it the transcripts of the December 21, 2015 and December 23, 2015 proceedings (the "Transcripts") before Judge Chettiar.
- [27] Each page of the Transcripts had a notice reading: "CFCSA – Restriction on Access". Further, on the cover page of each Transcript there was a legend, highlighted by being outlined with a box, stating:

CFCSA MATTER RESTRICTION ON ACCESS s. 3.2 Provincial Court Act
--

- [28] The Transcript of December 21, 2015 contained frank testimony by NB respecting certain issues in her life and the reasons behind her children, including EM, having been taken into care.
- [29] The hearing was held on June 14, 2016 before Master MacNaughton and NB was not represented at the hearing. The Respondent referred in that hearing, while speaking to the application, to the content of the December 21, 2015 Transcript.
- [30] NB objected to the Respondent's use of the Transcript and expressed concern that he even had access to it because she was under the impression that the transcripts were sealed.
- [31] The transcript from the June 14, 2016 hearing reads in part on page 35 commencing at line 11 and referring to the Transcripts:
- [NB]: How did you get this paperwork?
- [Respondent]: Well, this –
- [NB]: This was sealed.
- [Respondent]: Well, ma'am this was from the – the –
- [NB]: That was sealed, and the judge ordered in the last trial that we were that you didn't have – you were denied access to my files.
- [Respondent]: Well –
- [NB]: So how you obtained any of my personal information is questionable right now, Your Honour.
- [Respondent]: Well, we had –
- [NB]: You even told him –
- [Respondent]: We had no problems getting –
- [NB]: that he was not allowed to obtain any of that.
- The Court: No, I didn't make such an order, Ms. [NB].
- [NB]: I have – my lawyer even emailed me and told me to remind the court of that.

The Court: I didn't make such an order.

[Respondent]: There's no such order.

- [32] At the June 14, 2016 hearing, the Master ordered expanded access to EM for the Foster Parents, ordered that NB could not remove EM from the lower mainland and included a police assistance order.
- [33] NB appealed the Master's order and was represented by counsel in the appeal.
- [34] By letter dated January 11, 2017, NB's counsel expressed concerns respecting the Respondent's use of the Transcripts at the June 14, 2016 hearing, including that, because the Respondent's clients were not parties to the Child Protection Hearing and had been expressly denied joinder to that proceeding, they should not have been permitted to have access to the Transcripts. NB's counsel asked the Respondent for an explanation of the authority that permitted the Respondent to use the Transcripts in the Foster Parents' Supreme Court family law case.
- [35] On January 14, 2017 the Respondent replied by letter stating various reasons in justification of his use of the Transcripts including that NB did not object to the use of the Transcripts, and by stating that transcripts of an open court hearing are not covered by the confidentiality provisions of the CFCSA.
- [36] The Respondent admitted in these proceedings that he was mistaken in this letter and agreed that NB had objected to the use of the Transcripts before Master MacNaughton.
- [37] On January 17, 2017, NB's counsel responded to the Respondent's letter and, among other things, raised a concern that the Respondent had stated to the Master that he was permitted to use the Transcripts because there was no court order preventing him from doing so, when there were applicable rules that prevented its use. In this proceeding, the Respondent testified that he felt this was a mischaracterization of what he said before the Master.
- [38] On January 19, 2017, the appeal of the Master's June 14, 2016 order was heard by Justice Choi. It was continued on January 25, 2017 and on March 3, 2017, Justice Choi allowed the appeal, set aside the Master's order and did not order any contact between the Foster Parents and EM.
- [39] During his submissions before Justice Choi, the Respondent stated:

Obviously transcripts from Provincial Court are from an open court.
They're not covered by the confidentiality provisions of the CFCSA.

There's no court order – sorry, there's no statutory provision that says you can't use – not that I'm aware of.

[40] In her March 3, 2017 decision, Justice Choi stated the following:

[71] Another indication of serious animosity between the parties is the inclusion of a portion of the transcript from the Provincial Court proceeding. These transcripts included a full day of cross examination of NB. Mr. Hittrich read out at length from this cross examination at the June hearing, focusing on those sections that cast NB in a negative light. NB was extremely upset that the transcript had been obtained and argues that it was only used to undermine her and attack her character.

[72] I agree. As a non-party to the Provincial Court proceedings, LG and CW should not have been able to obtain the transcript: *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg. 533/95, R. 8(15).

[73] Mr. Hittrich argued that the master had authorised the search during the March hearing. He points to the master's comment that:

Well, frankly, the transcript of the proceedings or a written decision from Judge Chettiar should have been before me. I don't have it, so ...

[74] I do not accept that this statement amounted to an order for the respondents to obtain the transcript. I agree with NB that the transcript was used in the June hearing to cast aspersion on her.

[41] The Foster Parents instructed the Respondent to appeal the order of Madam Justice Choi.

[42] On April 5, 2017, the Respondent filed appeal books that contained the affidavit to which the Transcripts were attached.

[43] On July 6, 2017, Justice Forth ordered that Dr. Koopman be appointed as an expert to prepare a report under s. 211 of the *Family Law Act* concerning EM.

[44] In an email to the Law Society dated February 20, 2018, the Respondent stated that, at some time between July 6, 2017 and July 13, 2017, he directed the Foster Parents to deliver an extra appeal book that they had, containing the Transcripts, to Dr. Koopman.

- [45] On July 7, 2017, NB's counsel sent an email to the Respondent and objected to the inclusion of the Transcripts in the material being delivered to Dr. Koopman.
- [46] On July 10, 2017, the Respondent responded to NB's counsel to state that it was essential that Dr. Koopman have before her all of the materials that are currently before the court, including the Transcripts.
- [47] The Transcripts were delivered to Dr. Koopman by the Foster Parents on July 10, 2017.
- [48] On July 13, 2017, the Respondent ceased to act for the Foster Parents.
- [49] On July 26, 2017, the Respondent wrote to Dr. Koopman and suggested that, until the appeal of Justice Choi's order was resolved, Dr. Koopman "not look at any transcripts from the Provincial Court."

THE CITATION

- [50] The Citation was authorized on November 8, 2018, issued on November 19, 2018 and served on the Respondent in accordance with the requirements of the Law Society Rules on November 21, 2018.
- [51] The substance of the Citation is set out in paragraph 2 above.
- [52] 1. The rules of the *Code of Professional Conduct for British Columbia* referred to in the Citation are as follows:

Rule 2.1-1(a): A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

Rule 2.1-2(a): A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

Rule 2.2-1: A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Rule 3.1-2: A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Rule 5.1-1: When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Rule 5.1-2(i): When acting as an advocate, a lawyer must not: ... (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party ...

ONUS AND STANDARD OF PROOF

[53] The onus of proving the allegations in the Citation is on the Law Society and the standard of proof is the balance of probabilities; *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63.

ANALYSIS

[54] The Citation revolves around the access and use of the Transcripts by the Respondent. We will discuss each stage of that access and use.

Definition of professional misconduct

[55] The Law Society seeks a finding of professional misconduct.

[56] The leading case on the definition of that phrase is *Lawyer 12*, 2011 LSBC 35, in which a s. 47 review panel endorsed the test described in *Law Society of BC v. Martin*, 2005 LSBC 16. In *Martin*, the hearing panel determined that the test is "... whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members; if so, it is professional misconduct" (*Martin*, para. 171).

[57] The *Martin* panel also stated: "... 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" (*Martin*, para. 154).

[58] In *Lawyer 12*, the review panel also endorsed a holistic approach to questions of professional misconduct: "We find that the proper approach should be to consider the conduct as a whole." (*Lawyer 12*, para. 8)

[59] Further, the minority of the review panel in *Lawyer 12* wrote (and the majority concurred that):

[49] ... there is a spectrum of culpability or blameworthiness between the standards that the Law Society expects of its members and the degree of fault that will constitute professional misconduct in a citation context.

[50] *Martin* describes the threshold as gross culpable neglect. That is to say that the culpability is of an aggravated character and not a mere failure to exercise ordinary care.

[51] If the conduct of the lawyer falls into the latter category then it is not a marked departure from the norm, and thus the lawyer cannot be found to have committed professional misconduct. If the conduct rises to the level of the former category, then there must be a finding of professional misconduct and there is no need to look any further.

Ordering and accessing the transcript

[60] As referenced by Justice Choi, Rule 8(15) of the *Provincial Court (Child, Family and Community Service Act) Rules* states:

Who may search files

(15) Only the following are entitled to search a registry file respecting a matter under the Act:

- (a) a party;
- (b) a party's lawyer;
- (c) a person authorized by a party, by a party's lawyer or by a judge.

[61] The facts before us establish that, when the Foster Parents first raised the question of accessing the registry file and obtaining transcripts of the Child Protection Trial, their request was limited to the transcript of the proceedings on December 23, 2015, the date that the Respondent appeared before Judge Chettiar to argue the joinder application.

[62] At that time the Respondent advised them that, because they were parties to the proceedings, they could obtain the transcripts because they were involved to some extent in the proceedings.

- [63] However, on December 23, 2015 Judge Chettiar did not grant the Foster Parent’s application for joinder to the Child Protection Trial, so the Foster Parents, while parties to that joinder application, were not parties in the Child Protection Trial. On that basis, Justice Choi found that the Foster Parents “... should not have been able to obtain the transcript” due to the application of Rule 8(15).
- [64] The Respondent argued that there is a distinction between the transcripts of a proceeding and the registry file referenced in Rule 8(15). Under the *Official Reporters Regulation*, BC Reg. 144/2010, s. 3.01(2), when a transcript of a proceeding is prepared, the person who prepared the transcript must provide the original to the court registrar for filing. An affidavit from Marge Harrison, who works at the agency that prepared the Transcripts, was submitted to us. It establishes that her agency had the contract to prepare the Transcripts and that their practice is to comply with the regulation and send the original to the court registrar and provide a copy to the party that ordered it. As a result, we find that the original of the Transcripts was placed in the court registry file, and the Transcripts provided to the Respondent were copies. As such, the Transcripts the Respondent had were copies of elements of the registry file and subject to Rule 8(15).
- [65] Rule 2.1-1(a) states that a lawyer should not assist any person to act in any way contrary to the law.
- [66] There was evidence before us as to whether the Respondent specifically advised the Foster Parents and his legal assistant with respect to whether they had the right to obtain the Transcripts for December 21, 2015 at the time the request was made. However, we find that it was not made out on a balance of probabilities that he did so. The Panel finds that, on the balance of probabilities, the Respondent advised his legal assistant on the availability of the December 23, 2015 transcripts, as indicated in his legal assistant’s email of March 22, 2016, and did not turn his mind to, or was not asked, about the December 21, 2015 transcript at that time. As a result, the Law Society has not met the burden of proving that the Respondent assisted the Foster Parents in obtaining a copy of the Transcripts.

Filing the Transcripts as exhibits

- [67] The second element of the citation is in respect of filing the Transcripts as exhibits to an affidavit.
- [68] When the Respondent received the Transcripts from the court reporter they were marked as follows:

<p>CFCSA MATTER</p> <p>RESTRICTION ON ACCESS</p> <p>S. 3.2 Provincial Court Act</p>

- [69] As well, the shoulder notes on each page of the Transcripts contained the following statement: “CFCSA – Restriction on Access”.
- [70] According to the *British Columbia Court Transcription Manual* (“Transcription Manual”), this cover page marking is referred to as a “ban box”. The Transcription Manual states at pp. 21 - 22:
- Information regarding sealing orders/bans on publication or where file access is restricted must be clearly noted in the transcript.
- [71] Similarly for shoulder notes, the Transcription Manual states at p.10: “The last line(s) of the shoulder note is used to note any bans.”
- [72] While this Panel does not find that it was incumbent upon the Respondent to be familiar with the Transcription Manual, the Panel does find that a lawyer, when presented with a transcript bearing the foregoing markings, ought to satisfy themselves as to what those markings were meant to communicate. Especially since it is clear from the Transcription Manual that these markings are the ordinary and customary way of communicating the existence of sealing orders and bans to readers.
- [73] There is an issue with the markings. S. 3.2 of the *Provincial Court Act* is not a correct citation as there is no such section of that Act. However, s. 3(6) of that Act contains a prohibition as follows:
- 3(6) In relation to family or children’s matters before the court, a person must not publish at any time anything that would reasonably be likely to disclose to members of the public the identity of the child or party.
- [74] The Transcripts were filed as exhibits to an affidavit by the Respondent with the court registry and were accessible by anyone with ordinary access to that registry. As a result, the children’s identity may well have been disclosed to a large number of people.
- [75] It is not necessary for this Panel to make a determination as to whether s. 3(6) of the *Provincial Court Act* was breached, because breaching the law is not the standard that is applicable here. The Panel must assess whether the Respondent’s actions failed to meet the standards the Law Society expects of lawyers. Rule 3.1-2: states that “a lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.”
- [76] In *Law Society of BC v. Kirkhope*, 2005 LSBC 23, the hearing panel stated at para 12:

... Certainly there may be circumstances where a lawyer might not understand the precise requirements of a certain undertaking and might make an honest and understandable mistake as to his duties. Such a situation would probably not constitute professional misconduct. But a prudent lawyer would not simply proceed on a course of action presuming he is right unless he was well and properly armed with knowledge or had sought guidance from others.

- [77] The Panel finds that the Respondent's actions in filing an affidavit containing transcripts that were clearly marked as being subject to restrictions on use without inquiring as to the nature and extent of such restrictions, and subsequently filing the transcripts in an affidavit that may have had the effect of exposing the identity of a child in a CFCSA proceeding, was a breach of Rule 3.1-2 and failed to meet the standard the Law Society expects of lawyers.

Misleading the court

- [78] The next element of the citation alleges that the Respondent misled Master MacNaughton in the June 14, 2016 hearing about the ability to rely upon the Transcripts and failed to inform the court about the provisions of the *Child, Family and Community Service Act*, the related Provincial Court Rules and the notations on the face of the Transcripts in regards to the proper procedure for obtaining access to the Transcripts.

- [79] The Panel does not find that this element of the citation has been made out.

- [80] Rule 5.1-2(i) requires lawyers, when acting as an advocate, not to

deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party.

[emphasis added]

- [81] While it is true that the Respondent did not inform the court about the relevant provisions of laws and rules related to the use of the Transcripts, the Panel finds that the cause of that failure was the Respondent being unaware of those provisions. While the failure of the Respondent to make himself aware of the meaning of the markings on the Transcripts failed to meet the standards expected of lawyers, the subsequent interactions with the court did not involve any deliberate action on behalf of the Respondent to mislead Master MacNaughton. Instead, the

representations he made to the court were merely reflective of his failure to inform himself of the relevant rules.

Including the Transcripts in the appeal books

- [82] In her decision of March 3, 2017, Justice Choi clearly stated, among other things, that the Foster Parents should not have been able to obtain the Transcripts.
- [83] The Respondent was instructed to appeal the decision and, in doing so, prepared and filed appeal books that again contained the affidavit with the Transcripts attached. The Respondent did not seek an order from the court before doing so.
- [84] The Respondent argues that first, Justice Choi's decision on the Transcripts was obiter by virtue of the applicability of Rule 8(15) not having been argued before her and thus, while informative, was not binding on the Respondent. Second, the Respondent argued that he was required to include the Transcripts in preparing the appeal books because they would be relevant to the appeal.
- [85] Court of Appeal Form 12 does not require that all affidavits that were before the lower court must be included in the appeal books. Rather it states that "[t]he party preparing an Appeal Book must include in that Appeal Book only filed copies of those affidavits and exhibits that are necessary to resolve the issues raised on appeal."
- [86] In a letter dated January 14, 2017, the Respondent, while responding to NB's counsel's letter informing him that they thought his use of the Transcripts was improper, stated: "There is no reason to believe that the use of the transcripts had any bearing on the interim contact order. In fact, the exact opposite is the case."
- [87] If it is the Respondent's position that the Transcripts did not have any bearing on Master MacNaughton's interim contact order and Justice Choi ruled that they should not have been used before her either, then it is not credible for the Respondent to then claim that the Transcripts were required to be included in the Appeal Book.
- [88] As for Justice Choi's decision being obiter, NB's counsel's objection to the use of the Transcripts was brought up in correspondence with the Respondent prior to the hearing before Justice Choi and was advanced in that hearing. Counsel specifically stated that "the court transcripts come under the court file, which is restricted in access to parties and their counsel, for which Mr. Hittrich was not counsel on [sic] his parties – his clients were not parties to the CFCSA proceedings."

- [89] Clearly, Rule 8(15) was referenced by counsel when discussing the restrictions on access to the court file to parties and their counsel, since Rule 8(15) is where those access provisions are found.
- [90] The Supreme Court of Canada described obiter as “commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not ‘binding’” (*R. v. Henry*, 2005 SCC 76 at para. 57). A ruling on a matter raised by counsel is not “commentary, examples or exposition”.
- [91] If the Transcripts were relevant to the appeal, Justice Choi ruling that the Respondent should not have access to them should have indicated to him that he should seek an order of the court to allow him to provide those Transcripts to the appellate court. Otherwise he would have been continuing to use them, despite Justice Choi’s ruling that he and his client should not have access to them.
- [92] The Respondent did not seek such an order.
- [93] Rule 5.1-1 states that, “when acting as an advocate, a lawyer must represent the client ... within the limits of the law.” The Panel finds that, by filing the appeal books with the Transcripts in them after Justice Choi had ruled that he and his clients should not have access to the Transcripts at all, the Respondent breached Rule 5.1-1.
- [94] The Respondent argued that *Groia v. Law Society of Upper Canada*, 2018 SCC 27, is relevant to these proceedings. *Groia* dealt with allegations of incivility due to counsel “... advancing good faith allegations in court of impropriety that stem[med] from a sincerely held legal mistake” (*Groia*, para 91). The Supreme Court of Canada cautioned that finding professional misconduct in that circumstance was not in the public interest because it could lead to lawyers being discouraged from advancing well-founded allegations.
- [95] In these proceedings, we are presented with counsel using Transcripts that are clearly marked on their face as being subject to usage restrictions, usage restrictions that the Respondent did not inquire into. This matter is not one of a good faith usage of the Transcripts based on a sincerely held legal mistake. The Respondent simply did not inform himself as to what the legal basis for the use of the Transcripts was. Further, when confronted by Justice Choi’s decision that such usage was not permitted, the Respondent persisted in using the Transcripts by filing them in the appeal books. Even if *Groia* were applicable to this matter, the Respondent, at least by the time he filed the appeal books if not earlier, could no longer claim that he held a sincerely held legal belief that his use of the Transcripts was legally permitted.

Providing the Transcripts to Dr. Koopman

- [96] The Respondent directed the Foster Parents to provide to Dr. Koopman, a psychologist appointed by court order, a copy of all the materials that had been before Justice Choi, including the Transcripts. Counsel for NB wrote to the Respondent on June 7, 2017 to object to him doing so and specifically pointed out that Justice Choi had ruled that he and his client were not entitled to have access to the Transcripts.
- [97] The Respondent replied on July 10, 2017 and stated: “It is essential that Dr. Koopman have access to everything that is currently before the Court and it is unreasonable for you to ask that she not look at our Factum and the transcripts from the Provincial Court.”
- [98] This statement was made after the Respondent had received Justice Choi’s decision, which found not only that he and his clients did not have the right to have access to those Transcripts but also that they had only been used to cast aspersions on NB’s character. As with the appeal books, it was no longer open to the Respondent to explain these actions by reference to his lack of understanding as to the restrictions that were applicable to the use of the Transcripts.
- [99] The Panel finds that the Respondent deliberately failed to comply with Justice Choi’s decision and, in doing so, the Respondent breached Rule 5.1-1.

PROFESSIONAL MISCONDUCT

- [100] Considering the Respondent’s behaviour in this matter as a whole, the Panel finds that, by filing the Transcripts as exhibits to an affidavit filed in the Supreme Court, by again filing those Transcripts in appeal books with the Court of Appeal and finally by providing those Transcripts to Dr. Koopman, the Respondent engaged in conduct that is a marked departure from the conduct the Law Society expects from lawyers.
- [101] Further, by acting without informing himself as to meaning of the statements restricting the use of the affidavits found on their cover page (and marked on every page of the Transcripts), and by continuing to use the Transcripts after Justice Choi clearly ruled that he and his clients did not have the right to have access to them, he acted with gross culpable neglect and not a mere failure to exercise the ordinary care expected of a lawyer.
- [102] As a result, this Panel finds that the Respondent’s conduct violated Rules 3.1-2 and 5.1-1 and constituted professional misconduct.

NON-DISCLOSURE ORDER

[103] Discipline counsel applied for a sealing order with respect to the exhibits filed in these proceedings to protect information respecting EM, KG, NB and the Foster Parents from being disclosed.

[104] Rule 5-8(2) of the Law Society Rules provides that, upon application or on its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so. In the absence of such an order, Rule 5-9(2) of the Law Society Rules permits a person to obtain a copy of an exhibit entered into evidence when a hearing is open to the public.

[105] We find that the exhibits filed in this hearing as well as any transcript of the hearing contain confidential information related to EM, KG, NB or the Foster Parents should not be disclosed. We therefore make the following order:

- (a) if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any information protected by solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person; and
- (b) if any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information, and any information protected by solicitor-client privilege must be redacted from the transcript before it is disclosed to that person.