2016 LSBC 20
Decision issued: May 31, 2016
Citation issued: February 21, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

MARTIN DREW JOHNSON

RESPONDENT

DECISION OF THE BENCHERS ON REVIEW

Review date: March 3, 2016

Benchers:

Majority decision:
Lynal E. Doerksen, Chair
Satwinder Bains
J.S. (Woody) Hayes
Dean P.J. Lawton
C.E. Lee Ongman
Carolynn Ryan

Dissent decision
Jamie Maclaren

Discipline Counsel: Alison Kirby
Counsel for the Respondent: Tony S. Paisana

MAJORITY DECISION OF LYNAL E. DOERKSEN, SATWINDER BAINS, J.S. (WOODY) HAYES, DEAN P.J. LAWTON, C.E. LEE ONGMAN AND CAROLYNN RYAN

BACKGROUND

[1] The Respondent was cited for being involved in a verbal altercation outside of a courtroom with a police officer who was also a potential witness in a trial where the

Respondent represented a client in a criminal matter. In the altercation the police officer said to the Respondent, "Don't for a minute think I don't know who you are and what you're all about," and the Respondent replied to the officer "fuck you" in an angry and insulting manner. After a hearing the Respondent was found to have committed professional misconduct and was suspended for one month.

[2] The Respondent seeks a review of the hearing panel's decisions and seeks to have the finding of professional misconduct overturned or, if that application is not successful, to have the penalty reduced.

[3] The Respondent argues that the hearing panel erred in:

(a) concluding that provocation is "irrelevant" to a determination of professional misconduct;

(b) concluding that provocation should not be a defence or excuse to professional misconduct;

(c) finding that the Respondent's actions constituted professional misconduct;

(d) overemphasizing the Respondent's previous disciplinary record and failing to apply the "gap" principle; and

(e) according less weight to the letters of reference filed in support of the Respondent.

STANDARD OF REVIEW

[4] It was agreed by both parties that the standard of review is "correctness." This applies to both the finding of professional misconduct and the penalty imposed. Although this Review Panel is bound by the findings of fact made by the hearing panel, if the hearing panel applied the law in error and reached the wrong conclusion or determination, the Review Panel may "correct" this with its own determination (see *Law Society of BC v. Foo*, 2015 LSBC 34 at paragraph 9; *Law Society of BC v. Harding*, 2015 LSBC 45 at paragraph 23).

PROVOCATION

[5] The decision of the hearing panel on Facts & Determination (the "F&D decision") 2014 LSBC 08, was unanimous in its result but diverged in the manner in which it reached that end. The issue of provocation is where their reasons diverge.

[6] The majority reasons appear first in the decision but were written after the minority reasons because the minority reasons set out the findings of fact and comment upon these findings of fact. The minority reasons set out the finding of fact in paragraph 31:

> (a) the Respondent asked Officer B to attend the former matrimonial home with his client while he picked up a few of his belongings;
>
> (b) Officer B refused;
>
> (c) Officer B's demeanour was unyielding, and his voice became raised, insistent and offending;
>
> (d) both men became heated and volatile;
>
> (e) Crown counsel intervened and suggested a solution that seemed workable to both sides;
>
> (f) an older more experienced police officer would likely have defused the situation;
>
> (g) after the Respondent asked Officer B if he could smell the marijuana in the house, Officer B said, "Don't for a minute think that I don't know who you are or what you are about";
>
> (h) the Respondent was shocked by this remark, and quickly said "fuck you" to Officer B. He immediately regretted saying this;
>
> (i) at this point they came very close together, almost nose to nose. Their chests or stomachs were touching;
>
> (j) Officer B said, "You don't scare me, you big shot lawyer," and he pointed out that their chests were touching. Officer B then said, "That's assaulting a police officer";
>
> (k) the Respondent said, "You are assaulting me," to which Officer B replied, "You haven't seen anything until you've seen an RCMP assaulted"; and
>
> (l) Officer B then spun the Respondent around, arrested him and handcuffed him with the assistance of one of the sheriff's officers.

[7] The majority's comments on the findings fact are found in paragraphs 4 through 7:

> In addition to our differences as to how our learned colleague framed the issue, we also have a different interpretation of some of the facts and inferences upon which he based his reasons.
>
> It may be correct that Officer B overreacted in his dealings with the Respondent and that he may not have had reasonable grounds to make an arrest or to handcuff the Respondent and take him into custody. And, it may well be that Officer B did perceive the actions of the Respondent as constituting an act of assault. But based on the evidence, we cannot say that the conduct of Officer B was both "extreme and unnecessary" given that the Officer and the Respondent were "nose to nose". Nor can we agree that the Respondent was "*paraded*" down the hall, as stated in paragraph [41]. On the contrary, the Court Sheriff's evidence was that he assisted Officer B in "escorting" Mr. Johnson down the hall.
>
> As for whether or not the words "fuck you" were spoken in anger, there is evidence from Crown Counsel that the Respondent became angry, and the demeanour of both the Respondent and Officer B were heated and volatile at the time they were "nose to nose" and moments later when the Respondent uttered the words "fuck you". Accordingly, it is the view of the Majority that the words were spoken in anger, and not innocuously or harmlessly. Indeed, under the circumstances, it is clear the Respondent could not have used those words in these particular circumstances without the words being meant as an insult and spoken, no matter how loudly, in anger.
>
> Likewise, we do not see the facts of this case as an over-aggressive police officer provoking a lawyer into uttering a verbal insult, leading to a citation from the Law Society. Although Officer B might have taken more proactive steps to diffuse the situation, we believe the Respondent had a higher duty to avoid putting himself into the position where the police officer and Mr. Johnson were "nose to nose", leading to the expletive being angrily uttered by him.

[8] The unanimous decision of the panel on Disciplinary Action (2014 LSBC 50) states in the first paragraph that "the Respondent had been provoked by the officer."

[9] What divided the majority and minority is the question of the application of "provocation" in a disciplinary hearing. The majority states that provocation can never be used as a defence as it held in portions of paragraphs 3, 9, 10 and 14:

> [3] ... In our view, provocation is irrelevant to a determination of professional misconduct. Whether or not a lawyer could be pushed to a "breaking point" is irrelevant to a determination of professional misconduct. ...
>
> [9] We also wish to make it abundantly clear that there should not be a defence of "provocation" as suggested by our learned colleague. ...
>
> [10] We do not accept that there are any circumstances in which a lawyer in a courthouse could say "fuck you" in anger to a witness, to another lawyer or to any member of the public. ...
>
> [14] Accordingly, it does not matter if a lawyer is provoked, or whether the lawyer has reached a breaking point or if litigation is sometimes hostile, aggressive and fierce. Saying "fuck you" to a witness, another lawyer, or a member of the public in a courthouse in an angry, insulting, hostile or belligerent manner, as the Respondent did, is totally indefensible, is always a marked departure from the standard of conduct that the Law Society expects of lawyers and, therefore, always constitutes professional misconduct.

[10] In a portion of paragraph 47 the minority states that provocation can, in the right circumstances, amount to a defence:

> ... I also accept that the use of discourteous or profane language may be excusable in certain cases where the provocation is extreme. ...

ANALYSIS

[11] We find that framing the issue of provocation as a defence is not the correct approach in dealing with an allegation of professional misconduct. In administrative hearings provocation is only a factor among many other possible factors to be considered by a hearing panel to determine if the conduct of the Respondent is a "marked departure" from the conduct the Law Society expects of its members **(***Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171). To entertain a "defence of provocation," phrased in that way, has the potential to move the focus of the hearing away from this standard test.

[12] The criminal law defence of provocation was referred to us, but we do not find it useful to our analysis. There is too much dissimilarity between the criminal law and administrative law to make any use of the defence of provocation as it is used

in criminal law. Provocation as set out in the *Criminal Code* (s. 232) is a *partial* defence to the charge of murder. It is not available as a defence to any other charge. For example, if an accused is found to have committed murder but was sufficiently provoked by the victim, the accused may be found guilty of the lesser offence of manslaughter. In simple terms, murder requires a specific intent to kill someone and an action that results in the death of the victim. Manslaughter only requires an intent to commit an unlawful act (but not the intent to kill) which nonetheless results in the death of the victim. An accused convicted of murder faces minimum penalties, whereas an accused found guilty of manslaughter may not face a minimum penalty. In criminal law the charge against an accused must be proven beyond a reasonable doubt.

[13] Unlike the *Criminal Code*, provocation is not recognized in the *Legal Profession Act* or the Rules of the Law Society. Also, the Act has no degrees of culpability for professional misconduct as there are for homicide in the *Criminal Code*. An allegation of professional misconduct before an administrative tribunal only requires proof on a balance of probabilities (*Law Society of BC v. O'Neill*, 2013 LSBC 23). What factors a panel will consider to determine if professional misconduct has been committed will depend on the circumstances of each case, and it is not advisable to lay down a principle that any given factor, such as provocation, can never be a factor to consider.

[14] Instructive on this point are two cases from other jurisdictions: *Groia v. The Law Society of Upper Canada, 2013 ONLSAP 41*; and *Law Society of Alberta v. Lee, 2009 ABLS 31*.

[15] In *Groia* the appeal panel held at paragraph 7:

> ... Provocation from opposing counsel is a relevant consideration, although it is not a complete defence.

[16] In *Lee* the hearing committee held at paragraph 143 (iv):

> Provocation, or events leading up to the comments, may mitigate against the comments such that comments made which would [be] sanctionable if made unprovoked may not be sanctionable in the presence of provocation.

[17] Thus, it would not be useful or wise to foreclose this issue from ever becoming a factor. Sometimes life, or in this case the practice of law, has a way of providing a factual scenario that challenges what would appear to have been an inviolable principle.

[18] It is also arguable that the majority was confining their comments on provocation to the intent behind the words said by the Respondent. The words of the majority at paragraph 8 of the F&D decision appear to indicate this:

> ... we wish to make it clear that our decision is not meant to deny the use of a word in the English language that people may hear or use all the time, or otherwise interfere with one's freedom of speech. Rather, we wish to make it clear to members of the profession, that insults or profanity, if uttered in anger (whether using the f-word or not), directed to a witness, another lawyer, or member of the public in the circumstances and the place in which it was used by the Respondent, are not acceptable and can constitute professional misconduct.

Given this qualifying comment by the majority, it is not clear that they are suggesting that provocation can never be used as a factor in any case, but certainly in circumstances similar to the facts of the case at hand where the words were said in anger with the intent to insult.

[19] In any event, we will make it clear that provocation can be a factor to be considered in determining if a lawyer has committed professional misconduct but its use must be left to each hearing panel on a case by case basis. As was stated in the minority decision at paragraph 47:

> I recognize that no-one is perfect and that every person has a breaking point. I also accept that the use of discourteous or profane language may be excusable in certain cases where the provocation is extreme. The general issue seems to be, could a reasonable member of the Law Society, acting with courtesy, fairness, integrity, honesty and dignity, be driven to the breaking point by the particular circumstances of provocation such that his inappropriate response would be excusable. I believe that there are circumstances when a reasonable lawyer could be driven to such a point. If that occurs, the particular conduct of the lawyer may be excusable. Each case will, however, depend on the degree of provocation and the nature of the lawyer's reaction.

APPROPRIATE TEST FOR THE USE OF PROVOCATION AS A FACTOR IN ASSESSING A QUESTION OF PROFESSIONAL MISCONDUCT

[20] If provocation can be used as a factor in determining whether professional misconduct has been committed, did the hearing panel apply the appropriate test for the use of this factor? The minority decision held that provocation may be used in

certain cases where the provocation is "extreme" (at paragraph 47 of the F&D decision).

[21] The Respondent argues that a test that only allowed provocation to be a factor if the provocation is "extreme" would be "difficult to interpret and apply in practice." The Respondent urges the test as used in criminal law should be applied in this case.

[22] The criminal test for the use of the defence of provocation is that the person must be subjected to a "... wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self-control ..." and the person must act upon that insult "... on the sudden and before there was time for his passion to cool" ... (*R. v. Thibert*, [1996] 1 SCR 37 at paragraph 4). The Respondent argues that what occurred in this case meets these criteria.

[23] For reasons already stated above, we decline to make use of the criminal definition of provocation or apply it to this case. A further distinguishing feature is that the Respondent as a lawyer is a member of a profession in which higher standards of conduct are expected than those of the ordinary citizen. The Respondent is an experienced lawyer. In any litigation, experienced counsel know that matters can become emotionally charged. As was stated by the hearing panel the onus is on the Respondent to "rise above the fray" (at paragraph 9 of the F&D decision).

[24] Each case will have its own unique facts, and we will not set out here a test for what amount or quality of provocation is required to prevent what would otherwise be a finding of professional misconduct. Provocative words are so enmeshed in the context of what was said, who said it, how it was said, timing, intent, demeanour, who heard the words, who was intended to hear the words, cultural understandings and so forth, that it is impossible to lay down a rule here. Even using the qualifier by the minority that the provocation must be "extreme" is difficult to define. Again, this is best left with future hearing panels to determine should the issue arise again.

[25] In any event the words spoken by the officer ("Don't for a minute think I don't know who you are and what you're all about") were found by the hearing panel to be insufficiently provocative. The hearing panel was in the best position to observe and determine this issue. There is nothing in the evidence to suggest any error in this conclusion.

[26] The Respondent argued that such words were intended to impugn his character. This might be so, but many lawyers at some point in time have had an opposing party or hostile witness call into question their character. No doubt such comments

sting, but to excuse the Respondent's reply to these provocative words in the circumstances of this case would send a message that it is permissible for counsel to trade an "insult for an insult." This cannot be countenanced.

ONE-OFF REMARK?

[27] If the hearing panel erred in the use of provocation in assessing whether professional misconduct occurred, does it change the outcome? The Respondent argues that the use of the words "fuck you" are a one-off remark that should be treated as falling short of professional misconduct. In support of this the Respondent refers to *Harding*. In that case the review panel held at paragraph 45:

> … 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."

And further at paragraph 60:

> The standard against which lawyers' conduct should be measured cannot be one of perfection. Many lawyers make isolated statements in a moment of frustration that they later regret. In most cases, making an isolated intemperate or ill-considered statement with *no improper intent* will not amount to professional misconduct and that is what the hearing panel concluded in this matter.
>
> [emphasis added]

[28] However, this case is distinguishable as *Harding* clearly leaves open to a hearing panel, based upon the facts, that a rude or aggressive comment "may or may not cross the line." Further, Harding did not use profanity, and his words were not intended to insult, but they had another improper purpose (to cause the police to attend) that the review panel found, based on the facts, "crossed the line." As we have found that it is an error to hold that provocation is never a factor, it would be an error to hold that a lawyer is allowed a "one-off remark" in every case.

[29] The Respondent points out that there is no pattern of rude or aggressive behaviour as was found in the cases of *Law Society of BC v. Lanning*, 2008 LSBC 3, and *Law*

Society of Upper Canada v. Guiste, 2011 ONLSHP 24. Again, these matters are very specific to their facts, and we are not persuaded that they show the hearing panel committed an error in the result. No pattern of rude or aggressive behaviour is required.

[30] As was stated at the beginning, the hearing panel only differed on the use of provocation but were united in the result that the Respondent had committed professional misconduct as was stated in the words of the minority:

> [48] I conclude that, while the remarks of the Respondent are understandable, they are not excusable and constitute a marked departure from what the Law Society expects of its membership. I find that the Respondent's words constitute professional misconduct. I feel that a reasonable and proper response from the Respondent was to say nothing further. He should have bitten his lip and walked away.
>
> [49] The public's confidence in their public institutions, such as the courts, and the integrity of the legal profession, are but a few of the underpinnings in safeguarding a free and democratic society. The use of profanity by the Respondent, a member of the legal profession and an officer of the court, towards a potential witness in a case within the confines of the courthouse and within the presence of others could have the effect of eroding public confidence in these bodies and constitutes behaviour that I believe must be rebuked.
>
> [51] Even if litigation can occasionally be hostile, aggressive and even fierce, that does not, in our view, excuse the conduct of the Respondent. If indeed the practice of litigation has become aggressive and fierce, then it becomes even more important that the Law Society, to the extent it can, control and limit the type of behaviour that constitutes a marked departure from the conduct it expects from its members.

[31] The determination of professional misconduct by the hearing panel is well supported by the facts of this case, and we find no error that should cause the result to be overturned. Thus we uphold the finding of professional misconduct by the hearing panel.

DISCIPLINARY ACTION

[32] The Respondent submitted that, should this Review Panel not overturn the finding of professional misconduct, the penalty imposed is excessive and the hearing panel over-emphasized the Respondent's discipline record, commonly referred to as the professional conduct record (PCR), and under-emphasized the letters of good character submitted on behalf of the Respondent.

[33] The decision of the hearing panel on Disciplinary Action (2014 LSBC 50, the "DA decision") at paragraph 10 identified and thoroughly explored all relevant factors as set out in the well-known case of *Law Society of BC v. Ogilvie*, 1999 LSBC 17. The hearing panel was mindful of the numerous factors, both in mitigation and in aggravation of determining the proper penalty. Importantly, for the purpose of this review, at paragraph 10(m) of the DA decision the hearing panel determined that the range of penalties is between a $1,500 fine and a three-month suspension.

[34] The hearing panel noted many mitigating (or non-aggravating) factors:

(a) The Respondent gained nothing from this incident;

(b) The Respondent has paid a cost for this incident in that he was arrested by the officer and the incident has been given significant media attention;

(c) This was a "one-off" event that is not likely to be repeated by the Respondent;

(d) There was no impact on the officer;

(e) Many letters of reference spoke positively to the Respondent's character;

(f) The Respondent regrets his words and acknowledged he acted improperly;

(g) There was provocation by the officer that led to the incident.

[35] At paragraph 12 of the DA decision the hearing panel discussed the impact of the provocation by the police officer and considered it a significant factor such that, if the Respondent had no prior discipline record, the hearing panel would have meted out a reprimand or a small fine.

[36] However, several aggravating factors were significant to the hearing panel and outweighed the mitigating factors:

(a) Paragraph 10(a): Nature and gravity of the conduct proven: ...We conclude that the breach was moderately serious because the Respondent ought to have kept his temper despite the provocation. And it was serious because of the location of the incident, namely, in a public area of the courthouse.

(b) Paragraph 10(f): This was the second incident of this nature committed by the Respondent.

(c) Paragraph 10(k): The need for specific and general deterrence: We believe that this is a significant factor to consider, particularly the need for general deterrence. The profession must know that courtesy, civility, dignity and restraint should be the hallmarks of our profession and that lawyers must strive to achieve such. The profession should also know that a marked departure from such standards will be sanctioned.

(d) Paragraph 11(b): The discipline record of the Respondent.

[37] The hearing panel gave less weight to the many letters of reference that spoke well of the Respondent. At paragraph 10(c) the hearing panel commented on the Respondent's PCR and that much of it was due to the Respondent's prior addiction to alcohol and drugs:

> ... His letters of reference show improvement in this area of concern, although we do not place significant weight on the letters because some of the authors may not have been aware of all the factors of this case and may not represent a broad view of the profession. They are nevertheless helpful and do disclose a significant improvement in the areas of concern.

[38] The Respondent argues that the hearing panel committed two errors in balancing the various factors:

(a) An over-emphasis on the Respondent's prior discipline record and failing to recognize the significant gap between the Respondent's last citation; and

(b) An under-emphasis on the Respondent's good character.

[39] The Respondent argues that the hearing panel should adopt the "gap" principle that is often employed in criminal law, namely, the longer an accused has been without a criminal conviction the less significant is a prior record.

[40] We find that it is not necessary to look to the criminal law for guidance on this issue. It has been addressed previously in *Law Society of BC v. Lessing*, 2013 LSBC 29, at paragraphs 71-72:

> [71] In this Review Panel's opinion, it would be a rare case for a hearing panel or a review panel not to consider the professional conduct record. These rare cases may be put into the categories of matters of the conduct record that relate to minor and distant events. In general, the conduct record should be considered. However, its weight in assessing the specific disciplinary action will vary.
>
> [72] Some of the non-exclusionary factors that a hearing panel may consider in assessing the weight given are as follows:
>
> (a) the dates of the matters contained in the conduct record;
>
> (b) the seriousness of the matters;
>
> (c) the similarity of the matters to the matters before the panel; and
>
> (d) any remedial actions taken by the Respondent.

[41] A similar assessment was recently conducted in *Law Society of BC v. Siebenga,* 2015 LSBC 44. The hearing panel specifically referred to the above noted paragraphs in *Lessing* at paragraph 47:

> [47] Lawyers who have been found to have committed professional misconduct on two occasions and fined on both occasions, are candidates for suspension on a third citation. This does not mean "three strikes and you're out." Rather, it means three strikes and you may be out depending on the circumstances. To put it another way, lawyers who have been found to have committed professional misconduct on two occasions are put in a state of "heightened possibility" of being suspended. A hearing panel should seriously consider issuing a suspension, instead of a fine.

We agree with this statement. Thus, even though the Respondent's prior similar conduct was somewhat dated, it could not be ignored and it was entirely within the hearing panel's discretion to give the Respondent's PCR the weight it felt it deserved.

[42] With respect to the character letters, it is clear the hearing panel gave the letters some weight. However, there is only so much weight that character letters can be given. This is well stated by Gavin MacKenzie in his work *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Carswell, 1993), at page 26-45:

> Some types of evidence in mitigation of penalty are more reliable indicators of the likelihood of recurrence than are others. Character evidence is common and can be persuasive, but it is much less valuable if the witnesses are not fully informed of the facts. Even then, it is difficult to gauge the extent to which the evidence is affected by factors such as friendship. Virtually all lawyers are responsible for some good deeds, and virtually all are held in high esteem by some other lawyers and clients. The discipline hearing panel must ensure that the process is not transformed from a deliberative process into a referendum among members of the profession.

[43] The character letters are almost all from lawyers who have worked with the Respondent, some for decades. One letter is from an addictions counsellor. All speak very highly of the Respondent and describe the incident as "out of character." Some state that they are aware of the incident, and one states that she has read the F&D decision.

[44] That the Respondent has people who speak well of him is positive and is reflected in the hearing panel's decision on penalty. The hearing panel recognized that the addiction issues that plagued the Respondent earlier in his career appeared to be overcome and therefore this incident was unlikely to reoccur. The hearing panel described this incident as a "one-off." The character letters attest to all of this.

[45] However, we must agree with Gavin MacKenzie's comments set out above. There is a question whether all authors of the character letters knew all the circumstances of the Respondent's PCR. For example, conduct reviews are not published. Many of the letters refer to the Respondent's reputation in the community and say that they have never heard of the Respondent committing such behaviour before. Significantly, none of the letters refers to the incident of 1997 when the Respondent was involved in a similar incident and disciplined in 2001.

[46] No one wants to see harm come to their friends and colleagues, to put too much weight on character letters would, in effect, put the friends and colleagues of the Respondent in the place of the members of the hearing panel and would detract from the Law Society's duty to protect the public interest. In this case the character letters were one factor among many that the hearing panel had to consider and

weigh. We see no error in either the manner or the weight given by the hearing panel to the character letters.

[47] Finally, there was no suggestion by the Respondent that the penalty was outside the range of penalties available to the hearing panel, as stated at paragraph 10(m) of the DA decision. This is significant because what is being asked of this Review Panel is that we re-adjust the balancing of factors that the hearing panel undertook and thereby come to a different result. We think this would amount to tinkering, something we are not prepared to do.

[48] This Review Board will not interfere with the determination of the hearing panel when what is really at issue is the weighing of factors. A different panel may have given a different penalty, but that is not the test we must apply. We find that the penalty imposed is within the range of acceptable penalties. The hearing panel properly considered all of the factors, including the character letters and the PCR of the Respondent. We will not adjust the hearing panel's assessment of weight that was given to the factors that lead to the penalty imposed.

[49] Thus, we uphold the penalty imposed by the hearing panel.

COSTS

[50] If counsel cannot agree on costs, we will accept written submissions within 30 days of the release of this decision.

DISSENTING DECISION OF JAMIE MACLAREN

[51] I have read and considered the Majority's decision.

[52] I agree with the Majority's affirmation of "correctness" as the appropriate standard for reviewing the application of law to findings of fact.

[53] I also agree with the Majority that the criminal law defence of provocation has no functional equivalence in administrative law as a defence to an allegation of professional misconduct. In criminal law, a defence of provocation can only operate to reduce culpable homicide from murder to manslaughter when the act was committed in the heat of passion caused by sudden incitement. Here, it is one of a number of possible factors for a panel to consider in applying the test in *Martin* on

a case by case basis, and thus decide if a lawyer's conduct is a "marked departure" from the standards set by the Law Society.

[54] But despite this functional difference, I find that the analysis of provocation in mitigation of wrongful conduct is much the same in this administrative law context as it is in the criminal law context. Whether measured against the standard of the "ordinary person" or the heightened professional standard of a lawyer, a decision-maker must determine if the provocative act or incident was sufficient under the circumstances to cause the subject to behave wrongfully under sudden loss of self-control. This determination is reserved for the act of culpable homicide in criminal law, but may be applied to a wide range of wrongful conduct — from common and mild to unusual and severe — in administrative law. To the extent that culpability is tied to intentionality or ulterior motive, it diminishes with the loss of self-control. The expectation of self-control, on the other hand, rises with the mildness of the provocative act and the severity of the wrongful conduct. This standard analysis underpins the treatment of provocation as a mitigating factor to wrongful conduct in *Groia* and *Lee*.

[55] In this case, the hearing panel's findings of fact include that Officer B was "unyielding" and "offending" in his conduct toward the Respondent. The minority found that Officer B was "confrontational" and "aggressive" in manner and tone, and that his remark, "Don't for a minute think I don't know who you are and what you are about," could be taken as a veiled threat. Whatever its true intention, the hearing panel found that Officer B's conduct and statement were enough to shock the Respondent and provoke his quick reply of "fuck you" in anger. The minority found that the Respondent immediately regretted his profane reply. It was then Officer B — not the Respondent — who initiated physical contact between the two men.

[56] The findings of fact suggest that the Respondent's profane reply was more reflexive than purposeful. It was uttered under sudden loss of self-control. I agree with the Respondent's submission that it was a "one-off" remark that, while clearly rude and aggressive, had no ulterior motive. I also agree with the hearing panel majority's view that the word "fuck" is not as vulgar and offensive as it used to be; the majority acknowledged that "it is used in everyday conversation harmlessly and innocuously." Its common and denatured use now extends as far as barrister lounges, law offices, and legislature hallways. When uttered spontaneously in anger, without any accompanying threats, its meaning is largely constrained to emotional punctuation.

[57] Courts and law society panels have repeatedly held that rude and aggressive "one-off" remarks may not rise to the threshold of professional misconduct, particularly when unaccompanied by threats, violence or intimidation. For example, in the appeal of the *Groia* case to the Ontario Divisional Court, *Groia v. The Law Society of Upper Canada,* 2015 ONSC 686, the Court held at paragraph 74:

> Rather, the conduct that engages the incivility concern begins with conduct that it is rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality. It is conduct that attacks the personal integrity of opponents, parties, witnesses or of the court, where there is an absence of a good faith basis for the attack, or the individual counsel has a good faith basis for the belief but that belief is not an objectively reasonable one. In addition, single instances of such conduct will be less likely to engage the misconduct concern as will repeated instances of the same conduct. In other words, *a solitary instance of uncivil conduct will not, generally speaking, be sufficient to ground a complaint of professional misconduct, unless it is of a particularly egregious form.*
>
> [emphasis added]

[58] Also in *Groia*, the Court noted at paragraph 52:

> Another well-known reality is that trials are generally intense, stress-filled events. As has often been said, a trial is not a "tea party". Emotions run high. Much is at stake. The potential for clashes between the participants – parties, witnesses, lawyers and judges – is inherent in the nature of the process. Harsh words will often be spoken in the "heat of the battle". *Consequently, everyone involved, most certainly the professional participants (i.e. lawyers and judges), must have a certain level of resilience to the impact of badly chosen words, uttered without the time and benefit of quiet reflection.*
>
> [emphasis added]

[59] As noted above by the Majority, the review panel majority in *Harding* held at paragraph 45:

> … 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." ...

[60] Also in *Harding*, and again noted by the Majority, the dissenting decision included the following guidance at paragraph 60:

> The standard against which lawyers' conduct should be measured cannot be one of perfection. Many lawyers make isolated statements in a moment of frustration that they later regret. In most cases, making an isolated intemperate or ill-considered statement with no improper intent will not amount to professional misconduct and that is what the hearing panel concluded in the matter.

[61] The Majority distinguishes *Harding* from the facts at hand on the basis that the respondent did not use profanity and did not intend to insult, but instead had an ulterior motive. I find that nothing the Respondent did or said surpasses a characterization as "aggressive and rude." And I am persuaded that the Respondent's lack of an ulterior motive in uttering "fuck you" is an important factor in concluding that his conduct was spontaneous, singular and not so egregious as to rise to the threshold of professional misconduct.

[62] Law society panels have largely found a single instance of intemperate language to constitute professional misconduct only when accompanied by an ulterior motive, perception or intent. This was the case in *Harding*, *Foo*, *Law Society of BC v. Greene*, 2003 LSBC 30, 2003 CanLII 52523 and *Law Society of BC v. Laarakker*, 2011 LSBC 29. Conversely, in *Law Society of BC v. Harding*, 2014 LSBC 30, the panel would have dismissed a professional misconduct allegation against a member who told opposing counsel that her client could learn a lesson from being "gang raped" in prison, partly on the basis that the comment was not intended to coerce or intimidate the recipient.

[63] In *Doré v. Barreau du Québec*, 2012 SCC 12 at paragraph 61, the Supreme Court of Canada acknowledged the importance of professional discipline to prevent incivility in the legal profession, and potent displays of disrespect for participants in the justice system, that extend "beyond mere rudeness or discourtesy."

[64] I find that the Respondent's single, bald utterance of "fuck you" was provoked by Officer B's aggressive and offensive behaviour and did not extend beyond "mere rudeness or discourtesy" under the circumstances. The Respondent uttered the profane but commonplace words without ulterior motive, in a momentary act of anger, and in a private conversation in a quiet area of the courthouse. There is no evidence of bystanders overhearing the utterance. And while Officer B was technically a potential witness in the case then nearing disposition, he had prior knowledge of the Respondent from dealings outside of the courthouse.

[65] I find that the hearing panel majority erred in entirely disregarding the mitigating effects of Officer B's provocative conduct, and in categorically rejecting the possibility of any circumstances under which a lawyer might say "fuck you" in a courthouse. I find that, under these specific circumstances, the Respondent's conduct was wrongful but excusable, and did not constitute a "marked departure" from the standards set by the Law Society. I therefore disagree with the Majority's decision that the facts support the hearing panel's determination of professional misconduct. I would substitute a dismissal of the citation in this case.

[66] If my decision is wrong, and the facts do indeed support a determination of professional misconduct here, I agree with the Majority's decision regarding penalty.