IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Gulliver v. Law Society of Newfoundland and Labrador*, 2024 NLCA 23
Date: July 12, 2024
Docket Number: 202301H0016 and 202301H0022

BETWEEN:

SUSANNE GULLIVER — APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR — RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: D.E. Fry C.J.N.L., F.P. O'Brien and D.M. Boone JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 202201G0248 (2023 NLSC 23)
Appeal Heard:	November 8, 2023
Judgment Rendered:	July 12, 2024
Reasons for Judgment by:	F.P. O'Brien J.A.
Concurred in by:	D.E. Fry C.J.N.L. and D.M. Boone J.A.

Counsel for the Appellant/ Respondent by Cross-Appeal: Stephen J. May, K.C.
Counsel for the Respondent/Appellant by Cross-Appeal: Aimee N. Rowe

Authorities Cited:

CASES CITED: *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100; *Harrison v. Law Society of British Columbia*, 2022 BCCA 316; *Jackman v. Newfoundland Dental Board*, 1989 CanLII 4936 (NLSC); *Deokaran v. Law Society of Ontario*, 2023 ONSC 5666; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Michele Santarsieri Inc et al v. Manitoba (Deputy Minister of Finance)*, 2023 MBCA 61, leave to appeal to SCC refused, 40886 (29 February 2024); *Canada Fluorspar (NL) Inc. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9220*, 2022 NLCA 21; *O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14; *Shute v. Paradise (Town)*, 2024 NLCA 19; *Mount Pearl (City) v. Workplace Health, Safety and Compensation Review Division*, 2008 NLCA 69; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 2; *Public Service Pension Plan Corporation v. Boyles*, 2023 NLCA 10; *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, leave to appeal to SCC refused, 39343 (14 January 2021); *Zarooben v. The Workers' Compensation Board*, 2022 ABCA 50.

STATUTES CONSIDERED: *Law Society Act, 1999*, SNL 1999 c. L-9.1, sections 41(c), 45; *Family Violence Protection Act*, SNL 2005 c. F-3.1.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 58.

F.P. O'Brien J.A.:

OVERVIEW

[1] The appellant in this matter (the "client") was represented by a member of the Law Society of Newfoundland and Labrador (the "lawyer") in a family law dispute.

[2] After the solicitor-client relationship ended, the client complained to the Law Society about the lawyer's representation and conduct.

[3] The client made two allegations that are relevant to this appeal. The first was that the lawyer failed to provide a quality of service "at least equal to that which lawyers generally expect of a competent lawyer in a like situation". The second was that the lawyer failed to follow the client's instructions.

[4] The Law Society investigated the client's allegations and dismissed them, concluding that there were "no reasonable grounds to believe that [the lawyer] engaged in conduct deserving of sanction".

[5] The client appealed to the Supreme Court of Newfoundland and Labrador, and a Supreme Court Judge dismissed the appeal (2023 NLSC 23, the "Supreme Court decision").

[6] The client appealed the Supreme Court decision to this Court and the Law Society cross-appealed with respect to the standard of review used by the Judge.

[7] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

[8] First, regarding the allegation that the quality of service provided by the lawyer was not at least equal to that of a competent lawyer, I would conclude there was no error made in dismissing this allegation. Accordingly, I would dismiss the appeal on this issue.

[9] Second, regarding the allegation that the lawyer failed to follow instructions, I would conclude that the decision to dismiss this allegation was made without properly considering relevant information. Accordingly, I would allow the appeal on this issue and remit this allegation to the Law Society for further consideration.

[10] Third, regarding the cross-appeal concerning the standard of review, I would conclude that the Judge chose the correct standard of review. Accordingly, I would dismiss the cross-appeal.

BACKGROUND

The Complaints Authorization Committee

[11] The client's allegations were referred to the Law Society's Complaints Authorization Committee (the "Committee") for investigation.

[12] The Committee is a statutory committee of the Law Society, composed of two lawyers and one public representative who is not a lawyer. All three members of the Committee are also members of the governing body of the Law Society, referred to as the Benchers.

[13] The *Law Society Act, 1999*, SNL 1999, c. L-9.1 (the "*Act*"), in s. 45(1), sets out the Committee's powers to investigate an allegation made against a lawyer.

[14] The Committee investigates allegations and formulates an opinion as to whether there are "reasonable grounds to believe" that the lawyer has engaged in "conduct deserving of sanction" (s. 45).

[15] Conduct deserving of sanction is a defined term in s. 41(c) of the *Act*, which includes professional misconduct, failure to maintain the standards of practice, conduct unbecoming a member of the Law Society, and acting in breach of the *Act* or rules made pursuant to the *Act*, including the rules of professional ethics or conduct.

[16] Sections 45(2) and (3) deal with the possible outcomes of the Committee's investigation of an allegation, and its determination following this investigation.

[17] Section 45(2) provides that where the Committee "is of the opinion that there are no reasonable grounds to believe that [the lawyer] has engaged in conduct deserving of sanction", the Committee shall dismiss the allegation.

[18] Section 45(3) states that where the Committee "is of the opinion that there are reasonable grounds to believe that [the lawyer] has engaged in conduct deserving of sanction", the allegation shall be considered as constituting a complaint, and the Committee may take further action. For example, the Committee may counsel or caution the lawyer, have the matter referred to a Law Society disciplinary panel or suspend or restrict the lawyer's licence. If the matter is referred to a disciplinary panel, there may be a hearing before a Law Society adjudication tribunal, and a

determination may be made by an adjudication tribunal regarding whether the lawyer is guilty of conduct deserving of sanction.

[19] Courts have considered the term "reasonable grounds to believe", in the context of the regulation of professions and in other contexts, to mean "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". This must be "assessed objectively and must be supported by the evidence", and any determination or conclusion "should not be made arbitrarily or capriciously but should be an objective opinion capable of justification". A determination as to whether there are "reasonable grounds to believe" requires "an objective basis for belief based on compelling and credible information". (See for example *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 39, citing *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; *Harrison v. Law Society of British Columbia*, 2022 BCCA 316, at para. 15; *Jackman v. Newfoundland Dental Board*, 1989 CanLII 4936 (NLSC), at paras. 4 and 13; and *Deokaran v. Law Society of Ontario*, 2023 ONSC 5666, at paras. 16-18).

[20] The Committee's responsibility, then, is to investigate allegations and form an opinion regarding whether there are reasonable grounds to believe that a lawyer has engaged in conduct deserving of sanction. The broad scope of "conduct deserving of sanction" as defined in s. 41(c) requires a detailed review of the information obtained in the investigation. The Committee's opinion must be grounded in and informed by the information that has been gathered through the investigation. In assessing whether an error was committed in this instance, it is therefore helpful to consider the information in the record, which information was received by the Committee in its investigation of these allegations.

The Committee's Investigation

[21] The Committee investigated the allegations between September 2020 and June 2021. The investigation was carried out by way of an exchange of written correspondence among the Committee, the client, and the lawyer.

[22] Having received the positions of the lawyer and the client in writing, including written replies from each, the lawyer and client were advised in June 2021 that the allegation would be considered by the Committee in its meeting on September 14, 2021. The Law Society indicated that "following the meeting, the [Committee's]

reasons for decision must be prepared and approved" … and "notice of the Committee's determination will be provided to you" (Appeal Book, pages 226-231).

[23] However, at the September 2021 meeting, having considered the written materials that had been provided to it by the lawyer and the client, the Committee did not form an opinion as to whether there were reasonable grounds to believe that the lawyer had engaged in conduct deserving of sanction. Rather, the Committee decided that further investigation was required. It wrote the client and the lawyer in September 2021 to advise it had "decided to conduct further investigation" and that the Committee was "seeking additional information" from the lawyer and the client (Appeal Book, pages 232-239).

[24] This further investigation took the form of the Committee providing specific questions in writing to the lawyer and the client and requesting written responses. The questions provided to each were not the same. Written responses were provided to the Committee in September and October 2021 (Appeal Book, pages 240-277), and the Committee provided its written decision in December 2021, dismissing the allegations (Appeal Book, pages 44-50).

The Record

[25] The Committee's opinion must be based on the record of its investigation. What follows is a brief overview of the information in the record and the respective positions provided to the Committee by the lawyer and the client, which are reflected in that record.

[26] The record indicates that the lawyer began representing the client in August 2019, relating to issues involving the relationship between the client and her former spouse, which was characterized as "high-conflict".

[27] The client and her former spouse maintained ongoing contact related to the parenting of their child, and the client had concerns about this ongoing contact. From time to time, this was the subject of litigation in the Supreme Court of Newfoundland and Labrador, Family Division.

[28] On December 7, 2019, the client obtained an Emergency Protection Order (EPO) against her former spouse pursuant to the *Family Violence Protection Act*, SNL 2005 c. F-3.1. This was done without the lawyer's knowledge or advice.

[29] Subsequently the client's former spouse filed an application in the Provincial Court of Newfoundland and Labrador seeking to vacate (that is, to set aside) the EPO, again pursuant to the *Family Violence Protection Act*. The application was set for Friday, December 20, 2019, in the Provincial Court.

[30] The record indicates that in the days leading up to the Provincial Court hearing, the lawyer advised the client to consent to the application to vacate the EPO, and to deal with the matter in the Supreme Court, Family Division, through a consent order that could address her concerns. The lawyer indicated that it would not be in the client's interests to contest the matter. The client advised the Committee that she told the lawyer that she wished to maintain the EPO and contest the application to vacate it.

[31] The record also confirms that there was a meeting on the afternoon of Thursday, December 19, 2019, the day before the Provincial Court hearing. Present at the meeting were the lawyer, the client, and the client's father. The record indicates that the client's father had been highly involved in assisting and supporting his daughter with the ongoing legal issues. In fact, the client had consented to the lawyer communicating with the client's father, which happened frequently, but did not consent to him providing instructions.

[32] One of the reasons for the December 19, 2019, meeting was to discuss the EPO hearing scheduled for the following day in Provincial Court. However, the record indicates that the meeting was cut short. The client received a call from her child's daycare indicating that she needed to attend immediately. She was advised that a member of her former spouse's family was supposed to pick up the child from daycare that day but had not done so. The client indicated that the daycare staff were concerned and upset because the child had been left unattended outside the daycare. The client advised the Committee that when she received this call, she left the meeting with the lawyer at once and attended at the daycare.

[33] This meeting of December 19, 2019, is critical to the Committee's consideration of the allegation. The client and the lawyer provided the Committee with diametrically opposed positions as to what happened at that meeting; specifically, whether the client provided instructions to the lawyer to consent to the application in Provincial Court to vacate the EPO.

[34] The record reveals that, prior to this meeting, the client was of the view that the EPO should remain in place. A central issue to be considered by the Committee,

in its review of the record, was whether the client changed her position in the December 19, 2019, meeting and instructed the lawyer to appear in Provincial Court the next day and consent to the application to vacate the EPO.

[35] In correspondence to the Committee, the client stated she did not agree with consenting to vacate the EPO. She advised the Committee that she did not change her mind at that meeting on December 19, 2019, and that she did not instruct her lawyer to appear in Provincial Court to consent to the application.

[36] The lawyer advised the Committee that, after some discussion, the client changed her mind at the December 19, 2019 meeting and agreed that the lawyer would appear in Provincial Court the next day and consent to vacating the EPO.

[37] The client's father was also present at the December 19, 2019 meeting. He was not contacted by the Committee and was not asked to provide an account of what had happened in the meeting on the issue of instructions.

[38] The client stated that the next day, December 20, 2019, she had a telephone discussion with the lawyer (which occurred about one hour before the Provincial Court hearing) at which time she re-iterated her position that she wished to keep the EPO in place. Her father was present with her at the time and heard the discussion as the telephone was placed on speakerphone. The client told the Committee that the lawyer advised that it was not necessary for her to come to Provincial Court, and that she was directed by the lawyer to follow-up with the police and/or child protection services about the incident that had occurred at the daycare the previous afternoon.

[39] The lawyer was consistent in her position and maintained that she attended at Provincial Court on December 20, 2019 and, as instructed by the client, consented to the application to vacate the EPO. The lawyer advised the Committee that the client agreed with the lawyer's plan that a consent order could be filed in the Supreme Court, Family Division, to address her concerns regarding her former spouse. As such, the application to vacate the EPO was granted by the Provincial Court, and the EPO was set aside (Appeal Book, pages 17, 139).

[40] The information provided to the Committee indicated that the client was unhappy about the EPO having been vacated, that the solicitor-client relationship ended in January 2020, and that the client later contacted the Law Society.

[41] The Committee investigated, and dismissed, the client's allegations that the lawyer did not provide the quality of service expected of a competent lawyer and did not follow instructions regarding the EPO. The client appealed to the Supreme Court pursuant to s. 45(7) of the *Act* and the appeal was dismissed.

Standard of Review on this Appeal

[42] The analytical approach to be followed by an appellate court was considered by the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559. (See also *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at paras. 10-12; and *Michele Santarsieri Inc et al v. Manitoba (Deputy Minister of Finance)*, 2023 MBCA 61, at paras. 13-15, leave to appeal to SCC refused, 40886 (29 February 2024)).

[43] In *Agraira*, the Supreme Court of Canada noted that the issue for an appellate court "can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?" (para. 47).

[44] This approach has been followed by this Court, for example in *Canada Fluorspar (NL) Inc. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9220*, 2022 NLCA 21; *O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14; and *Shute v. Paradise (Town)*, 2024 NLCA 19.

[45] In this regard, "the applications judge's decision is reviewable by this Court on a standard of correctness" (*Canada Fluorspar (NL) Inc.*, at para. 14, citing *Mount Pearl (City) v. Workplace Health, Safety and Compensation Review Division*, 2008 NLCA 69, at para. 14).

[46] Consistent with the direction of the Supreme Court in *Agraira*, this appeal involves a consideration of whether the Judge correctly identified the applicable standard of review and applied it properly.

ISSUES

[47] The client contends that the Judge erred in upholding the Law Society's dismissal of the two allegations made against the lawyer; namely, that the quality of service provided by the lawyer was below that of a competent lawyer and that the

lawyer failed to follow instructions. The Law Society contends that the Judge chose an incorrect standard of review.

[48] Accordingly, this appeal will consider the following issues:

1. Did the Judge err in identifying the proper standard of review to be applied?

2. Did the Judge err in concluding that the Law Society made no error in dismissing the allegation that the lawyer failed to provide a quality of service at least equal to that expected of a competent lawyer in a like situation?

3. Did the Judge err in concluding that the Law Society made no error in dismissing the allegation that the lawyer failed to follow the client's instructions with respect to the EPO?

Issue 1: Did the Judge err in identifying the proper standard of review to be applied?

[49] The Law Society cross-appealed regarding the standard of review identified and used by the Judge on the initial appeal in the Supreme Court.

[50] Section 45(7) of the *Act* indicates that "a complainant [in this case the client] whose allegation is dismissed by the complaints authorization committee under subsection 45(2) may … appeal the dismissal to the Supreme Court".

[51] The client appealed the dismissal of the two allegations to the Supreme Court. As such, she exercised a right of statutory appeal.

[52] In this context, the Judge first had to determine whether the applicable standard of review on appeal was either (i) reasonableness or (ii) the appellate standard of review (which, depending on the context, may involve a review on the standard of correctness or palpable and overriding error).

[53] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Supreme Court of Canada clearly indicated that, in the context of a statutory appeal, the appellate standard of review applies (paras. 33, 36-38).

[54] The Law Society's position in the Supreme Court was that the standard of review to be applied on the appeal was reasonableness, and not the appellate standard. The Judge observed that the Law Society argued that the appellate standard of review did not apply to "a screening or investigative body like [the Committee], where the standard of reasonableness applies". The Law Society further submitted in the Supreme Court that to apply a standard other than reasonableness in this context "would render the screening function of [the Committee] moot" (Supreme Court decision, at para. 20).

[55] As such, the Law Society urged the Judge to "view the appeal … as relating to whether or not the [Committee] made a reasonable assessment of the information contained in the record before dismissing the Allegation", rather than applying the appellate standard of review (Supreme Court decision, at para. 20).

[56] Later in the decision, the Judge made a further reference to the Law Society's position in this respect, noting that the Law Society argued that the "[Committee's] assessment of the information is subject to a reasonableness standard of review …" (Supreme Court decision, at para. 53).

[57] However, the Judge rejected the Law Society's position in this regard and determined that the appellate standard of review applied in the appeal (Supreme Court decision, at para. 47).

[58] The Law Society filed a notice of cross-appeal in this Court regarding the Judge's determination of standard of review.

[59] In its notice of cross-appeal, the Law Society indicated that the Judge had "applied the appellate standard of review" and stated that this was "inconsistent with" the standard of review applied in another decision of the Supreme Court. The Law Society, in the cross-appeal, requested that this Court "provide clarification with respect to the appropriate standard of review relating to decisions of the [Law Society's] complaints authorization committee", and requested its costs in this Court and in the Supreme Court on this issue.

[60] The use of the appellate standard of review in a statutory appeal was confirmed in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29. The Supreme Court of Canada stated that the Court's direction, previously provided in *Vavilov*, that "appeals are to be decided according to the appellate standards of review was categorical". The Supreme Court made this clear in *Abrametz*:

> [27] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply: paras. 33 and 36-52. While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. …
>
> [28] … Here, we are dealing with a statutory appeal. As our Court has stated in *Vavilov*, at para. 36, "[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis".

[61] The appellate standards of review of correctness, for questions of law, and palpable and overriding error for questions of fact and for questions of mixed fact and law (where there is no extricable error of law), were referenced by the Supreme Court in *Abrametz*.

[62] In *Abrametz*, the Court noted it's prior articulation of these standards in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and their application in a statutory appeal context:

> [29] This case is a statutory appeal pursuant to *The Legal Profession Act, 1990*. Therefore, the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at paras. 24-25.

[63] The Judge, at paragraph 47 of the Supreme Court decision, having previously referenced and discussed the relevant extracts from *Vavilov* and *Abrametz*, correctly identified that the appellate standard of review applied in the statutory appeal of the Law Society's dismissal of the client's allegations:

> [47] Based on my reading of the wording contained in section 45(7) of the *Act*, and relying on the Supreme Court's analysis as set out in paragraph 33 and paragraphs 36 to 38 of *Vavilov*, and paragraphs 27 to 29 of *Abrametz*, I conclude the legislature intended the appellate standard to be applied to appeals from a decision of the CAC dismissing an allegation. The standard of reasonableness is to be reserved exclusively for statutory wording which permits a Court to conduct a judicial review.

[64] In doing so, the Judge made no error in identifying the appropriate standard of review to be applied on the appeal. The appellate standard of review applies when

considering the appeal of the Committee's determination in this circumstance because there is a statutory appeal of the determination provided for in the *Act.*

[65] While the Law Society described its cross-appeal as a request for "clarification" with respect to the appropriate standard of review, the filing of a cross-appeal connotes the Law Society's disagreement with the Judge's determination on this issue. The Judge did not accept the Law Society's position that a reasonableness standard of review should be applied on this statutory appeal. Rather, the Judge correctly identified that the appellate standard of review applied. As indicated, the Judge made no error in this regard.

[66] Accordingly, I would dismiss the Law Society's cross-appeal on this issue.

<u>Issue 2</u>: Did the Judge err in concluding that the Law Society made no error in dismissing the allegation that the lawyer failed to provide a quality of service at least equal to that expected of a competent lawyer in a like situation?

[67] The client alleged that the lawyer failed to provide a quality of service at least equal to that which is expected of a competent lawyer in a like situation.

[68] For the purposes of this appeal, this allegation was considered separate and apart from the other allegation, discussed below, regarding whether the lawyer followed the client's instructions about the EPO.

[69] The Committee dismissed the allegation that the lawyer failed to provide competent service, stating:

> With respect to [the] allegation … that [the lawyer] failed to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation, the Committee is of the opinion that there are no reasonable grounds to believe that [the lawyer] engaged in conduct deserving of sanction as alleged. [The lawyer] managed a difficult file in a high conflict situation. The Committee is of the opinion that there are reasonable grounds to believe that [the lawyer] took reasonable efforts to resolve issues and move the matter along.

[70] The record supports the Committee's opinion in this regard, and its dismissal of this allegation (see, for example, Appeal Book, pages 44-169).

[71] There are many examples in the record evidencing the lawyer's actions and efforts on behalf of the client which would have exceeded the level of skill, competence and care expected of a competent lawyer in a like situation. It is evident from the record that the lawyer was available to the client, both day and night, to assist the client with the legal issues presented. The record discloses that the lawyer demonstrated a level of competence and service to the client that might be described overall as distinguished, and exemplary in the difficult circumstances of this high-conflict representation.

[72] It is clear from numerous examples in the record that the lawyer, in a dynamic and sometimes volatile context, acted in the client's best interests throughout and attempted to secure the best outcome and provide solutions that were optimal for the client. There was nothing presented on appeal to demonstrate that the lawyer's representation in this respect was anything other than competent, skilled, and professional.

[73] As such, there is no basis to conclude that the Judge erred by finding that the Committee made no error in dismissing this allegation, and no basis to warrant appellate intervention.

[74] Accordingly, I would dismiss the appeal on this issue.

<u>Issue 3</u>: Did the Judge err in concluding that the Law Society made no error in dismissing the allegation that the lawyer failed to follow the client's instructions with respect to the EPO?

The Committee's reasons for dismissing the allegation

[75] The client alleged that the lawyer failed to follow her instructions. The Committee dismissed this allegation and the Judge concluded that there was no error in doing so.

[76] The Committee's opinion in dismissing this allegation is brief. The Committee, in the three paragraphs set out below, provided the rationale for its opinion that the allegation should be dismissed. The Committee wrote:

> The Committee noted that [the client] takes the position that [the lawyer] failed to follow her instructions with respect to the EPO that was in place against her ex-husband. She contends that at a meeting on December 19, 2019, she advised [the

> lawyer] that she wanted to fight to keep the EPO in place. [The lawyer] takes the position that at the meeting on December 19, 2019, [the client] provided instructions to consent to having the EPO vacated.
>
> The Committee noted that both [the client] and [the lawyer] have highlighted that prior to the December 20, 2019 hearing, [the lawyer] had noted that if the EPO hearing were to go ahead, [the client] would have to take the stand and give oral evidence. The record demonstrates that [the client] did not attend court on December 20, 2019 to give evidence. The Committee noted that if [the client] had provided instruction to fight to keep the EPO in place, it would have been reasonable for her to conclude that her attendance at Court was required. As she did not attend at Court, this reasonably lends itself to the position taken by [the lawyer].
>
> The Committee also noted that the records indicate that [the client's father] was present at the December 19, 2019 meeting. The Committee highlights a text message sent from [the client's father] to [the lawyer], on December 20, 2019. In the text message, [the client's father] states "The fact that [the client] volunteered to give up the EPO". This reasonably lends itself to the position taken by [the lawyer].

[77] In the first paragraph above, the Committee simply acknowledged that the lawyer and client presented opposite positions regarding whether the client had instructed the lawyer to consent to the application to vacate the EPO. The lawyer claimed that the client provided these instructions during the meeting on December 19, 2019. The client maintained that no instructions were provided to the lawyer to consent to vacating the EPO, either at the December 19, 2019 meeting or at any other time.

[78] There is nothing in this first paragraph to indicate whether the Committee was or was not of the opinion that there were reasonable grounds to believe that the lawyer engaged in conduct deserving of sanction. Rather the paragraph simply describes the parties' differing positions.

[79] In the remaining two paragraphs relating to this allegation set out above, the Committee noted two distinct pieces of information from the record that the Committee appeared to rely upon to support its opinion that the allegation should be dismissed.

[80] The first was a text message from the client's father in which he indicated that the client had "volunteered" to give up the EPO. The Committee stated in its decision that this "reasonably lends itself to the position taken by [the lawyer]".

[81] The second piece of information noted and relied upon by the Committee was the fact that the client did not attend at Provincial Court when the EPO was set aside. Again, the Committee indicated in its decision that this "reasonably lends itself to the position taken by [the lawyer]".

[82] The Committee focused, in its written determination, on these two pieces of information to support its opinion that the allegation should be dismissed.

[83] However, a review of the record indicates that the Committee was aware of other relevant information in the record, including information that explicitly contradicted the information that the Committee relied upon. This contradiction in the record was noted by the Committee itself as discussed below. There is no indication in the decision that this information, which was relevant to the Committee's investigation, was properly taken into account in rendering its opinion. Neither was it referenced in the Committee's decision dismissing the allegations.

[84] For the reasons provided below, on a review of the decision and the information in the record, it is not apparent that the Committee appropriately considered relevant information in the record before formulating its opinion to dismiss the allegation. In these circumstances, I would conclude that the Committee's failure to consider relevant information constituted an error, justifying appellate intervention (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 104; *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at para. 50; *Public Service Pension Plan Corporation v. Boyles*, 2023 NLCA 10, at paras. 39-41; *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, at para. 42, leave to appeal to SCC refused, 39343 (14 January 2021)).

[85] The Committee's consideration of the two pieces of information that it relied upon to form its opinion and its failure to consider other relevant information will be discussed next, beginning with the Committee's consideration of the text message from the client's father.

The text message from the client's father

[86] The Committee highlighted in its decision a text message sent to the lawyer by the client's father.

[87] The text message in question included a statement by the client's father that indicated that the client had "volunteered to give up the EPO". The Committee noted that this statement by the client's father "reasonably lends itself to the position taken by [the lawyer]"; the Committee referenced it in its decision and relied on it to dismiss the allegation.

[88] The message in question was obtained during the Committee's investigation. The client's father had sent it to the lawyer, and it was part of the investigation record available to the Committee. The client's father did not present this information directly to the Committee, nor was he asked to comment on it or provide context for sending it to the lawyer.

[89] On appeal, the client submitted that the father's text message was "hearsay evidence" such that it was an error for the Committee to have accepted and relied on it in the investigation (see, for example, the Appellant's Factum, paras. 35-49). However, at the investigation stage the Committee's inquiry is focused on the threshold question of whether there are "reasonable grounds to believe" the lawyer engaged in conduct deserving of sanction. The Committee does not decide the merits at this stage; nor does it make evidentiary rulings. Information may be considered by the Committee in assessing the threshold question on an allegation, that might not ultimately be admissible on a subsequent hearing, by an adjudication tribunal, to decide the merits of a complaint. Consideration of such information by the Committee would not necessarily offend the evidentiary rules regarding hearsay evidence (see *Jackman*, at paras. 13-14).

[90] Notably, the Committee also identified a separate message that the client's father had sent to the lawyer that directly contradicted the message referenced above.

[91] The client submitted that the Committee erred in failing to properly consider this message when determining the matter and forming its opinion (see, for example, the Appellant's Factum, paras. 59-62). For the reasons that follow, I would agree with this submission.

[92] The Committee noted that, in this separate message to the lawyer, the client's father described a telephone call that took place on December 20, 2019, involving himself, the lawyer, and the client. The client's father stated that he and his daughter were together during the call and that he heard the conversation because the call had been placed on speakerphone. The telephone call in question took place approximately one hour before the Provincial Court matter was scheduled that day.

[93] The client's father later sent a message to the lawyer regarding what his daughter had told the lawyer during this call. His message to the lawyer indicated that during that telephone call on December 20, 2019, his daughter "insisted we fight to keep the EPO in place".

[94] The Committee itself "noted" that the two messages sent from the client's father to the lawyer were directly contradictory (Appeal Book, page 61). That is, in one message the father said his daughter wanted to keep the EPO in place, and in the other message (which the Committee referenced and relied upon in its decision) he indicated that she had "volunteered" to give up the EPO. The messages appeared to be diametrically opposed.

[95] The Committee commented on these two contradictory messages as part of its "further investigation" of the allegations. Specifically, the Committee wrote the lawyer in September 2021 and noted that the client's father's "comments appear to be contradictory" and requested that the lawyer "comment on the contradictory nature of the statements" (Appeal Book, page 234).

[96] The Committee wrote to the lawyer and described the contradiction in the father's two statements, as follows:

> [The client's father] states in a January 10, 2020, email to you [i.e., the lawyer]:
>
> > [The client] and I spoke to you on December 20 at 108pm … During the phone our phone [sic] we had you on speaker phone and [the client] insisted we fight to keep the EPO in place. Instead you instructed us to go to CSSD [i.e. Child Protection Services].
>
> Further, in a text message to you on December 20, 2019 at approximately 6:29 pm, [the client's father] stated in reply to your query asking what was going on, "The fact that [the client] volunteered to give up the EPO".
>
> [The client's father's] comments appear to be contradictory. Please comment on the contradictory nature of the statements and provide any other comments you wish to the Complaints Authorization Committee to consider.

[97] In reply to the Committee's query regarding the contradictory nature of the father's statements, the lawyer wrote that "these statements do contradict themselves". In the same reply the lawyer reiterated the position already

communicated to the Committee that the client had agreed to vacate the EPO in the meeting on December 19, 2019 (Appeal Book, page 270).

[98] Nothing further appears to have been said or done by the Committee about these contradictory statements. The Committee provided the contradictory statements only to the lawyer. No further questions were asked of the lawyer regarding the contradiction after the Committee received the lawyer's response that "these statements do contradict themselves".

[99] The Committee did not, as part of its further investigation in September 2021, provide these contradictory statements to the client or ask her for any explanation or comment. This question was sent only to the lawyer.

[100] Likewise, the Committee did not, as part of its further investigation, contact the client's father, the author of these statements, to request comment or clarification on his statements which the Committee itself had characterized as "contradictory".

[101] The Committee's written request to the lawyer to comment on the contradictory nature of these statements was made in September 2021, as part of the Committee's "further investigation". This occurred after the Committee had determined that it required more information before it could formulate its opinion on whether there were reasonable grounds to believe the lawyer had engaged in conduct deserving of sanction. However, there is nothing to indicate that the Committee considered or resolved this acknowledged contradiction in the record through any further investigation or inquiry.

[102] The Committee, in its decision, referenced only one of the client's father's two conflicting statements namely, his text message indicating that the client volunteered to give up the EPO. As noted, the Committee cited this in support of its decision that the allegation be dismissed, writing that the father's statement "reasonably lends itself to the position taken by [the lawyer]".

[103] However, the Committee makes no further reference to the father's other statement that, on December 20, 2019, about an hour before the Provincial Court hearing his daughter insisted to the lawyer that the EPO remain in place.

[104] There is nothing in the decision to indicate that this directly contradictory information, which was identified by the Committee as an issue in its further investigation, was properly considered in formulating its opinion. Nor is there

anything in the decision to show how this contradiction, which had been flagged by the Committee itself, was resolved.

[105] The Committee's reference to the father's statement was presumably important and relevant to the Committee's consideration of this matter; it is one of only two pieces of information in the record that was noted in the decision in support of its opinion.

[106] The father's statement that his daughter insisted to the lawyer that "we fight to keep the EPO in place", was presumably also relevant to the Committee's task of determining whether there were reasonable grounds to believe that there had been a failure to follow instructions. It was an area of specific inquiry addressed in writing to the lawyer during the Committee's further investigation of the matter. The father's statements were confirmed as being contradictory. In this context, the "inconsistencies in the material received … required investigation and rationalization" (*Zarooben v. The Workers' Compensation Board*, 2022 ABCA 50, at para. 59). This does not appear to have occurred before the Committee formulated its opinion.

[107] Having identified information in its investigation that the Committee itself had characterized as "contradictory", the Committee would have been aware that it needed to clearly consider all relevant information relating to this contradiction. It is not apparent from the decision that the Committee did so.

[108] Rather, in its decision, it referenced only one of the father's contradictory statements. The Committee made no further note of the father's other statement, which would not appear to have supported the Committee's ultimate opinion.

[109] It is certainly possible that the Committee may have considered and discounted the other contradictory statement, perhaps concluding that it was not relevant or important to its determination, notwithstanding that it was identified in the investigation as relevant. However, it is not evident how this would have been done without further investigation and clarification of the information available to the Committee. This does not appear to have occurred and there is no indication in the record that such further consideration was undertaken by the Committee.

[110] As noted above, the Committee has a statutory duty to formulate an opinion, following an investigation, as to whether there are reasonable grounds to believe that a lawyer has engaged in conduct deserving of sanction.

[111] This opinion must be informed by the information obtained in its investigation. Failing to properly account for relevant and contradictory information in the record in this circumstance undermined the Committee's ability to formulate "an objective opinion capable of justification", based on "compelling and credible information" (*Charkaoui*, at para. 39; *Harrison*, at para. 15; *Jackman*, at paras. 4 and 13; *Deokaran*, at paras. 16-18).

[112] In relying on information that was contradicted in the record by other information and by failing to engage with or resolve the observed contradiction or reference it in its determination, the Committee failed to properly consider relevant information before formulating its opinion on this allegation.

[113] I would conclude that this constituted an error warranting appellate intervention, and that the Judge erred in concluding that the Law Society made no error in this respect (see *Benhaim*, at para. 104; *Haaretz.com*, at para. 50; *Boyles*, at paras. 39-41; *John Doe (G.E.B. #25)*, at para. 42).

The client did not attend at Provincial Court regarding the EPO

[114] The second piece of information in the record noted by the Committee in its decision in support of its opinion was that the client did not attend at the Provincial Court proceeding on December 20, 2019. This was referenced in a single paragraph set out above.

[115] The Committee noted the client's non-attendance at Provincial Court as a factor that "reasonably lends itself to the position taken by [the lawyer]"; namely that the client had instructed the lawyer to agree to vacating the EPO.

[116] However, other information in the record provides context for the client's non-attendance that the Committee does not appear to have properly considered or referenced. This information included the client's statements to the Committee that she was told by the lawyer not to attend at Provincial Court, that she was directed by the lawyer to file a complaint with child protection services (about the previous afternoon's daycare incident) when the Provincial Court hearing was scheduled and that she advised the lawyer an hour before the Provincial Court hearing that she "insisted we fight to keep the EPO in place". While this information was provided to the Committee, and is part of the Committee's investigation record, it is not apparent that the Committee properly considered it in making its determination.

[117] The client and her father both advised the Committee that they were directed by the lawyer to meet with police and child protection services on Friday, December 20, 2019 (including at the time scheduled for the Provincial Court proceedings) to report the incident that had occurred at the child's daycare the day before.

[118] The client's father wrote to the lawyer in this regard: "[The client] and I spoke to you on December 20, at 1:08 p.m. … during the phone our phone [sic] we had you on speaker phone and [the client] insisted we fight to keep the EPO in place. Instead, you instructed us to go to [Child Protection Services]" (Appeal Book, pages 11, 256).

[119] The client's account is similar. She wrote to the Committee about what occurred on December 20, 2019 and explained why she wasn't in Provincial Court that day: "The next morning [Dec. 20, 2019] [the lawyer] sent my father and I to [the police] to file a report [regarding the daycare incident that had occurred the day before] and assured us that I did not have to be in court that afternoon and that my [former spouse] would not be there. … Instead [my lawyer] sent us to CSSD [Child Protection Services] to file a report with them [about the daycare incident]" (Appeal Book, page 2).

[120] Included in the Committee's summary of the information obtained in the investigation is a statement from the client outlining her position about what occurred on December 20, 2019, and specifically why she did not attend Court.

[121] The client's statement included the following information: "I explicitly told [the lawyer] many times over the phone that day [Dec. 20, 2019] that I expected [the lawyer] to fight to keep my EPO in place. I was in such a tizzy trying to protect my child that I had just assumed that my counsel would do as I asked ... [My lawyer] again kept arguing [that the lawyer's] plan [of obtaining a consent order in Family Court] was better, at no point did I agree to [this] plan and told [my lawyer] that [the plan] would destroy me and my credibility. [My lawyer] told me over and over that [my former spouse] was not coming [to court]. My lawyer also states … that [the] instructions were to proceed with their agreement, this was not the case and [my lawyer] was fully aware that I had never agreed to [consent to vacate the EPO]. … [My lawyer] could have had the issue set aside and [the Provincial Court Judge] asked [my lawyer] several times if [my lawyer] wanted to set the matter aside and revisit it after the holidays and my lawyer refused. [My lawyer] knew full well that this hearing could have been delayed and chose not to inform me of this and instead acted against my direct instruction" (Appeal Book, pages 1-3).

[122] In September 2021, as part of its further investigation, the Committee wrote again to the client and asked why she did not attend court.

[123] The client stated in her reply that "I did not attend court because [the lawyer] told me that I need not attend court and that [my former spouse] would not be attending court either". The client re-iterated in the same correspondence that she "did not consider vacating the EPO at any point including the 19 December 2019 meeting"; that she "never agreed to vacate the EPO with certain conditions and did not change my mind about it"; and that she told her lawyer that "I wanted to keep the EPO and gave [my lawyer] the explicit instructions to keep it in place and that I would rather have it thrown out and have to apply for another down the road than have a [Family Court] consent order [that her former spouse] would ignore and was unenforceable by police" (Appeal Book, page 240).

[124] The lawyer's position throughout was that: the client did not need to attend at Provincial Court on December 20, 2019, because there was an agreement to consent to vacating the EPO; the client had provided instructions to the lawyer to consent to the application to vacate the EPO; and that testifying in Provincial Court to contest the application to vacate the EPO would not be in the client's best interests (see, for example, Appeal Book, pages 44-169, 267-271).

[125] The Committee did not inquire of the client as to whether she understood that her absence in Provincial Court might signify that she had agreed to have the EPO vacated, and that she had provided instructions to her lawyer to do so.

[126] While the above information regarding the client's explanation for not attending at Provincial Court on December 20, 2019 was available to the Committee, there is nothing in the decision to indicate that this was properly considered. Rather, the Committee's decision suggests that the client's non-attendance in Provincial Court indicated her agreement with the lawyer consenting to the application to set aside the EPO; that is, as the Committee stated, the client's failure to attend "reasonably lends itself to the position taken by [the lawyer]".

[127] However, given the information available to the Committee, the client's non-attendance in Court must be considered in context. This was not a binary situation where failure to appear in Court automatically meant that the client had provided instructions to consent to the application to vacate the EPO. The Committee on this point appears to conflate the client's non-attendance with her having provided

specific instructions, without considering other relevant information in context, including accounting for the client's explanation for her non-attendance.

[128] There is nothing in the single paragraph in the decision on this point to indicate the Committee accounted for relevant information in the record, described above, in formulating its opinion regarding whether there were "reasonable grounds to believe" that the lawyer engaged in conduct deserving of sanction (*Charkaoui*, at para. 39; *Harrison*, at para. 15; *Jackman*, at paras. 4, 13; *Deokaran*, at paras. 16-18).

[129] In these circumstances, I would conclude that this constituted an error, and that the Judge on appeal erred by concluding that the Law Society had made no error in dismissing this allegation (see *Benhaim*, at para. 104; *Haaretz.com*, at para. 50; *Boyles*, at paras. 39-41; *John Doe (G.E.B. #25)*, at para. 42).

[130] In the result I would remit this allegation to the Committee for further consideration.

[131] In doing so, it is not the Committee's ultimate conclusion that is meant to be impugned by this decision, but rather how the Committee arrived at this conclusion. Put another way, it is not what the Committee decided, but how. The conduct of the lawyer is also not being impugned in this decision. It is not meant to resolve whether the Committee was correct or incorrect in its opinion that there were no reasonable grounds to believe that the lawyer engaged in conduct deserving of sanction.

[132] Rather, the decision is meant to confirm the Committee's duty to properly consider all relevant information before formulating its opinion. This is particularly important where the Committee is aware of a contradiction in the information obtained and relies on one portion of this conflicting information to support its opinion without addressing or resolving the observed conflict in its determination. The Committee has a duty to consider all relevant information. It is not apparent from the record that it did so, or that it resolved the contradiction that it had identified.

[133] The Court appreciates the statutory responsibility of the Committee under the *Act*, and how this differs for example, from the statutory role and responsibility of a Law Society adjudication tribunal appointed to deal with a complaint referred to it by the Law Society's disciplinary panel. Unlike an adjudication tribunal, the Committee does not make findings on the merits of a complaint, and does not consider "evidence", as would an adjudication tribunal in the context of a

disciplinary hearing. Nonetheless, the Committee has the responsibility under the *Act* to decide, by formulating an opinion as required by s. 45, upon consideration of information obtained in the investigation. This administrative law function must be informed by relevant information in the record.

[134] It is not the function of appellate review, in this context, to parse the Committee's opinion or require that every item of information collected in the investigation be considered or referenced in the opinion. Such an approach would not be appropriate or functional. However, in the instant case, the distinction is that the Committee itself flagged and requested further information regarding contradictory statements on an issue that was relevant and central to the allegation. This was also central to the Committee's determination regarding whether there were reasonable grounds to believe the member had engaged in conduct deserving of sanction. Accordingly, it was incumbent on the Committee to fully address this in rendering its opinion.

[135] The Committee, in carrying out its statutory role under the *Act*, had the responsibility to grapple with the conflicting information that was presented to it and formulate an opinion that evinces a proper consideration of relevant information in the record. The Committee itself identified an important issue concerning contradictory statements in the record but left the issue hanging and unresolved at first instance, thereby ignoring relevant information.

[136] This is unfair to both the lawyer and client. Regrettably, this necessitates that the matter be remitted to the Committee for further consideration, resulting in an additional expenditure of time, expenses, energy (including emotional energy), and other resources involved in revisiting this matter, for both the lawyer and the client. This, unfortunately, must also entail the further attention and resources of the Committee, in the proper exercise of its statutory duty.

SUMMARY AND DISPOSITION

[137] In summary, I would dismiss the Law Society's cross-appeal regarding the standard of review and dismiss the client's appeal regarding the allegation that the lawyer failed to provide competent service.

[138] Regarding the client's appeal on the allegation that the lawyer failed to follow instructions respecting the EPO, having determined that the Committee erred in its

consideration of this allegation, I would allow the appeal and remit the allegation to the Law Society for further consideration.

[139] In the result, as the appeal is allowed and the cross-appeal is dismissed, the appellant is entitled to costs on this appeal on column 3 of the *Court of Appeal Rules*, NLR 38/16, rule 58. The Judge's determination on costs in the Supreme Court remains undisturbed.

_____

F.P. O'Brien J.A.

I concur: _____

D.E. Fry C.J.N.L.

I concur: _____

D.M. Boone J.A.