IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Law Society of Newfoundland and Labrador v. Buckingham*, 2023 NLCA 17
Date: June 6, 2023
Docket Number: 202201H0020

BETWEEN:

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR — APPELLANT

AND:

ROBERT W. BUCKINGHAM — RESPONDENT

AND:

COLLEGE OF PHYSICIANS AND SURGEONS OF NEWFOUNDLAND AND LABRADOR, NEWFOUNDLAND AND LABRADOR PHARMACY BOARD, COLLEGE OF REGISTERED NURSES OF NEWFOUNDLAND AND LABRADOR, NEWFOUNDLAND AND LABRADOR COLLEGE OF DIETITIANS, COLLEGE OF LICENSED PRACTICAL NURSES OF NEWFOUNDLAND AND LABRADOR, NEWFOUNDLAND AND LABRADOR PSYCHOLOGY BOARD, NEWFOUNDLAND AND LABRADOR COUNCIL OF HEALTH PROFESSIONALS, and NEWFOUNDLAND AND LABRADOR COLLEGE OF SOCIAL WORKERS

INTERVENOR

Coram: F. P. O'Brien, G. D. Butler and K. J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 202101G2711 (2022 NLSC 37)

Appeal Heard: April 20, 2023
Judgment Rendered: June 6, 2023

Reasons for Judgment by: K. J. O'Brien J.A.
Concurred in by: F. P. O'Brien and G. D. Butler JJ.A.

Counsel for the Appellant: Aimee N. Rowe
Counsel for the Respondent: John D. Brooks, K.C.
Counsel for the Intervenors: Ruth E. Trask and Robert Bradley

Authorities Cited:

CASES CITED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Martin v. Law Society of Newfoundland and Labrador*, 2010 NLTD(G) 186, 302 Nfld. & P.E.I.R. 293; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42, 7 C.A.N.L.R. 758; *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68, 344 Nfld. & P.E.I.R. 62.

STATUTES CONSIDERED: *Law Society Act, 1999*, SNL 1999, c. L-9.1, sections 44(2), 45, 46, 47, 50(1), 49, 50(3), 51, 55.2; *Canadian Charter of Rights and Freedoms*, section 2(b).

RULES CONSIDERED: *Law Society Rules*, rule 9.04(3).

OTHER: *Code of Professional Conduct*, Law Society of Newfoundland and Labrador, 2020, chapters 5.6-1, 7.5-1, 2.1-1.

K. J. O'Brien J.A.:

OVERVIEW

[1] This appeal is about the Complaints Authorization Committee (CAC) of the Law Society of Newfoundland and Labrador and, in particular, its duties when issuing a letter of counsel or caution to a lawyer.

[2] Robert Buckingham is a lawyer and a member of the Law Society of Newfoundland and Labrador.

[3] A client of Mr. Buckingham died while in custody at Her Majesty's Penitentiary. Following his death, Mr. Buckingham gave two interviews to the media. The first interview included this exchange (2022 NLSC 37, at para. 7):

> [Journalist]: There's so many story lines that have emerged from this story I mean the bigger picture that he is the third prisoner to die inside HMP since August 2017-five people inside the province's corrections system in a little over two years.
>
> [Mr. Buckingham]: [My client is] the first one [who] appears to have died at the hands of a correctional officer.

[4] The second interview included this exchange (2022 NLSC 37, at para. 8):

> [Journalist]: Mr. Buckingham, what do you know about how… how your client died?
>
> [Mr. Buckingham]: I know more than what I can say. And so, unlike…unlike the…the leak that came out of the penitentiary the other day, which was obscene, and unusual, and then, the comments by…by Mr. Earle that there… there exists a videotape, you know, I'm not going to get into that. That's…that's speculation, and to…to what I know, other than, you know, there…that appears to be different from the other deaths at the...at the penitentiary, and at the Women's Correctional Centre. This appears to be at the…at the hands of…of the correctional officers.

[5] "Mr. Earle" referred to Jerry Earle, the president of the Newfoundland and Labrador Association of Public and Private Employees (NAPE), the correctional officers' union.

[6] NAPE complained to the Law Society about Mr. Buckingham's public statements. In particular, NAPE complained about Mr. Buckingham's statement that his client's death "appear[ed] to be at the … hands of …the correctional officers" and his statement that he knew "more than what [he could] say". NAPE alleged that by making these comments, Mr. Buckingham was in breach of chapter 5.6-1 of the *Code of Professional Conduct*, Law Society of

Newfoundland and Labrador, 2020 (the *Code*), which requires that a lawyer encourage public respect for and try to improve the administration of justice.

[7] The receipt of NAPE's allegation triggered the Law Society's disciplinary procedures, which are codified in the *Law Society Act, 1999*, SNL 1999, c. L-9.1 (the *Act*).

[8] As a first step, the Director of Professional Responsibility of the Law Society wrote NAPE asking it to confirm its allegations as:

- Robert Buckingham failed to discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

- Robert Buckingham failed to uphold respect for the administration of justice, in that his public statements on [the media outlets involved] have the potential to weaken or destroy public confidence in legal institutions or authorities.

[9] NAPE confirmed that this was an accurate statement of its allegations.

[10] The Director of Professional Responsibility then forwarded the allegations to Mr. Buckingham for response. The *Law Society Rules* require lawyers to respond to allegations made against them (rule 9.04(3)).

[11] Mr. Buckingham responded to the allegations with a ten-page letter, plus enclosures. He stated that his comments were made in response to information in the media from Mr. Earle and an unnamed source about his client's interactions with correctional officers just prior to his death. Mr. Buckingham identified this information as the basis for his analysis and position. He emphasized his professional duty to advocate for his clients (the deceased client and that man's family). Mr. Buckingham also asserted his and his clients' right to be heard.

[12] The Director of Professional Responsibility forwarded Mr. Buckingham's response to NAPE for comment and NAPE replied. NAPE's reply was similarly forwarded to Mr. Buckingham for comment. There was some more back and forth in writing. There was no oral hearing.

[13] Ultimately, the Vice President of the Law Society forwarded NAPE's allegations to the CAC pursuant to section 44(2) of the *Act*. The CAC is created by the *Act* and is composed of three benchers of the Law Society: two lawyers and one layperson.

The CAC's decision

[14] The CAC reviewed the allegations and the material submitted by NAPE and Mr. Buckingham. It formed the opinion that there were reasonable grounds to believe that Mr. Buckingham had engaged in conduct deserving of sanction and it issued a "Letter of Counsel" to Mr. Buckingham. The CAC sent a copy of the Letter of Counsel to NAPE.

[15] The Letter of Counsel is a decision of the CAC. The *Act* does not give a lawyer the right to appeal a CAC decision but, by common law, a lawyer can ask the Supreme Court of Newfoundland and Labrador to review it.

[16] Mr. Buckingham applied for judicial review.

The reviewing judge found the CAC's decision was unreasonable

[17] A judge of the Supreme Court of Newfoundland and Labrador reviewed the CAC's decision and found that it was unreasonable. In doing so, he also held that the CAC has a duty to give reasons when counselling or cautioning a lawyer.

[18] Referencing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the judge noted that a reasonable decision must be justified and transparent. The judge found that the CAC's decision was not justified because it did not engage in any meaningful way with Mr. Buckingham's assertion that he had a reasonable belief in the truth of what he said, nor with the fact that his statements were not presented as definitive conclusions as to what had occurred but as support for his position that an inquiry should be called.

[19] The judge also reviewed *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, a case in which the Supreme Court of Canada considered whether a lawyer's client advocacy crossed the line into professional misconduct. The judge found that the CAC's decision did not demonstrate that it was alive to the requirement to do a context-specific balancing of factors before coming to its decision, as endorsed by the Supreme Court of Canada in *Groia*. As a result, the judge found that the CAC's decision was also unreasonable because it was not justified by reference to the legal constraints imposed on it.

[20] The judge quashed the CAC's decision and remitted the matter to the CAC for reconsideration.

Issues on appeal

[21] The Law Society appealed the judge's decision to this Court. The main grounds of appeal raised by the Law Society are:

(1) The judge erred in finding that the CAC had a duty to give reasons for its decision to counsel Mr. Buckingham.

(2) The judge erred in finding that the reasons that the CAC gave in the Letter of Counsel did not meet the requirements of reasonableness.

Intervenors

[22] Eight health-related, self-governing, statutory bodies applied to intervene in this appeal and were granted the right to do so (*Law Society of Newfoundland and Labrador v. Buckingham*, 2022 NLCA 56). Each of the Intervenors is governed by legislation that includes the authority of a complaints authorization committee to counsel or caution a member. Although their statutory disciplinary procedures are not identical, the Intervenors made a unified submission to the Court to give a broader context for the issues under appeal.

[23] The Intervenors agree with the judge's finding that the CAC had a duty to give reasons for its decision to counsel. However, they submit that the judge's decision set the bar too high for the content of the CAC's reasons. The Intervenors submit that there should be one law of professional regulation in this Province that is workable for all regulators.

Conclusion

[24] For the reasons that follow, I agree that the CAC had a duty to give reasons for its decision. I also find that the judge properly applied the standard of reasonableness to the CAC's decision, and I agree with his conclusion that the CAC's decision was unreasonable. I would thus dismiss the appeal and send the matter back to the CAC for reconsideration.

STANDARD OF REVIEW

[25] On an appeal of a judicial review decision, this Court must decide if the reviewing judge chose the correct standard of review and applied it properly. To do this, this Court does not accord deference to the judge's application of the standard of review, but rather performs the review anew (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R.

559, at paras. 46-47; and *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at para. 10).

[26] Here, the judge applied a reasonableness standard of review to the CAC's decision. This is the correct standard of review and I will apply the same.

THE CAC'S LEGISLATIVE AUTHORITY

[27] Section 45 of the *Act* governs the CAC. It states in relevant part:

> 45.(1) Where an allegation has been submitted to the complaints authorization committee, the committee may exercise one or more of the following powers:
>
> (a) refer the allegation back to the vice-president for
>
> (i) an investigation in accordance with the rules,
>
> (ii) further investigation in accordance with the rules where the vice-president conducted an investigation in accordance with subsection 44(1.1), or
>
> (iii) alternate dispute resolution in accordance with the rules;
>
> (b) conduct an investigation itself or appoint a person to conduct an investigation on its behalf;
>
> (c) conduct a practice review into the member's practice or the conduct of a professional law corporation of which the member is a voting shareholder; and
>
> (d) require the respondent to appear before it.
>
> (1.1) An investigation referred to in paragraph (1)(a) or (b) may be delegated by the vice-president or the complaints authorization committee to the staff of the society.
>
> (2) Where the complaints authorization committee is of the opinion that there are no reasonable grounds to believe the respondent has engaged in conduct deserving of sanction, the committee shall dismiss the allegation and give notice in writing of the dismissal to the complainant and the respondent.
>
> (3) Where the complaints authorization committee is of the opinion that there are reasonable grounds to believe that a respondent has engaged in conduct deserving of sanction, the allegation shall be considered as constituting a complaint, and the committee may
>
> (a) counsel or caution the respondent;
>
> (b) instruct the vice-president to file the complaint against the respondent and refer it to the disciplinary panel;

> (c) make an application under Part III for the appointment of a custodian of the member's practice or of a professional law corporation of which the member is a voting shareholder; and
>
> (d) suspend or restrict the respondent's licence.
>
> (4) A person conducting an investigation under paragraph (1)(a), (b) or (3)(c) may require
>
> (a) the respondent to
>
> (i) undergo an examination or assessment he or she considers necessary and as arranged by the vice-president, and
>
> (ii) permit the vice-president or a member of the complaints authorization committee or a person appointed by the complaints authorization committee to inspect and copy the records of the respondent and other documents relating to the subject matter of the investigation; and
>
> (b) a person other than the respondent to permit the vice-president or a member of the complaints authorization committee or a person appointed by the complaints authorization committee to inspect and copy records and other documents relating to the subject matter of the investigation held by that person,
>
> and the respondent or other person shall comply.
>
> …

[28] In this case, the CAC chose to investigate the allegations by reviewing the material collected by the Director of Professional Responsibility in her correspondence with Mr. Buckingham and NAPE.

[29] Following its investigation, had the CAC been of the opinion that there were *no* reasonable grounds to believe Mr. Buckingham had engaged in conduct deserving of sanction, it would have dismissed the allegation with written notice to Mr. Buckingham and NAPE (s. 45(2)). NAPE would have had the right to appeal to the Supreme Court (s. 45(7)).

[30] Here, however, the CAC was of the opinion that there *were* reasonable grounds to believe Mr. Buckingham had engaged in conduct deserving of sanction. NAPE's allegations thus became a "complaint" against Mr. Buckingham (s. 45(3)). To deal with this complaint, the CAC chose to "counsel or caution" Mr. Buckingham by way of the Letter of Counsel (s. 45(3)(a)).

DUTY TO GIVE REASONS FOR A COUNSEL OR CAUTION

[31] Although the Law Society initially submitted on appeal that the CAC did not have a duty to give reasons, it clarified its submission at the hearing. The Law Society explained that it agrees that a caution or counsel requires some explanation. It submits that the explanation does not have to be in the form of a written decision, but rather that the CAC may give its explanation within the letter that cautions or counsels the member.

[32] Reasons are an explanation of how and why a decision was made (*Vavilov*, at para. 79). In finding that the CAC was required to give reasons, the judge was not requiring a separate written decision. It is open to the CAC to give its reasons within the Letter of Counsel. Mr. Buckingham does not argue otherwise.

[33] Because of the Law Society's clarification, the CAC's duty to give reasons is no longer in dispute in this appeal. However, for completeness, I will give a short explanation of why reasons are required.

[34] To begin, the *Act* does not require the CAC to give reasons for its decisions.

[35] In its written submission, the Law Society cited *Martin v. Law Society of Newfoundland and Labrador*, 2010 NLTD(G) 186, 302 Nfld. & P.E.I.R. 293, as support for the proposition that the CAC does not have to give reasons. In *Martin*, the judge declined to read a requirement for the CAC to give reasons into the *Act*, given that it was a detailed and comprehensive statutory scheme. *Martin* was a judicial review of a CAC decision to dismiss an allegation against a lawyer. The CAC had given reasons for the dismissal and so the judge's comments were peripheral to his decision. The judge did not examine whether the CAC had a common law duty to give reasons.

[36] Even if not required by statute, the requirement to give reasons can arise at common law as a matter of procedural fairness. The duty of procedural fairness is inherently flexible and context-specific. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes must be determined with reference to all of the circumstances. So although reasons are not necessary for all administrative decisions, each decision-making process must be evaluated in its particular context (*Vavilov*, at para. 77; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 682; *Baker v. Canada*

(Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at paras. 21-23; and *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42, 7 C.A.N.L.R. 758, at paras. 64-67).

[37] In *Baker*, the Supreme Court of Canada set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case. These factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself (paras. 23-28).

[38] In this case, the judge considered relevant factors from *Baker* and concluded that procedural fairness requires that a CAC issuing a counsel or caution provide reasons. I agree with his analysis and conclusion (2022 NLSC 37, at paras. 27-32). I will summarize the factors he considered.

[39] First, by their nature, counsels and cautions require explanation so that lawyers may understand what they have done wrong and not repeat the behavior. Second, the CAC investigates allegations and forms opinions as to whether there are reasonable grounds to conclude that misconduct has occurred. It would be impossible to judge the sufficiency of an investigation or the reasonableness of the opinion without some explanation. Third, counsels and cautions can have significant consequences for lawyers, including impacts on career advancement and with respect to how the Law Society deals with future allegations or complaints against them. Finally, given that lawyers are required to respond to allegations against them, they would legitimately expect the CAC to not reject their response without explanation.

THE REASONABLENESS OF THE CAC'S DECISION

[40] The parties disagree about how detailed the CAC's reasons need to be and whether its reasons to Mr. Buckingham met the requirements of reasonableness.

The CAC's reasons

[41] In the Letter of Counsel, the CAC concluded that there were reasonable grounds to believe that Mr. Buckingham's public comments, identified above in the two quoted media exchanges, were not compliant with chapter 7.5-1 of the *Code*, which states:

> Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

[42] The CAC gave the following reasons for its conclusion:

> The Committee noted that at the time [Mr. Buckingham] gave these two public statements, the evidence to support them did not exist. The record demonstrated that [Mr. Buckingham] provided these statements on November 8, 2019 and that the death was ruled a homicide in December 2019.

[43] The CAC did not give further reasons and it did not identify any other specific material as supporting its conclusion. It did state more generally that its opinion was on "the basis of the information on file".

Vavilov and the purpose of reasons

[44] In *Vavilov*, the Supreme Court of Canada gave new guidance to courts conducting reasonableness reviews of administrative decisions. In doing so, the Supreme Court affirmed the need to develop and strengthen a culture of justification in administrative decision-making (*Vavilov*, at para. 2).

[45] Where an administrative decision maker has given reasons, a reviewing court must examine them with "respectful attention" and seek to understand the reasoning process followed by the decision maker to arrive at their conclusion (*Vavilov*, at paras. 81, 84-86).

[46] The reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency, and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear upon it (*Vavilov*, at para. 99). Elements that may be relevant in evaluating reasonableness include: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies (*Vavilov*, at para. 106).

[47] To be reasonable, a decision must be based on reasoning that is both rational and logical. Although a reasonableness review is not a "line-by-line treasure hunt for error", the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic (*Vavilov*, at para. 102).

The effect of the governing statutory scheme

[48] The Law Society highlights the CAC's role within the *Act*'s statutory scheme as a screening mechanism to assess allegations and to consider the availability of remedial measures short of a full hearing before an adjudication tribunal. It characterizes the work of the CAC as investigative and not adjudicative. Given this statutory role, the Law Society submits that less scrutiny should be given to the CAC's reasons on review.

[49] To understand the Law Society's submission, it is necessary to understand the statutory distinction between the CAC and an adjudication tribunal.

[50] Having found that there are reasonable grounds to believe that a lawyer has engaged in misconduct, if the CAC refers the matter to the disciplinary panel, then the disciplinary panel must appoint a three-person adjudication tribunal to hear the complaint (*Act*, at s. 46). Before the adjudication tribunal, the lawyer may either plead guilty or have a hearing. Typically, a hearing is conducted in public with witnesses called and other evidence tendered (*Act*, at s. 47). Following a hearing, the adjudication tribunal decides if the lawyer is guilty of conduct deserving of sanction (*Act*, at s. 50(1)). Upon either a finding of guilt or a guilty plea, the adjudication tribunal determines the appropriate sanction for the lawyer's misconduct (*Act*, at ss. 49, 50(3)). An adjudication tribunal must file a written decision or order, which must be published under certain conditions (*Act*, at s. 51). Either the Law Society or the lawyer may appeal a decision or order of an adjudication tribunal (*Act*, at s. 55.2).

[51] Generally, a lawyer will be due greater procedural protection before an adjudication tribunal than before the CAC (*Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68, 344 Nfld. & P.E.I.R. 62, at paras. 32-36). The procedure before an adjudication tribunal is more akin to a court proceeding and the consequences of being found guilty of misconduct are usually more serious than those of a finding that there are reasonable grounds to believe that misconduct occurred.

[52] However, I would not characterize the CAC's role as always investigative. Although its work is primarily investigative, sometimes the CAC makes a final decision to resolve a complaint, subject only to judicial review. Making a decision to resolve a disputed matter is more of an adjudicative function than an investigative one.

[53] The type of decision that the CAC makes affects the level of justification required for its decision to be reasonable. When the CAC makes a final decision, such as a decision to counsel, usually more will be needed to explain the result to the people affected because there will not be any further opportunity for them to be heard.

[54] What is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. Each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context (*Vavilov*, at para. 90).

[55] In the case of a counsel or caution, the CAC's decision must be assessed in the context of the nature of the allegation, the standard of conduct believed to have been breached, relevant legal constraints, the material gathered during the investigation, and the member's response. This is not a closed list. The requirements of justification, transparency, and intelligibility should guide the CAC's work.

The potential impact of the CAC's decision: not just remedial

[56] Both the Law Society and the Intervenors characterize a counsel or caution as remedial. Generally, both describe a caution as a warning not to do something and a counsel as advice on how to act in the future.

[57] Although both counsel and caution are generally remedial in nature, they are not exclusively so. Counsel and caution can have adverse consequences for a lawyer, which do not advance remediation. In the present case, there are three such potential consequences.

[58] The first is the impact on possible future allegations of misconduct. The Letter of Counsel explained how it could be considered by the CAC in dealing with future allegations or complaints and by a future adjudication tribunal in deciding an appropriate sanction.

[59] The second is the impact on judicial appointment. The Letter of Counsel explained that it would be included in the information provided by the Law Society in the application process for judicial appointment.

[60] Finally, a counsel or caution is not a private matter between the Law Society and the member, and so may negatively impact a lawyer's professional reputation in the community. In this case, the Letter of Counsel was sent to

NAPE with no restrictions on circulation or publication. Additionally, the CAC directed that the Vice-President give notice of the circumstances giving rise to the counsel to Law Society members, omitting information that might identify Mr. Buckingham. As noted by the judge at paragraph 14 of his decision, despite such anonymization, in a case such as this one, the member's identity may still be obvious from the circumstances.

[61] The CAC's decision had potential for significant impact on Mr. Buckingham's career and professional reputation, and its reasonableness must be evaluated in this context.

A reasonable decision is justified by reference to relevant legal constraints

[62] The judge found that the CAC did not justify its decision by reference to the legal constraints imposed on it by *Groia*.

The Supreme Court of Canada's decision in Groia

[63] In *Groia*, the Supreme Court considered the circumstances in which a lawyer's strong advocacy crosses the line into professional misconduct based on incivility. The Supreme Court was reviewing a decision of an appeal panel of the Law Society of Upper Canada (now Ontario) to sanction a lawyer for professional misconduct because of allegations of prosecutorial misconduct he made during a criminal trial. The lawyer was operating under an honest but mistaken understanding of the law of evidence and the role of the prosecutor.

[64] In the majority decision, Justice Moldaver emphasized the importance of civility to the justice system. He also noted that the duty of civility cannot be understood in isolation and that its standards cannot compromise a lawyer's duty of resolute advocacy:

> [71] Although of doubtless importance, the duty to practice with civility is not a lawyer's sole ethical mandate. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. The duty of civility must be understood in light of these other obligations. In particular, standards of civility cannot compromise the lawyer's duty of resolute advocacy.
>
> [72] The importance of resolute advocacy cannot be overstated. It is a vital ingredient in our adversarial justice system — a system premised on the idea that forceful partisan advocacy facilitates truth-seeking: see e.g. *Phillips v. Ford Motor Co.* (1971), 18 D.L.R. (3d) 641, at p. 661. Moreover, resolute advocacy is a key component of the lawyer's commitment to the client's cause, a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*:

> *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 83-84.

[65] Justice Moldaver also noted the importance of proportionately balancing a lawyer's right to free expression protected by the *Canadian Charter of Rights and Freedoms* with the Law Society's statutory mandate (para. 119). He continued:

> [120] …sanctioning a lawyer for good faith, reasonably based allegations that are grounded in legal error does not reflect a proportionate balancing. Advancing good faith, reasonable allegations — even those based on legal error — helps maintain the integrity of the justice system by holding other participants accountable. Well-founded arguments exposing misconduct on the part of opposing counsel thus lie close to the core of the s. 2(*b*) values underpinning a lawyer's expressive freedom. Discouraging lawyers from bringing forward such allegations does nothing to further the Law Society's statutory mandate of advancing the cause of justice and the rule of law. If anything, silencing lawyers in this manner undercuts the rule of law and the cause of justice by making it more likely that misconduct will go unchecked.

[66] The reference to "good faith" and "reasonably based" allegations in the above quote is important. The Supreme Court endorsed the appeal panel's requirement that the lawyer's allegation be made in good faith and have a reasonable basis. The majority held that requiring that the allegations be true, or even reasonable, would set the bar too high, and risk unjustifiably tarnishing a lawyer's reputation and chilling resolute advocacy (*Groia*, at paras. 7, 95).

Groia was a relevant legal constraint for Mr. Buckingham's case

[67] The Law Society submits that the CAC should not be required to reference relevant case law in its reasons. It also submits that the CAC was not required to apply *Groia* because Mr. Buckingham's circumstances were different from Mr. Groia's, in that the allegations against Mr. Buckingham did not involve the duty of civility and his statements were made outside of court.

[68] There is a difference between citing case law and justifying a decision in relation to the law. The judge found that the CAC's decision did not demonstrate that it was "alive" to the requirements of *Groia* and did not justify the outcome by reference to the legal constraints that it imposed. He did not require that the CAC cite or explicitly mention *Groia*.

[69] The legal constraints on how and what an administrative decision maker can lawfully decide come from both statutory and common law (*Vavilov*, at para. 111). Where, for example, there is a relevant case in which a court

considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent (*Vavilov*, at para. 112).

[70] I agree with the judge that it was unreasonable for the CAC to make its decision without regard to the principles enunciated in *Groia*. I will explain why.

[71] First, *Groia* was a recent decision from the Supreme Court of Canada that addressed a lawyer's right to free expression and duty of resolute advocacy in the context of statements criticizing another justice system participant. A decision from the highest court in Canada that considered discipline of a lawyer in circumstances with significant parallels to those of Mr. Buckingham was relevant.

[72] The professional codes of conduct of the law societies across Canada are similar because they are largely based on a nationally developed model. The Law Society and members of CAC should be aware of significant developments in the law that directly affect their work.

[73] Second, although *Groia* dealt directly with the duty of civility, the decision is not only relevant to that chapter of the *Code*. The chapters of the *Code* are interrelated and must be understood in light of each other (see quoted above *Groia*, at para. 71).

[74] Chapter 7.5-1 of the *Code*, which the CAC was considering, expressly requires a harmonious reading because it allows a lawyer to communicate with the media provided that there is no infringement of the lawyer's other obligations. Those other obligations must be considered in applying chapter 7.5-1.

[75] Third, the principles enunciated in *Groia* were not limited to in-court statements. Additionally, the commentary for chapter 7.5-1 of the *Code* sets the same standard for in-court and out-of-court statements:

> [1] Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with…the courts… . The mere fact that a lawyer's appearance is outside of a courtroom, … does not excuse conduct that would otherwise be considered improper.

[76] Fourth, without naming the case, NAPE referred to *Groia* in its initial letter of complaint to the Law Society: "We note that the Supreme Court of

Canada has recently discussed how lawyers must establish a proper evidentiary foundation when making serious allegations". This signaled *Groia's* relevance.

[77] Finally, Mr. Buckingham's response put the issues of resolute advocacy and freedom of expression squarely before the CAC. This made *Groia's* relevance even clearer.

[78] The CAC had to justify its decision with regard to the relevant principles of *Groia*. This does not mean that the CAC had to cite *Groia* or that it should have applied *Groia* to come to a particular result. Nevertheless, to reasonably decide Mr. Buckingham's case, the CAC had to explain its result in the context of those principles.

A reasonable decision addresses key arguments

[79] The judge found that the CAC's decision was not justified because it did not engage in any meaningful way with Mr. Buckingham's assertion that he had a reasonable belief in the truth of what he said, nor with the fact that his statements were not presented as definitive conclusions as to what had occurred, but as support for his position that an inquiry should be called.

[80] A reasonable decision does not have to address every submission but its reasons must meaningfully account for the central issues and concerns raised by the parties (*Vavilov*, at para. 127). Addressing the key arguments shows the parties that their concerns have been heard and can alert the decision maker to inadvertent gaps or flaws in its reasoning (*Vavilov*, at para. 128).

[81] In his response to the allegations, Mr. Buckingham raised a number of important points and arguments.

[82] One was client advocacy. Mr. Buckingham asserted that he spoke to the media in response to information made public by Mr. Earle and an unnamed source that made his client out to be the "author of his own death". Mr. Buckingham stated he was representing his clients' interests and that he was calling for a public inquiry on their behalf.

[83] Another was the *Charter*-protected right to free expression. Mr. Buckingham stressed that his clients had a right to be heard and to ask questions. He also asserted his own right to speak freely, stating that he refused to be "coerced into silence". In his second substantive submission to the Law Society, he explicitly referenced his section 2(b) *Charter* rights in carrying out his professional duties as an advocate.

[84] Mr. Buckingham also identified an evidentiary basis for his statements. He made clear that he believed his statements to be true. He explained why the information he had supported his belief.

[85] The CAC's decision did not address any of the above. There is nothing in the Letter of Counsel to demonstrate that the CAC considered Mr. Buckingham's submissions.

[86] The Letter of Counsel had significant consequences for Mr. Buckingham. Law Society rules required him to respond to NAPE's allegations of professional misconduct. He responded with relevant submissions. In this context, the CAC could not reasonably issue a counsel or caution without addressing Mr. Buckingham's key arguments.

A reasonable decision is logical with a rational chain of analysis

[87] To be reasonable, a decision must be based on reasoning that is both rational and logical (*Vavilov*, at para. 102). Read holistically, a decision should reveal a rational chain of analysis (*Vavilov*, at para. 103).

[88] Reviewing the Letter of Counsel, I am unable to follow the CAC's chain of analysis leading to its conclusion that there were reasonable grounds to believe that Mr. Buckingham had breached chapter 7.5-1 of the *Code*. There are two significant gaps in its reasoning.

[89] First, I am unable to understand why the CAC concluded that when Mr. Buckingham made the two public statements, the evidence to support them did not exist. The only support the CAC gave for this conclusion was that the client's death was ruled a homicide after Mr. Buckingham made his statements.

[90] It is unclear how this fact supported this conclusion. Certainly, there *could* be evidence to support a finding of homicide before the Chief Medical Examiner's ruling. In fact, Mr. Buckingham had put forward information supporting his view that this death did not appear to be a suicide in his response.

[91] To understand the CAC's reasoning, the Law Society urges this Court to read the Letter of Counsel in conjunction with the full record that was before the CAC. Although I agree that this Court can, and should, read the Letter of Counsel in light of the record and with sensitivity to the CAC's role and choice of procedure, I find nothing in the broader context to explain why the CAC found that no evidence existed to support Mr. Buckingham's statements. Simply put, there is nothing in the record to fill the analytical gap.

[92] Second, even if there was no existing evidence to support Mr. Buckingham's statements when he made them, I cannot follow how this fact connects to a breach of chapter 7.5-1 of the *Code* (cited above, at para. 41).

[93] In order to find a breach of chapter 7.5-1 of the *Code*, the CAC had to be of the opinion that there were reasonable grounds to believe that Mr. Buckingham had infringed his obligations to the administration of justice (as opposed to his client, the profession, or the courts, which are also referenced in chapter 7.5-1). To make this determination, the CAC had to have measured his behavior against a standard. Without some explanation of what Mr. Buckingham's obligations were to the administration of justice, it is impossible to understand why Mr. Buckingham's actions could be reasonably viewed as infringing them.

[94] Careful attention to the Letter of Counsel suggests that the CAC required that Mr. Buckingham's statements be *supported by existing evidence* in order to comply with his professional obligations to the administration of justice. Yet, there is nothing in the Letter of Counsel to explain why the CAC required this. The basis for the CAC's requirement should be apparent to Mr. Buckingham.

[95] Given that the Letter of Counsel did not give an explanation, Mr. Buckingham might reasonably look to the chapter of the *Code* at issue for an explanation of his obligations. However, neither chapter 7.5-1 of the *Code* nor its commentary address the substance of a lawyer's obligations to the administration of justice.

[96] As the chapters of the *Code* are interrelated, Mr. Buckingham might reasonably look to other chapters of the *Code* for guidance. Chapter 5.6-1 of the *Code* addresses a lawyer's obligation to the administration of justice. It states that a lawyer must encourage public respect for and try to improve the administration of justice. The commentary of that chapter states that a lawyer should lead in seeking improvements in the legal system, but that any criticisms should be "bona fide and reasoned".

[97] "Supported by existing evidence" is a more exacting standard than "bona fide and reasoned". If the CAC is imposing a different standard for criticism of the justice system under chapter 7.5-1 than that which is suggested in the commentary of chapter 5.6-1, then it should explain its decision to Mr. Buckingham in a transparent and intelligible manner. A member getting a counsel or caution should be able to understand why the CAC found reasonable grounds to believe that his actions were a breach of his professional obligations.

Conclusion on the reasonableness of the CAC's decision

[98] I have reviewed three ways in which the CAC's decision was unreasonable: it was not justified in relation to the law stated in *Groia*, it did not meaningfully address Mr. Buckingham's arguments, and there are gaps in its overarching chain of analysis. Although, I have dealt with these aspects of the decision separately, they are interrelated.

[99] Overall, the CAC's decision does not adequately explain why it found reasonable grounds to believe that Mr. Buckingham infringed his obligations to the administration of justice in the context of his duty to advocate for his clients, his right of free expression, and his conviction that what he said was true, based on the information he had. The CAC's decision did not meet the requirements of justification, transparency, and intelligibility, primarily because it did not demonstrate that it considered these legal and factual constraints.

[100] Requiring that the CAC explain its decision to counsel or caution rationally, logically, and in relation to the applicable facts and law is not too great a burden. Doing so does not require that the CAC give court-like reasons, or in-depth analysis of all issues raised. Nor is it inconsistent with the CAC's role within the *Act*'s regime for disciplinary matters.

[101] The Law Society has a mandate to protect the public interest. It does so primarily by setting professional standards and regulating its members according to those standards. The Law Society's management of complaints and discipline of its members is a central part of its regulation.

[102] Even at the CAC stage of the disciplinary process, a member is due an intelligible explanation as to why his or her behavior is believed on reasonable grounds to be professional misconduct. The standard to which the member is being held should be transparent. A counsel or caution will not otherwise be effective at guiding the lawyer's future behavior and will not advance the goal of public protection.

A FURTHER MATTER OF PROCEDURAL FAIRNESS

[103] Although not raised by the parties, during the appeal hearing the Court identified a concern about procedural fairness related to how the Law Society presented the allegations to Mr. Buckingham for response. I will comment on it briefly to give guidance to the Law Society.

[104] In its initial complaint, NAPE alleged that Mr. Buckingham had breached chapter 5.6-1 of the *Code* (respect for the administration of justice). In verifying the complaint, the Director of Professional Responsibility of the Law Society formulated two allegations, one based on the wording of chapter 2.1-1 (duty of integrity) and one based on the wording of chapter 5.6-1 and its commentary. These allegations were forwarded to Mr. Buckingham for response.

[105] The CAC ultimately found that there were reasonable grounds to believe that Mr. Buckingham had breached chapter 7.5-1 (communications to the media and public statements). The specific wording of chapter 7.5-1 was not used in the allegations.

[106] When investigating an allegation of professional misconduct, the Law Society has a duty to tell the member what professional obligation is alleged to have been breached with clarity and precision. If particular sections of the *Act*, the *Code*, or other regulations are engaged, then they should be identified. This is a matter of procedural fairness and necessary so that the member can understand the nature of the alleged breach and respond effectively.

[107] Given that allegations may be filed by members of the public with little knowledge about professional standards, the Law Society may need to decide what professional obligations are engaged. In the course of investigating, additional professional obligations may come under consideration. If so, the member must be advised and given the opportunity to respond, as appropriate.

[108] The Law Society submitted that the allegations forwarded to Mr. Buckingham were sufficiently broad to put him on notice that chapter 7.5-1 was being considered, noting that a copy of that chapter had been included in the package sent to him. I cannot agree. Mr. Buckingham did not address chapter 7.5-1 in his response and this suggests that he was not on notice. Regardless, a member should not have to deduce or speculate about the standards of conduct at issue; they should be clearly communicated.

DISPOSITION

[109] For these reasons, I agree with the reviewing judge that the CAC's decision was unreasonable. I would therefore dismiss the appeal and affirm the judge's decision to quash the Letter of Counsel and remit the matter to the CAC for reconsideration with the benefit of these reasons.

[110] As Mr. Buckingham has been successful, I would further order that he have his costs in this Court on column 3 of the scale of costs against the Law

Society only and affirm the costs order in the court appealed from. There shall be no order for costs regarding the Intervenors.

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K. J. O'Brien J.A.

I concur: _____
F. P. O'Brien J.A.

I concur: _____
G. D. Butler J.A.