Court of Appeal for Saskatchewan

Docket: CACV2994

Citation: *Kapoor v The Law Society of Saskatchewan*, 2019 SKCA 85

Date: 2019-08-30

Between:

Ajit Kapoor

Appellant

And

The Law Society of Saskatchewan

Respondent

Before:	Richards C.J.S., Leurer and Barrington-Foote JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Leurer
In concurrence:	The Honourable Chief Justice Richards The Honourable Mr. Justice Barrington-Foote
On Appeal From:	2016 SKLSS 13, Regina
Appeal Heard:	February 21, 2019
Counsel:	Morris P. Bodnar, Q.C., for the Appellant Tim Huber for the Respondent

Leurer J.A.

I. INTRODUCTION

[1] This case concerns a lawyer's duty to be candid. More specifically, at stake in this appeal is whether there are circumstances in which a lawyer may be obligated to give frank disclosure of non-binding case authority known to be contrary to the position for which the lawyer is advocating.

[2] The *Code of Professional Conduct* [*Code*], applicable to members of the Law Society of Saskatchewan [Law Society], describes the obligations of a lawyer as an advocate as including to "represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect" (*Code* at s. 4.01(1), as it was during the relevant time of this matter, and presently at s. 5.1-1). The *Code* also states more specifically that a lawyer must not deliberately refrain from informing a tribunal of any "*binding authority* that the lawyer considers to be *directly on point* and that has not been mentioned by another party" (*Code* at s. 4.01(2)(i), as it was, and presently at s. 5.1-2(i), emphasis added).

[3] The appellant, Ajit Kapoor, was found guilty by a hearing committee of the Law Society of conduct unbecoming a member of the Law Society because he failed to bring "*relevant and adverse case authority*" to the attention of a judge of the Provincial Court of Saskatchewan (*Law Society of Saskatchewan v Kapoor*, 2016 SKLSS 13 (CanLII) at para 2 [*Hearing Committee Decision*]). Mr. Kapoor appeals this finding as well as the order of costs made against him by the hearing committee.

[4] For the reasons that follow, I would dismiss Mr. Kapoor's appeal.

II. BACKGROUND

[5] Mr. Kapoor is a retired member of the Law Society. He changed his status from active to inactive on June 30, 2014 and remained an inactive member until he retired in January 2016.

[6] On March 14, 2014, Mr. Kapoor appeared in the Provincial Court of Saskatchewan on behalf of a client charged with the offence of driving while disqualified. The Crown proved, as part of its case, that the accused had been driving a motor vehicle while also subject to a prohibition against driving.

[7] At the conclusion of the Crown's case, Mr. Kapoor rose to request a non-suit. He advanced several arguments, one of which was premised on the failure by the Crown to prove that the accused was not enrolled in an alcohol ignition interlock program. Mr. Kapoor's submission was that the proof of non-enrolment in such program was an essential element of the offence, and therefore the accused should be acquitted. In support of his argument on this point, Mr. Kapoor referred to *R c Larivière*, 38 CR (5th) 130 (Que CA) [*Larivière*] and *R v Liptak*, 2009 ABPC 342, 481 AR 116 [*Liptak*]. Mr. Kapoor drew these cases from Alan D. Gold, *The Practitioner's Criminal Code*, 13th ed (Markham: LexisNexis, 2012) [*Gold's 2012 Annotated Code*]. Mr. Kapoor neglected to mention *R v Whatmore*, 2011 ABPC 320, 526 AR 124 [*Whatmore*], which is referred to in *Gold's 2012 Annotated Code*, as "contra" the position for which Mr. Kapoor advocated.

[8] The trial judge ruled against Mr. Kapoor on the point at issue, but before the trial ended, he became aware of the *Whatmore* decision.

[9] Mr. Kapoor was ultimately charged with conduct unbecoming a lawyer. The formal complaint alleges that he:

> 1. Failed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application on March 18, 2014.

[10] The complaint against Mr. Kapoor proceeded to a hearing pursuant to the discipline process provided for in *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 [*Act*].

[11] The hearing committee found as fact that the decision by Mr. Kapoor not to bring *Whatmore* to the attention of the trial judge was deliberate. It then went on to hold that: (1) the specific obligation to disclose binding authority on point does not subsume the more general duty of candour; and (2) in the circumstances of this case, Mr. Kapoor's failure to bring the *Whatmore* case to the trial judge's attention constituted conduct unbecoming.

[12] The parties agreed that, based on these findings, a reprimand was an appropriate penalty. The hearing committee ordered Mr. Kapoor to pay $6,192.50 in costs.

III. ISSUES

[13] Mr. Kapoor frames his appeal with reference to three issues. I would restate these issues slightly as follows:

(a) Was it unreasonable for the hearing committee to conclude that the failure to bring relevant and adverse but *non-binding* case law to the attention of a court or tribunal can constitute conduct unbecoming a lawyer?

(b) Was it unreasonable for the hearing committee to conclude that Mr. Kapoor's failure to bring the *Whatmore* decision to the trial judge's attention was a breach of his duty of candour?

(c) Was the hearing committee's costs award unreasonable?

IV. ANALYSIS

A. Was it unreasonable for the hearing committee to conclude that the failure to bring relevant and adverse but *non-binding* case law to the attention of a court or tribunal can constitute conduct unbecoming a lawyer?

[14] Two specific provisions of the *Code*, found in the chapter titled "Relationship to the Administration of Justice", lie at the heart of this appeal:

> **Advocacy**
>
> **4.01 (1)** When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
>
> **4.01 (2)** When acting as an advocate, a lawyer must not:
>
> (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
>
> (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

> (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
>
> (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
>
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
>
> (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
>
> (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;
>
> (h) make suggestions to a witness recklessly or knowing them to be false;
>
> (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
>
> (j) improperly dissuade a witness from giving evidence or advise a witness to be absent;
>
> (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
>
> (l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;
>
> (m) needlessly abuse, hector or harass a witness;
>
> (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;
>
> (o) needlessly inconvenience a witness; or
>
> (p) appear before a court or tribunal while under the influence of alcohol or a drug.

[15] Since the conduct at issue in this appeal, the *Code* has undergone a significant revision, but none of the changes affect the substance of the obligations found in s. 4.01 quoted above.

[16] The determination of the first issue is not dependant on the specifics of Mr. Kapoor's conduct. Instead, it turns on whether, as a general proposition, a "failure to bring relevant and adverse *but non-binding* case law to the attention of a court is capable of constituting conduct

unbecoming, particularly but not entirely in light of the specific wording of rule 4.01(2)(i) of the [*Code*]" (*Hearing Committee Decision* at para 29, emphasis in original).

[17] The hearing committee answered this question affirmatively. It found that, in order to ground a valid complaint, it was necessary to show that the member's conduct violated s. 4.01(1). The hearing committee held that this may occur, even if there is no violation of the more specific, and limited, prohibition found in s. 4.01(2)(i). The point of principle made by the hearing committee is that these two *Code* provisions embody separate, even if at times overlapping or related, obligations.

[18] Before turning to the further specifics of the hearing committee's decision, it is important to place in context this Court's role in reviewing decisions of the hearing committee. The Legislature has entrusted to the Law Society, through the *Act*, the duty to govern the legal profession in the public interest. Decisions respecting professional discipline are left to the committees of the Law Society. A lawyer or the Law Society has a right to appeal to this Court. However, the lens through which this Court conducts its review is limited. The standard of review—absent issues of procedural fairness, jurisdiction and certain questions of law that do not arise on this appeal—is reasonableness. The point was succinctly made by Whitmore J.A. in *Peet v Law Society of Saskatchewan*, 2019 SKCA 49 [*Peet*]:

> [16] The appropriate standard of review to be applied to decisions of the Committee is reasonableness: *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII) at paras 38–41, [2014] 6 WWR 643 [*Merchant Law*]. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII) at para 59, [2009] 1 SCR 339, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) at para 47, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court explained the application of the reasonableness standard:
>
> > [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[19] See also *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 43, [2018] 1 SCR 772 [*Groia*].

[20] Turning then to the decision under appeal, the hearing committee began its analysis by quoting from the following extract from the preface to the *Code* which, it stated, "provides some assistance in interpreting and applying it in the context of the discipline process" (*Hearing Committee Decision* at para 33):

> The standard of acceptable ethical conduct is enforced by the Law Society's discipline process which holds lawyers accountable for conduct found to be "conduct unbecoming" defined by the Act as:
>
> > […] any act or conduct, whether or not disgraceful or dishonourable, that:
> >
> > (i) is inimical to the best interests of the public or the members; or
> >
> > (ii) tends to harm the standing of the legal profession generally;
>
> The Benchers of the Law Society of Saskatchewan are responsible for determining what constitutes conduct unbecoming in any circumstance. In this Code, the Benchers attempt to define and illustrate appropriate standards of conduct expected in a lawyer's professional relationship with clients, the profession and the justice system. It is impossible for any code to prescriptively or exhaustively establish what might constitute conduct unbecoming. That determination is left to the Benchers who are guided by the legislation, this Code, other decisions of the Benchers of the Law Society of Saskatchewan and other Law Societies, the jurisprudential authority of the Courts and the legitimate expectations of the public.
>
> The rules and principles in this Code are therefore intended to prohibit some conduct, and to otherwise provide general guidance for these purposes. This Code, and its interpretation, is intended to provide a framework within which the lawyer may fulfill the core duties of integrity, competency and loyalty.
>
> This Code should not be construed as all-encompassing or as limiting other duties imperative to the protection of the public, and the public interest generally. Instead, this Code is intended to articulate those immutable ethical principles that assure a philosophy where the legal profession is dedicated to the high standards of ethical behaviour that are required, and must evolve over time in a changing society.
>
> This preface is part of this Code.

[21] The hearing committee continued:

> [34] In our view, the Code should not be interpreted strictly, unless the Formal Complaint itself uses a specific provision of the Code in describing the charge. So, for example, if the charge in this case had stated that the Member's conduct contravened rule 4.01(2)(i) of the Code, the elements of that rule would have to be proved unless the charge were amended. But, that is not the charge set out in the complaint.
>
> [35] Similarly, the fact a Code provision deals with related or similar subject matter does not affect the validity of a complaint related to conduct not specifically addressed in that provision.

[22] Mr. Kapoor argues that the *Hearing Committee Decision* evinces an error in principle. The proposition Mr. Kapoor advances is that, because the benchers have enacted a specific requirement relating to the submission of legal authorities, a lawyer cannot be found to commit a breach of a more general duty, such as the duty of candour, in relation to the submission of such authorities. He expresses this idea in several different ways. In his factum, Mr. Kapoor argues that the "Rules and their attendant commentaries set out the scope of what will be considered conduct unbecoming and by extension what is not". More subtly, he argues that the hearing committee "ought to have considered all of the rule when deciding the scope of the duty of candour". These arguments reduce to the proposition that s. 4.01(2)(i) defines exhaustively when an advocate is obligated to advise a court or tribunal of unhelpful authority.

[23] It was not unreasonable for the hearing committee to reject this argument. In this case, the complaint against Mr. Kapoor was rooted in conduct described in s. 4.01(1), not s. 4.01(2). The prohibition on a lawyer deliberately refraining from informing a tribunal of binding authority found in s. 4.01(2)(i) is but one of 16 specific proscriptions found in s. 4.01(2). Nothing on the face of s. 4.01(2) *expressly* states that these specific proscriptions occupy a particular field or subject matter to the exclusion of other the duties described in the *Code*. Mr. Kapoor is left to argue that this conclusion should be drawn by *implication*.

[24] Mr. Kapoor pointed to no other provision in the *Code*, including its commentary, that would suggest that the specific proscriptions contained in s. 4.01(2) (acts and omissions that a lawyer, when acting as an advocate, "must not" do or omit to do) create an occupied field where more general duties are not still at play. In contrast, the preface to the *Code*—specifically said to form part of the *Code*—was reasonably relied upon by the hearing committee as providing "some assistance in interpreting and applying it in the context of the discipline process" (*Hearing Committee Decision* at para 33). The preface states that "[i]t is impossible for any code to prescriptively or exhaustively establish what might constitute conduct unbecoming". Instead, the preface reminds that this determination is left to the Benchers, "who are *guided* by the legislation, this Code" (emphasis added) and other matters.

[25] Mr. Kapoor points to an earlier version of the *Code* as suggesting that, as currently worded, the *Code* does not require disclosure of non-binding authority. Specifically, at several points in the past, the equivalent provision to s. 4.01(2)(l) has been expressed in language referring to a member's obligation not to deliberately refrain from informing courts or tribunals of "any *pertinent adverse* authority", rather than "binding" authority (*Code of Professional Conduct* (Regina: The Law Society of Saskatchewan, 1991) at 31, emphasis added). The argument is that the evolution to the present language evinces an intention to fully define an advocate's duty to cite authority. However, the historical record contains no suggestion that the change in wording of this specific proscription was intended to operate to limit any other canon of conduct.

[26] Mr. Kapoor also referred to the following passage found in *Stewart v Canadian Broadcasting Corporation* (1997), 150 DLR (4th) 24 at 107 (Ont Ct J (Gen Div)) [*Stewart*] as supporting his argument:

> It is common ground that the Professional Conduct Handbook contains various rules and commentaries which have been adopted by the Law Society. Both have been adopted by Convocation pursuant to its power to regulate conduct and its discretion to determine the extent of regulation and the means of doing so. The commentaries therefore can be more than illustrations of the ways in which a rule should operate. They can expand upon Convocation's intention in enacting a particular rule, or upon its scope. However, it is important to note that not all do. Some commentaries are described as "guiding principles" about a particular rule. Some are expressed in mandatory terms. Others are directory, advisory or definitional. The spectrum of effects which Convocation has chosen to give the rules and commentaries is an important feature of them. In my opinion, this demonstrates that Convocation did not intend to impose standards of conduct in all areas of professional life. It has refrained from doing so even in some conduct areas which it has chosen to address.

[27] *Stewart* involved completely different issues than the present appeal, dealing with a suit by a person convicted of a crime against the Canadian Broadcasting Corporation about a broadcast concerning his case, as well as his former counsel who was involved in the production. The lawyer argued that there was no ethical rule making it improper for him to participate in the broadcast. Nothing in the passage Mr. Kapoor points to assists in his argument that s. 4.01(2) occupies the field of a counsel's duties. Indeed, and somewhat ironically, immediately before the passage quoted by Mr. Kapoor, MacDonald J. makes the point that "the rules and commentaries address only specific issues and are not all inclusive" (*Stewart* at 106).

[28] Also not helpful to Mr. Kapoor is the decision of the hearing panel in *Law Society of Upper Canada v Birdi*, 2010 ONLSHP 106 [*Birdi*]. Paragraph 77 of *Birdi*, to which Mr. Kapoor points, simply stands for the proposition that professional misconduct can be found when a member commits conduct that is contrary to commentary to a particular rule of conduct.

[29] In the result, it was not unreasonable for the hearing committee to conclude that a failure to bring relevant and adverse but *non-binding* case law to the attention of a court or tribunal is capable of being a breach of the duty of candour and fairness and thereby constitute conduct unbecoming a lawyer.

B. Was it unreasonable for the hearing committee to conclude that Mr. Kapoor's failure to bring the *Whatmore* decision to the trial judge's attention was a breach of his duty of candour?

[30] The second issue, and the one the hearing committee described as being the more "central" one, is "whether, *in the circumstances of this case*, [Mr. Kapoor's] failure to bring the *Whatmore* case to the trial judge's attention constituted conduct unbecoming" (*Hearing Committee Decision* at para 36, emphasis added).

[31] The evidence before the hearing committee consisted of the transcript and audio recording of the trial, and the extract from *Gold's 2012 Annotated Code*.

[32] Since the reasons for a decision are properly read and understood in the context of the evidence on which it is based, the details as to what occurred in the trial are pivotal to the decision of the hearing committee and the issues now alive in this Court.

[33] After the Crown closed its case, Mr. Kapoor began his argument on his non-suit application. The point of Mr. Kapoor's submissions was that it is an essential element of the charge of operating a motor vehicle while disqualified that an accused was not registered in an alcohol ignition interlock device program, which would allow the accused to drive the vehicle while otherwise disqualified. Mr. Kapoor began by referring to *Larivière*, which he said supported his position. The trial judge expressed surprise that the law was as advanced by Mr. Kapoor and stated that he was "not bound by any other [province's court decisions], obviously, but I'll certainly listen to argument".

[34] Mr. Kapoor insisted that he was "not, Your Honour, misleading you". Mr. Kapoor then offered to read an extract from *Gold's 2012 Annotated Code*. The trial judge stated that he was "not going to take a cite out of the Code. I'll go read the case". However, Mr. Kapoor pressed on and read to the trial judge the following passage from *Gold's 2012 Annotated Code* (at 438):

> On a charge of operating a motor vehicle in Canada while disqualified from so doing, contrary to s. 259(4) of the *Criminal Code*, the Crown was required by the terms of s. 259(4) to prove, as elements of the offence, that the accused was not "registered in an alcohol ignition interlock device program established under the law of the province in which the [accused] resides" and, if the accused was so registered, that the accused was not in compliance with the conditions of that program.

[35] Although not referred to by Mr. Kapoor, this passage is supported by a footnote, which states as follows (*Gold's 2012 Annotated Code* at 438):

> *R. v. Lariviere* (2000), 38 C.R. (5th) 130, [2000] Q.J. No. 3086 (Que. C.A.); *R. v. Liptak*, [2009] A.J. No. 1271 (Alta. Prov. Ct.); *Contra R. v. Whatmore*, 2011 ABPC 320, [2011] A.J. No. 1147 (Alta. Prov. Ct.) (onus on accused to prove registration and compliance with interlock program).

[36] The trial judge reiterated that he was "going to have to look at the case", as he had "never heard that [i.e., the absence of enrolment in an interlock program] cited as an element of the offence" and he was "quite surprised by" the proposition.

[37] At this point, the trial judge asked Mr. Kapoor if he had anything further to add. Mr. Kapoor stated that he had "a little bit" more to say and gave the trial judge the citation to *Liptak*, which Mr. Kapoor stated stood for the "same proposition" as *Larivière*. Mr. Kapoor then emphasized his argument by stating that he was not "making it up".

[38] Following his reference to *Liptak*, Mr. Kapoor moved on to make argument on a completely different ground, unrelated to the submissions rooted in the reference to *Larivière* and *Liptak*. After concluding his submissions on this additional ground, Mr. Kapoor closed his argument on his non-suit application.

[39] The trial judge then invited submissions from Crown counsel. Mr. Kapoor interjected at several points in the Crown argument to reiterate his submission. The trial judge made statements to the effect that he had decided to reject Mr. Kapoor's argument, but then dialogue continued with Mr. Kapoor suggesting that he understood the trial judge remained at least somewhat open to persuasion on this point. The trial judge said he was "going to read" *Larivière* and *Liptak*, but that

he was "telling" Mr. Kapoor that if he had "a case for me that it's [*sic*] been followed in Saskatchewan, or that it's been approved in Saskatchewan I'd listen to that". The trial judge stated that the argument "just absolutely does not make sense to me", but also said "[i]f I'm wrong in law on that conclusion, then I stand to be corrected".

[40] Ultimately, the trial judge appeared to reject Mr. Kapoor's submission on this point, notwithstanding what Mr. Kapoor told him about *Larivière* and *Liptak*:

> -- I cannot accept it as a -- and I'm not bound by the Quebec Court of Appeal and certainly not by the Alberta Provincial Court. So unless I can be persuaded that this is the law in Saskatchewan, which has never been raised in any decision, case before me in 14 years by the Crown, and that is from 2000, in the past 14 years, or by the defence, that it's a constituent element to be proven, I'm never heard of it, other than today.
>
> Now, it may be that that's my fault, but you would -- one would imagine, if it's good law in Saskatchewan, that it would, of course, be cited regularly and that it would be approved by our courts. And it would likely go up to the Court of Appeal to be -- to be endorsed and -- and to be the law in Saskatchewan. But as I say, it's never been so cited to me, I've never heard of that as being a requirement of the offence required to be proved.
>
> If that's the Quebec Court of Appeal's determination, again I haven't read the entire decision, I cannot agree with that as a general proposition of law, on this particular charge. For the reasons that I've stated. So that's my view. I don't accept that that is an element of the offence that is required to be proven by the Crown.
>
> So that motion for nonsuit is dismissed. It -- the elements of the offence have been established in evidence. That, of course, does not preclude evidence being raised with respect to the offence itself. That can be done. Or on all of the evidence and argument being made as to whether or not reasonable doubt exists with respect to the elements being proven. That is a different issue.

[41] Even following this, Mr. Kapoor continued to press his point, alluding to the possibility of an appeal and inviting the trial judge to "give [him] a chance to look at the other position". However, the trial judge refused to reconsider his position and insisted that Mr. Kapoor proceed with the trial. A brief adjournment followed to allow Mr. Kapoor to determine whether to call evidence.

[42] During the break, the trial judge asked to see Mr. Kapoor's copy of *Gold's 2012 Annotated Code*. When the trial resumed, the trial judge confronted Mr. Kapoor about the failure to draw *Whatmore* to his attention. In the exchange that followed, Mr. Kapoor claimed that he "honestly intended to bring this contra up" but that he "could not say anything".

[43] After a review of the events of the trial, the hearing committee began its analysis by rejecting the suggestion made by Mr. Kapoor to the trial judge that he had intended to refer to *Whatmore*, but the trial judge's interjections prevented this from occurring. Specifically, the hearing committee found, as a fact, that the decision by Mr. Kapoor not to bring *Whatmore* to the attention of the trial judge was deliberate, stating as follows:

> [28] The facts central to the determination of the complaint are not in issue. [Mr. Kapoor] acknowledged he was aware of the *Whatmore* decision, which was adverse to the position and the case authority he was citing. While he may have suggested to the trial judge that his failure to mention *Whatmore* was innocent, this position is not tenable when considering the whole of the discussion recorded in the transcript, and counsel for [Mr. Kapoor] did not advance this in the Hearing.

[44] No challenge to this finding of fact is mounted in this Court.

[45] Having found Mr. Kapoor's decision to omit reference to *Whatmore* to be intentional, the hearing committee responded to arguments made to it by Mr. Kapoor as follows:

> [40] Counsel for [Mr. Kapoor] expressed concern that a finding of conduct unbecoming here would cast too wide a net and necessitate discipline proceedings in multiple cases in the future. We acknowledge the validity of a cautionary note and the importance of striking an appropriate balance. That balance must be found by criminal defence counsel, by judges hearing criminal cases and by the Law Society when it considers a complaint, including in the initial stages of a complaint. The balance may be difficult to find at times. However, we do not see this is as one of those times. There are two factors present here that will separate this case from many others.
>
> [41] First, the authorities, for and against, were relevant to an issue [Mr. Kapoor] placed before the court. Neither the trial judge nor opposing counsel would reasonably have anticipated a need to address the issue and prepare accordingly.
>
> [42] Secondly, the trial judge clearly demonstrated to [Mr. Kapoor] that he wanted more input in relation to the position [Mr. Kapoor] was advancing and the two cases supporting it. It is difficult to understand how [Mr. Kapoor] could not conclude the court would be keenly interested in knowing of the contrary authority of which [Mr. Kapoor] was clearly aware.
>
> …
>
> [46] While a failure to bring an adverse case to the court's attention will not in all circumstances give rise to discipline, we find [Mr. Kapoor's] failure to bring the *Whatmore* decision to the court's attention was, in the limited circumstances specific to this matter, conduct unbecoming a lawyer and we find the Formal Complaint to be well founded.

[46] Mr. Kapoor asserts that this reasoning discloses several errors. Before turning to the specifics of these alleged errors, it is worth repeating that the standard against which these alleged errors is reviewed in this Court remains one of reasonableness, as summarized in *Peet*.

[47] Mr. Kapoor argued in his factum that he was not obligated to bring *Whatmore* forward because the trial judge "made it clear that he was not persuaded to follow *Larivière* unless it had been followed in Saskatchewan" and "the transcript reveals that [Mr. Kapoor] reasonably believed that the trial judge had no interest in learning about cases from other jurisdictions". This, it is said, rendered *Whatmore* "irrelevant" to the matter. Respectfully, I cannot accept either of the planks of this argument. More importantly, the hearing committee also did not accept these arguments when they were put to it.

[48] I agree with Mr. Kapoor that the trial judge made it clear he would not follow *Larivière* unless it had been followed in Saskatchewan. However, this does not mean that it was not open to the hearing committee to find that he was nonetheless obligated to cite *Whatmore* for that reason.

[49] By my count, while conveying various degrees of scepticism, the trial judge expressed interest at specifically looking at the case authority referenced by Mr. Kapoor on at least five occasions. Mr. Kapoor's attempts to persuade the trial judge to rule contrary to the trial judge's own expressed doubts confirm and indeed heighten the relevance of *Whatmore* to the issue Mr. Kapoor placed before the court. Mr. Kapoor had initially only referred to *Larivière after* he appeared to have concluded his submissions, but the trial judge asked if he had anything more to add. Mr. Kapoor then introduced *Liptak* but made no reference to *Whatmore*. The hearing committee attached importance to this timing, emphasizing that Mr. Kapoor "again did not mention the *Whatmore* decision" (*Hearing Committee Decision* at para 22). To underscore that he was advocating with the weight of authority behind him, after Mr. Kapoor referenced *Liptak*, Mr. Kapoor stated to the trial judge that he was not "making it up".

[50] In light of all of this, it was reasonable for the hearing committee to have held the trial judge would have been interested in knowing of the contrary authority of which Mr. Kapoor was found to be clearly aware. Mr. Kapoor had cited *Liptak*, a decision of the Alberta Provincial Court. He was also aware that *Whatmore*, a later decision of the same court, reached the opposite conclusion. Mr. Kapoor knew the trial judge was not only struggling with what he considered to be a very surprising decision in *Larivière*, but interested in *Liptak*, as he asked for the name of the judge who decided that case. In those circumstances, it was open to the committee to find that the trial judge would be very much interested in *Whatmore* as a result of Mr. Kapoor's unexpected

representations, regardless of the fact the trial judge had said he would not change his mind. It was also open to the hearing committee to find that Mr. Kapoor would have known of the trial judge's interest. As a consequence, it was reasonable for the hearing committee to conclude Mr. Kapoor's duty of candour was engaged.

[51] Mr. Kapoor argues that the duty of candour and fairness of defence counsel "does not require counsel to divulge to the court all knowledge they possess about the case". However, the hearing committee did *not* require Mr. Kapoor to divulge all knowledge he possessed about the case to the trial judge. Instead, the hearing committee found very specific facts that engaged the duty of candour in the circumstances of this case.

[52] Mr. Kapoor says that it is open to counsel to make the "tactical choice" not to provide a judge with all the cases that have judicially considered a particular point, regardless of the volume of cases. Respectfully, Mr. Kapoor sets up a straw man. On the evidence before the hearing committee, Mr. Kapoor did not have a large volume of cases. Rather, he had three cases from two provinces, one of which (as found by the hearing committee) he deliberately withheld from the trial judge. However, the hearing committee did not treat the volume of cases as inciting the duty of candour in this case. Rather, again, the hearing committee found the very specific facts that "separate this case from many others" (*Hearing Committee Decision* at para 40). In this regard, the reasons of the hearing committee must also be read as a whole. The hearing committee rejected as "not tenable" (at para 28) the suggestion that Mr. Kapoor's decision to not refer the trial judge to *Whatmore* was innocent. I would note as well that, in the circumstances of this case, the hearing committee could reasonably have found that once Mr. Kapoor chose to cite to *Liptak,* he also, implicitly at least, held the case out as representing the law in Alberta as interpreted by the Provincial Court of Alberta. This representation was untrue and, according to the facts as found by the hearing committee, *known* by him to be untrue. It may not have amounted to misconduct for Mr. Kapoor to have simply referred the trial judge to *Larivière* (this issue was *not* before the hearing committee), however, I cannot accept that it was an ethical tactical choice for Mr. Kapoor to have, in substance, held out *Liptak* as the law of Alberta, when he was aware that it is not.

[53] Finally, Mr. Kapoor points to *Groia* as supporting a more limited approach to the interpretation of professional responsibilities than that adopted by the hearing committee in this case. He specifically emphasizes paragraph 7 of *Groia*, wherein Moldaver J. introduced his analysis by stating that "Mr. Groia's allegations were made in good faith and they were reasonably based. As such, the allegations themselves could not reasonably support a finding of professional misconduct". The proposition is that, here, Mr. Kapoor acted both reasonably and in good faith.

[54] *Groia* was decided after the *Hearing Committee Decision*, and therefore was not directly considered by the hearing committee. Mr. Kapoor did not refer to *Groia* in his factum, and only limited representations were made with respect to the implications of the decision to the outcome of this case. I would, however, make two points respecting Mr. Kapoor's reliance on *Groia*.

[55] First, Mr. Kapoor points to a single sentence in paragraph 7 of *Groia*. However, *Groia* suggests that an examination into issues of good faith and reasonableness is not the end of an inquiry into professional misconduct. The next sentence, at the beginning of paragraph 8, places paragraph 7 in context: "*Nor could the other contextual facts in this case reasonably support a finding of professional misconduct* against Mr. Groia on the basis of incivility" (emphasis added). Given that the allegations were made in good faith and with a reasonable basis, the bare fact of the allegations—"the allegations themselves"—did not amount to professional misconduct. However, the appeal board also considered the full context of Mr. Groia's conduct to determine if it, as a whole, amounted to incivility. This aspect of the framework is outlined later in *Groia* in the following way:

> [82] Two points about evaluating what the lawyer said warrant comment. First, *I do not read the Appeal Panel's reasons as characterizing allegations made in bad faith or without a reasonable basis as a stand-alone "test" for professional misconduct.* When the reasons are read as a whole, it is apparent that whether or not allegations of prosecutorial misconduct are made in *bad faith or without a reasonable basis is simply one piece of the "fundamentally contextual and fact specific" analysis* for determining whether a lawyer's behaviour amounts to professional misconduct: A.P. reasons, at paras. 7 and 232.
>
> [83] To be clear, in some circumstances, bad faith allegations or allegations that lack a reasonable basis may, on their own, warrant a finding of professional misconduct. *However, a law society disciplinary tribunal must always take into account the full panoply of contextual factors particular to an individual case before making that determination.* A contrary interpretation would render redundant any assessment of the frequency or manner in which the allegations were made and the presiding judge's reaction — factors which the Appeal Panel considered relevant to the overall inquiry.
>
> (Emphasis added)

[56] Second, and in any event, findings made by the hearing committee reflect that it did not believe Mr. Kapoor acted reasonably. This is most evident in connection with its conclusion that "it is difficult to understand how [Mr. Kapoor] could not conclude the court would be keenly interested in knowing of the contrary authority of which [Mr. Kapoor] was clearly aware" (at para 42). The hearing committee made no overt finding that Mr. Kapoor did not act in good faith, although it did describe as "not tenable" the suggestion that "his failure to mention *Whatmore* was innocent" (at para 28). From all of this, I find no basis to set aside the *Hearing Committee Decision* on the ground that Mr. Kapoor's actions were reasonable and done in good faith.

[57] Based on the foregoing, in my respectful view, the hearing committee did not act unreasonably when it concluded, on the facts of this case, that Mr. Kapoor breached his duty of candour and thereby committed conduct unbecoming a lawyer when he failed to draw the *Whatmore* decision to the attention of the trial judge.

C. Was the hearing committee's costs award unreasonable?

[58] The *Act* contemplates that the hearing committee may make an order fixing costs at s. 53(3)(a)(iii)(v).

[59] The purpose of costs in a professional discipline context is "not to indemnify the opposing party but for the sanctioned member to bear the costs of disciplinary proceedings as an aspect of the burden of being a member… and not to visit those expenses on the collective membership" (*Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37 at para 44).

[60] The hearing committee ordered Mr. Kapoor to pay $6,192.50 in costs. $4,560.00 of this amount represented the time spent by counsel for the conduct investigation committee who prosecuted the charge against Mr. Kapoor (22.8 hours at $200.00/hour). In his factum, Mr. Kapoor does not challenge the time that was taken to present the case against him but argues that the hourly rate is "excessive".

[61] Mr. Kapoor's arguments in this Court echo those made before the hearing committee. The hearing committee answered those arguments, reasoning as follows:

> [64] [Section] 53(3)(a)(v) of *The Legal Profession Act, 1990* provides authority for the Hearing Committee to require a Member found guilty of conduct unbecoming a lawyer to pay "the costs of the inquiry, including the costs of the Conduct Investigation Committee and Hearing Committee" as well as "the costs of the Society for counsel during the inquiry" and "all other costs related to the inquiry". However, the award of costs, including the costs attributed to counsel for the Investigation Committee, must be reasonable: see *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (CanLII).
>
> [65] In our view, neither the hourly rate for Investigation Committee counsel nor the total number of hours attributed to the complaint were unreasonable or excessive. This hourly rate has been applied in previous discipline matters. See for example *Law Society of Saskatchewan v. Phillips*, 2015 SKLSS 2 (CanLII).

[62] This decision is reasonable. In *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at para 152, [2014] 6 WWR 643 [*Merchant*], Ottenbreit J.A. observed that "[t]here is no prohibition in the *Act* against the Law Society properly claiming costs associated with in-house counsel. There is a cost to the resources which the Law Society allocates to the prosecution of the complainant". Although in *Merchant* the Court ordered that the matter of costs be referred for an assessment, the challenge was to the reasonableness of the amount of time spent. Here, the only question is one of the appropriate hourly rate. Mr. Kapoor has provided no reason why an assessing officer is in a better position than the hearing committee to determine what hourly rate is reasonable in the circumstances.

[63] I observe as well that the suggestion by Mr. Kapoor to send this issue to an assessment is effectively an invitation for this Court to mandate in all cases that the parties engage in a process that itself will be fraught with costs. Given the amounts involved, it was therefore sensible for the hearing committee to determine this issue.

[64] Mr. Kapoor bears the burden of convincing the Court that the rate of $200.00 is unreasonable. He has pointed to nothing that would justify this conclusion. In contrast, there are indicators that the rate allowed by the hearing committee was reasonable. The case against Mr. Kapoor was presented by relatively senior counsel. This Court is not unfamiliar with rates charged by lawyers in private practice. There is much merit to the Law Society's submission that if the prosecution of the complaint had been handled by external counsel, the costs could have increased dramatically, perhaps doubling, if not escalating them even more. While this may not in

all cases determine the issue, it validates the implicit conclusion by the hearing committee that the Law Society was not deriving a profit by claiming costs of its employed counsel at an hourly rate of $200.00.

[65] In all these circumstances, I would decline to interfere with hearing committee's award of costs.

V. CONCLUSION

[66] For the reasons given, I would dismiss Mr. Kapoor's appeal, with costs in favour of the Law Society in the usual way.

"Leurer J.A."
Leurer J.A.

I concur. "Richards C.J.S."
Richards C.J.S.

I concur. "Richards C.J.S."
for Barrington-Foote J.A. as per authorization