Court of Appeal for Saskatchewan
Docket: CACV3924

Citation: ***Xiao-Phillips v Law Society of Saskatchewan*, 2024 SKCA 44**
Date: 2024-04-25

Between:

Nathan Xiao-Phillips

Appellant

And

Law Society of Saskatchewan

Respondent

Before:	Leurer C.J.S., Jackson and McCreary JJ.A.
Disposition:	Appeal dismissed
Written reasons by: In concurrence:	The Honourable Chief Justice Leurer The Honourable Madam Justice Jackson The Honourable Madam Justice McCreary
On appeal from: Appeal heard:	Law Society of Saskatchewan Hearing Committee, Regina September 14, 2023
Counsel:	Merrilee Rasmussen, K.C. for the Appellant Sean Sinclair for the Respondent

Leurer C.J.S.

I. INTRODUCTION

[1] After a hearing, the appellant, Nathan Xiao-Phillips, was found to have committed conduct unbecoming a lawyer: *Law Society of Saskatchewan v Phillips* (18 October 2021) Regina (Sask LSS) [*Conduct Decision*]. For this, he received a 71-day suspension, a reprimand and was ordered to pay costs in the amount of $15,000: *Law Society of Saskatchewan v Xiao-Phillips*, 2022 SKLSS 3 [*Penalty Decision*].

[2] Mr. Xiao-Phillips appeals from both the *Conduct Decision* and the *Penalty Decision*, pursuant to the grant of leave to appeal given under s. 56(1)(a) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 [*Legal Profession Act*].

[3] I have concluded that Mr. Xiao-Phillips's appeal must be dismissed. My reasons follow.

II. BACKGROUND

A. The complaint and merits hearing

[4] Mr. Xiao-Phillips was admitted as a member of the Law Society of Saskatchewan [Law Society] in 2014. In 2018, a hearing committee of the Law Society [Hearing Committee] was appointed to hear a multi-count complaint that he was guilty of conduct unbecoming a lawyer in connection with several proceedings before the courts of this province and the Canada Industrial Relations Board [CIRB]. By the time of the hearing, which began in 2021, the complaint had been amended to allege three counts of conduct unbecoming in connection with ten different proceedings.

[5] *The Legal Profession Act* defines conduct unbecoming in a way that encompasses what are, in some other jurisdictions, the separate concepts of professional misconduct and professional incompetence. In this regard, s. 2(d) states as follows:

> 2(d) "conduct unbecoming" means 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;
>
> and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii)[.]

[6] In this case, the first count alleged that Mr. Xiao-Phillips had advanced "frivolous and/or vexatious arguments and positions as demonstrated by" nine decisions, which were then listed. They are as follows:

(a) *Cowessess First Nation #73 v Saskatchewan Government and General Employees' Union*, 2015 CIRB 801 [*Cowessess No. 1*];

(b) *Saskatchewan Government and General Employees' Union v Cowessess First Nation #73*, 2017 CIRB LD 3801 [*Cowessess No. 2*];

(c) *Cowessess Indian Band No. 73 v Brabant and Company Law Office*, 2015 SKQB 412 [*Cowessess No. 3*];

(d) *Cowessess First Nation No. 73 v Brabant and Company Law Office*, 2016 SKCA 35, 476 Sask R 171 [*Cowessess No. 4*];

(e) *Phillips Legal Professional Corporation v Fond Du Lac First Nation*, 2016 SKPC 94 [*Fond Du Lac*];

(f) *Lunn v Phillips*, 2016 SKPC 93 [*Lunn*];

(g) *Sun Country Regional Health Authority (Sun Country Health Region) v Mamchur* (9 May 2017) Regina, QBG 1366 of 2015 (Sask QB) [*Sun Country*];

(h) *Saskatchewan Government and General Employees' Union v Cowessess First Nation #73*, 2015 CIRB 762 [*Cowessess No. 5*]; and

(i) *Gordon Estate v Regina Qu'Appelle Regional Health Authority* (4 November 2016) Regina, QBG 2355 of 2016 (Sask QB) [*Gordon Estate*].

[7] The second count alleged that Mr. Xiao-Phillips had failed to "provide a quality of service generally expected of a competent lawyer in a like situation as demonstrated by" four decisions, two of which overlapped with Count 1, and which were listed. They are as follows:

(a) *Saskatchewan Government and General Employees' Union v Cowessess First Nation #73* (28 January 2016) Regina, 31414-C (CIRB) [*Cowessess No. 6*];

(b) *Saskatchewan Government and General Employees' Union v Cowessess First Nation #73*, 2016 CIRB 812 [*Cowessess No. 7*];

(c) *Fond Du Lac*; and

(d) *Sun Country*.

[8] The third count alleged that Mr. Xiao-Phillips had committed conduct unbecoming by providing an undertaking to the court that he did not, and could not, fulfil in connection with the *Fond Du Lac* proceeding.

[9] The Law Society's Conduct Investigation Committee [CIC] and Mr. Xiao-Phillips followed an agreed-upon process at the hearing into the complaint. The case for the CIC in chief consisted of the eleven decisions referred to in the complaint. Mr. Xiao-Phillips filed an affidavit in response, with exhibits. Mr. Xiao-Phillips was then cross-examined by counsel for the CIC and re-examined by his own counsel. There were no other witnesses at the hearing. The hearing occurred over three days. The Hearing Committee reserved its decision.

B. The *Conduct Decision*

[10] As a bottom line, the Hearing Committee found in favour of the CIC on all matters but two. More specifically, it dismissed Count 3, that is the allegation that Mr. Xiao-Phillips had failed to fulfil the undertaking given in connection with the *Fond Du Lac* matter and Count 1(i), that is the allegation that Mr. Xiao-Phillips had advanced frivolous and/or vexatious arguments and positions in the *Gordon Estate* matter. The Hearing Committee concluded that all other parts of the complaint were made out in the evidence.

C. The *Penalty Decision*

[11] After the *Conduct Decision* was released, the parties filed a joint submission as to penalty, agreeing that an appropriate penalty was a reprimand and an award of costs in the amount of $15,000, inclusive of all fees and disbursements. Upon hearing from the parties, the Hearing Committee concluded that it could not accept the joint submission. Instead, it ordered that Mr. Xiao-Phillips receive a 71-day suspension, which had already been served, and a reprimand. It also ordered that Mr. Xiao-Phillips pay costs in the amount of $15,000.

III. ISSUES

[12] Some of Mr. Xiao-Phillips's grounds of appeal apply to more than one of the findings of conduct unbecoming made against him. I will address these before examining his arguments that are specific to the individual counts in the complaint. After addressing the issues that relate to the findings of conduct unbecoming, I will consider Mr. Xiao-Phillips's appeal against the professional discipline that it was ordered that he receive.

[13] Organized in this way, the outcome of Mr. Xiao-Phillips's appeal is determined by the answers to the following questions:

(a) Did the Hearing Committee correctly interpret Count 1?

(b) Did the Hearing Committee reverse the burden of proof?

(c) Did the Hearing Committee err in law by relying on the conclusions expressed in the decisions referred to in the complaint?

(d) Does the extensive copying by the Hearing Committee of the CIC's brief displace the presumption of the Hearing Committee's adjudicative integrity?

(e) Did the Hearing Committee apply the correct standard of proof for conduct unbecoming?

(f) Did the Hearing Committee err in its specific findings of conduct unbecoming?

(g) Was it open to the Hearing Committee to find Mr. Xiao-Phillips to have committed both Count 1 and Count 2 in the context of the same underlying facts?

(h) Did the Hearing Committee err in law by rejecting the joint penalty submission?

[14] The usual appellate standards of review apply in this appeal. This means that questions of law are subject to a correctness standard, and questions of fact and questions of mixed fact and law are reviewable for palpable and overriding error (*Merchant v Law Society of Saskatchewan*, 2022 SKCA 2 at para 29, 466 DLR (4th) 686, and *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 105, 470 DLR (4th) 328 [*Abrametz SCC*]).

IV. ANALYSIS

A. The proper interpretation of Count 1

[15] Mr. Xiao-Phillips's first argument is that the Hearing Committee erred in its interpretation of Count 1, when it found that the CIC was not required to prove that he intended to advance frivolous and vexatious arguments and positions. The question of the proper interpretation of a charge alleging that a lawyer has committed conduct unbecoming, and in particular "whether such an allegation requires proof of *mens rea*", is one of law, to be reviewed by this Court on a correctness standard (*Phillips v Law Society of Saskatchewan*, 2021 SKCA 16 at para 48, 456 DLR (4th) 469 [*Phillips 2021*]). I view this ground of appeal as being the most significant of all the grounds presented to us.

[16] Before getting into the specifics of Mr. Xiao-Phillips's submissions, I find it useful to state my understanding of the argument that he makes.

[17] In this case, it was accepted that Mr. Xiao-Phillips was counsel in the proceedings that the complaint identifies and that he had deliberately made the arguments and taken the positions that are referred to in the nine decisions indicated in Count 1. In other words, the arguments and positions were *knowingly* advanced by Mr. Xiao-Phillips. Considering this, when the Hearing Committee wrote that it was unnecessary "to determine the *intent of a member* charged with frivolous and/or vexatious arguments" (at para 28, emphasis added), I understand the Committee as concluding that it could find that Mr. Xiao-Phillips was guilty of conduct unbecoming without

necessarily having proof that he *knew* the arguments and positions he was advancing *were* frivolous or vexatious. The question to be considered under this heading is if this is a correct interpretation of Count 1 of the complaint.

[18] As I will explain, I agree with the Hearing Committee's interpretation of Count 1. The unbecoming conduct alleged is not premised on Mr. Xiao-Phillips knowing that the arguments and positions he was advancing were frivolous or vexatious. Nor is it an aspect that is necessarily inherent in the nature of the charge itself.

[19] The foundation for Mr. Xiao-Phillips's intent-related arguments largely rests on the meaning that the Hearing Committee ascribed to the words frivolous or vexatious. In this regard, it observed that the two words have "similar meanings but are not synonymous" (*Conduct Decision* at para 25). It then quoted the following definitions found in an unidentified edition of *Black's Law Dictionary* (at para 26):

> **Vexatious:** Without reasonable or probable grounds or excuse.
>
> **Vexatious proceeding:** Proceeding instituted maliciously and without probable cause.
>
> **Frivolous:** Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

[20] The Hearing Committee also referred to *Re Saskatchewan (Advanced Education)*, 2010 CanLII 28547 (Sask IPC). In that case, the Information and Privacy Commissioner for Saskatchewan defined frivolous as meaning "lacking a legal basis or legal merit; not serious; not reasonably purposeful" (at para 60, quoting from *Black's Law Dictionary*, 8th ed (St. Paul, MN: Thomson West, 2004) at 692). The Commissioner also concluded that vexatious meant "lacking a sufficient ground and serving only to annoy or harass when viewed objectively" (at para 63, quoting *Merriam-Webster's Dictionary of Law*, that was available online at the time).

[21] After a review of these authorities, the Hearing Committee made the following statements:

> [28] It is important to note that neither definition provided by the Privacy Commissioner creates a level of intent. It is not necessary to show that [Mr. Xiao-Phillips] intended to be vexatious and/or frivolous in his arguments or positions, but rather the determination in the case of vexatious is when "viewed objectively" and for frivolous "reasonably purposeful". Both definitions show that the trier of fact is looking at the

> behaviour from an objective or reasonable standard and it is not needed to determine the intent of a member charged with frivolous and/or vexatious arguments.

[22] Mr. Xiao-Phillips says that this paragraph reveals the Hearing Committee's error. More specifically, he asserts in his factum that, based on its reading of Count 1 "as not requiring intention, the Hearing Committee found that [he] had engaged in frivolous and vexatious arguments without making findings as to [his] intent". He makes what I take to be three separate submissions. The first is that a pleading or position can be found to be frivolous or vexatious only if it was accompanied by mala fides. The second is that a lawyer can only be found guilty of conduct unbecoming in connection with a pleading or position if the lawyer knew that it was improper. Third, he says that the Hearing Committee did not make the requisite findings of intent. As I will explain, I can accept none of these propositions.

[23] Mr. Xiao-Phillips supports his first argument by quoting from *Richardson v Richardson*, 2022 SKCA 142 at para 10, 84 RFL (8th) 42 [*Richardson*], and *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 at para 63 [*Harpold*]. However, these cases do not assist his position.

[24] Mr. Xiao-Phillips relies on a statement in *Richardson* that a "pleading is vexatious when it is 'commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purpose of delay or simply to annoy the defendants'". However, he fails to highlight that, in the same paragraph, Richards C.J.S. adopted the definition of a frivolous proceeding as one "where it is 'plain and obvious' or 'beyond reasonable doubt' that the claims it advances are 'groundless and cannot succeed'", referring to *Yashcheshen v Janssen Inc.*, 2022 SKCA 140 at para 20, which in turn quoted from *Siemens v Baker*, 2019 SKQB 99 at paras 23–25, [2019] 5 CTC 129. This definition does not tie vexatiousness to intent.

[25] Moreover, other decisions do not demand intent. For example, in *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49 at para 95, [2022] 8 WWR 60, this Court recognized that it is vexatious to bring a claim for an improper purpose, however it also recognized that it is not the *sine qua non* of vexatiousness. In that case, Ryan-Froslie J.A. observed that in *Barth v Saskatchewan (Social Services)*, 2021 SKCA 41, [2021] 12 WWR 460, this Court had adopted "the non-exhaustive list of factors or markers" for identifying a vexatious litigant, as set out by Henry J. in *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685 (Ont Sup Ct). Two of these

were "the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction" and "where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief". Justice Henry also stated that "vexatious actions *include* those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights" (emphasis added).

[26] Likewise, *Harpold* does not support Mr. Xiao-Phillips's argument that the use of the word "frivolous" in Count 1 "connotes an element of intention". Once again, he only quotes from part of what was said in that case. More completely, Schwann J.A. said as follows:

> [63] Determining whether a claim is frivolous, by necessity, involves an assessment of its merits and the motivation of the claimant. Evidence beyond the pleadings may be considered: *Merchant* at paras 56–57 and *Sagon* at para 18. An action is frivolous if it is groundless and lacks substance: see *Hope v Pylypow*, 2015 SKCA 26, 384 DLR (4th) 255, or *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119, 418 Sask R 96.

[27] Considering these authorities, I reject Mr. Xiao-Phillips's argument that it is inherent in an allegation that a pleading can only be frivolous or vexatious if there is mala fides on the part of the person who makes it.

[28] Mr. Xiao-Phillips's second submission, that a lawyer can only be found guilty of conduct unbecoming in connection with a pleading or position if the lawyer *knew* that it was improper, requires more scrutiny. He largely relies on *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772 [*Groia*], to advance this line of argument.

[29] I agree with Mr. Xiao-Phillips that not every lawyer who advances a frivolous or vexatious argument or position is necessarily guilty of conduct unbecoming. Similarly, a lawyer does not commit professional misconduct simply by bringing a novel action, or by making an argument that fails on its merits (see, e.g., *Groia* at para 89). However, this does not lead to the conclusion that a lawyer must *know* that they have advanced a frivolous or vexatious argument or position to be found to have acted in a way that is unbecoming a lawyer.

[30] In *Groia*, the allegation of professional misconduct was grounded in the contention that a lawyer had challenged the professional integrity of opposing counsel while representing a client at a hearing. The Law Society of Upper Canada's appeal panel had proceeded on the basis that

"allegations that are *either* made in bad faith *or* without a reasonable basis amount to professional misconduct" (at para 81, emphasis in original). The Supreme Court upheld this approach, based on an understanding that the appeal panel had not characterized "allegations made in bad faith or without a reasonable basis as a stand-alone 'test' for professional misconduct". Instead, it noted 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" (at para 82, quoting from the appeal panel's reasons at paras 7 and 232). In doing so, Moldaver J., speaking for the majority, agreed that "in some circumstances, bad faith allegations or allegations that lack a reasonable basis may, on their own, warrant a finding of professional misconduct" (at para 83). He further explained that "it was open to the Appeal Panel to conclude that allegations of prosecutorial misconduct or other challenges to opposing counsel's integrity must both be made in good faith *and* have a reasonable basis" (at para 84, emphasis in original). Justice Moldaver then went on to explain why a finding of professional misconduct cannot be grounded in mere legal error. On the facts of *Groia*, the Supreme Court found the appeal panel's decision to be unreasonable, applying the standard of review that was applicable in that case. However, it did so without disturbing the directions it gave relating to the proper boundaries of a finding of professional misconduct on the part of an advocate.

[31] I would add that the instruction provided by the Supreme Court in *Groia* is consistent with what this Court said in *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56, [2014] 6 WWR 643 [*Merchant 2014*]. That decision involved a complaint that alleged a lawyer was guilty of conduct unbecoming because he had breached a court order and had counseled or assisted his client in acting in defiance of a court order. Justice Ottenbreit, speaking for this Court, stated as follows:

> [68] The charges in this case, unlike in *Merchant* (2009), are not cast as *mens rea* offences. In my view, the Law Society properly framed each count as a strict liability offence. Nothing in the *Act* or the Code of Professional Conduct imparts any type of mental requirement into the offence. There is no express or necessarily implicit reference to any deliberate action or any other conduct that would make the *mens rea* fault standard applicable. The wording of the offences in this case does not, therefore, have the specificity of action present in *Merchant* (2009). As observed in *Merchant* (2009), conduct unbecoming can be established through negligence or total insensibility to the requirements of acceptable practice. Moral turpitude is not required.

[32] Since legal error is not the *sine qua non* for conduct unbecoming, it follows that not every lawyer who makes an argument or advances a legal position that is later found to be frivolous or vexatious has acted in a professionally inappropriate way. On the other hand, an argument may be made without a reasonable basis, even if it is not done knowingly. These are but two facts that can bear on the inquiry into whether unbecoming conduct has occurred. As directed in *Groia*, a final determination of this issue depends on a consideration of the full constellation of circumstances.

[33] Here, the question becomes whether the Hearing Committee approached the matter in a way that is consistent with these principles. I first observe that, before it examined the facts of each of the complaints, the Hearing Committee framed its analysis with a discussion, under the heading "Conduct Unbecoming", wherein it reviewed the elements of "conduct unbecoming" as defined in s. 2(d) of the *Legal Profession Act*.

[34] After setting out the statutory definition of conduct unbecoming, the Hearing Committee wrote that, under the *Legal Profession Act*, "conduct unbecoming does not require a specific intent but can be determined by the affect [*sic*] the conduct has on the public's interest or upon the legal profession" (at para 20). Later, in the same part of its reasons, the Hearing Committee identified that "[w]hether the actions of a member constitute conduct unbecoming is ultimately a question of fact for us as a panel to decide based upon all of the evidence placed before us" (at para 24). It was after this part of its analysis that the Hearing Committee discussed the meaning of frivolous and vexatious and the principles surrounding a lawyer's obligation to fulfil undertakings they give.

[35] Following all of this, the Hearing Committee entered into a detailed consideration of each of the complaints. It made specific determinations in connection with each count that comfortably fit within the statutory definition of conduct unbecoming, and the general principles that are contained in *Groia*. In this regard:

(a) In relation to Count 1(a) (pertaining to *Cowessess No. 1*), the Hearing Committee found that Mr. Xiao-Phillips had "brought forward an application that had no legitimate factual basis or remotely achievable goal" and "for which he had no understanding of the 'ethical' considerations that he claimed to be a principal motivating factor" (at para 39);

(b) In relation to Count 1(b) (pertaining to *Cowessess No. 2*), among other findings it made, the Hearing Committee described the positions taken by Mr. Xiao-Phillips as being “creations of [his] and not based in reality” (at para 46);

(c) In relation to Counts 1(c) and 1(d) (pertaining to *Cowessess No. 3* and *Cowessess No. 4*), the Hearing Committee described the submission made by Mr. Xiao-Phillips that he had brought forward the impugned argument in good faith as being “beyond comprehension”, a conclusion that it then explained (at para 55);

(d) In relation to Count 1(e) (pertaining to *Fond Du Lac*], the Hearing Committee determined that Mr. Xiao-Phillips not only failed to follow “normal practice”, but his approach and position were “nonsensical”, “disrespectful” and had “no properly discernible or achievable goal” (at para 60);

(e) In relation to Count 1(f) (pertaining to *Lunn*), the Hearing Committee concluded that Mr. Xiao-Phillips “neither during cross-examination nor in his own materials, posited a cogent explanation of his goals or how his arguments would further the goals of his client” (at para 66);

(f) In relation to Count 1(g) (pertaining to *Sun Country*), Mr. Xiao-Phillips was found to have made serious allegations “without any evidentiary basis”. The Hearing Committee described Mr. Xiao-Phillips’s “assertion that he was not impugning the character of opposing counsel [to be] an example of willful blindness” (at para 74); and

(g) In relation to Count 1(h) (pertaining to *Cowessess No. 5*), the Hearing Committee stated that Mr. Xiao-Phillips “was placing witness statements that were clearly improper before the [CIRB]” and that his explanation “for his actions had no factual connection to the evidence” (at para 81).

[36] I will have more to say about the evidence and the Hearing Committee’s findings. For the moment, I offer these examples to illustrate that the Hearing Committee did not base its findings in relation to Count 1 simply on the fact that Mr. Xiao-Phillips had knowingly made arguments

and advanced positions that turned out to be characterized as frivolous and vexatious or were the product of legal error.

[37] My conclusion, in this regard, is underscored by the reasons given by the Hearing Committee for dismissing the charge made in Count 1(i) (pertaining to *Gordon Estate*). In *Gordon Estate*, Popescul C.J.Q.B. had described a position taken by Mr. Xiao-Phillips to be "beyond comprehension". The Hearing Committee thought it to be "patently clear that given the facts before him that the Chief Justice would conclude as he did". Yet, the Hearing Committee found that Mr. Xiao-Phillips was *not* guilty of conduct unbecoming in advancing a frivolous position because the "unsuccessful and ill-advised argument, which lacked cogency, [while] clearly an example of [a] lawyer taking a poor path", did not meet the elements of the charge (at para 86). In doing so, the Hearing Committee recognized that unbecoming conduct does not occur merely because a position or argument is made intentionally but later found to be frivolous or vexatious.

[38] In summary, the Hearing Committee did not err in its interpretation of Count 1.

B. The burden of proof issue

[39] As I have mentioned, CIC presented its case by tendering the decisions referred to in the complaint. Mr. Xiao-Phillips invites this Court to find that the Hearing Committee erred in law by placing the burden of disproving CIC's case on him, when it accepted these decisions as constituting prima facie proof of the allegations made against him.

[40] Mr. Xiao-Phillips points out that the burden of proof rested on the CIC to make out the charges against him. His primary argument under this heading is that the Hearing Committee committed the same error that occurred in *Phillips 2021* wherein this Court found that a Law Society hearing committee had reversed the burden of proof through the use it put to a Provincial Court decision that was placed before it.

[41] As I will explain, I accept that the burden of proving that Mr. Xiao-Phillips had conducted himself in a manner unbecoming a lawyer rested at all times on the CIC. However, the Hearing Committee did not commit the kind of error that occurred in *Phillips 2021*, nor did the Hearing Committee otherwise misapply the burden of proof.

[42] In *Phillips 2021*, a lawyer was convicted of conduct unbecoming for failing to be frank and candid in relation to anticipated costs of litigation and to have charged a fee that was not fully disclosed, fair and reasonable. The finding of conduct unbecoming was based on a judgment given in a Small Claims Court action that the lawyer had brought against his client to obtain recovery of the unpaid portion of a $24,500 fee he had charged. The Provincial Court judge who presided at the Small Claims trial found that a fair and reasonable fee would be $10,000. The judge also concluded that the lawyer had breached his fiduciary duty when he put his own monetary interest ahead of his client's. Upon an appeal by the lawyer, this Court found that the hearing committee had erred in law when it proceeded on the basis that the Small Claims judgment was, standing alone, proof that the fee the lawyer had charged was unreasonable. In his factum, Mr. Xiao-Phillips reproduces several passages from the judgment in *Phillips 2021* as being applicable to his appeal, most pointedly the following:

> [79] Based on the foregoing authorities, I conclude that findings of fact made in a previous civil proceeding to which the lawyer was a party or has actively participated, such as the *Small Claims Decision*, may be admitted as *prima facie evidence* in support of disciplinary charges and not *proof* thereof.
>
> (Emphasis in original)

[43] Central to the decision in *Phillips 2021* was the fact that the hearing committee had treated the Small Claims judgment as being *determinative* of the issue of conduct unbecoming when it was deciding different issues. This Court found that this was contrary to the direction given in several cases, including *British Columbia (Attorney General) v Malik*, 2011 SCC 18, [2011] 1 SCR 657 [*Malik*]. Justice Ottenbreit, writing for the Court, quoted from the following passages from that decision (at para 80):

> [42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §19.177).
>
> …
>
> [48] Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (*Del Core*, at p. 22 [para 61]).

[44] This Court determined that the hearing committee in *Phillips 2021* had done "little analysis of whether the findings of the *Small Claims Decision* differed from the potential findings it was required to make for the purpose of the charges". The result was that the committee in that case gave "short shrift to [the lawyer's] attempts to displace those findings" (at para 89). Justice Ottenbreit observed that the hearing committee had acknowledged the lawyer's "entitlement to call evidence in defence and reply to displace the findings in the previous proceeding". However, he added that the "right and the opportunity to do so was attenuated by the approach of the Committee that the *Small Claims Decision* was almost immune to challenge on the crucial issues underpinning the allegations of conduct unbecoming" (at para 96).

[45] I see no evidence that any of this occurred here. To the contrary, the Hearing Committee put the guidance given in *Phillips 2021* front and centre in its analysis. In this regard, after setting out some brief background, it identified several preliminary issues it was required to consider. The first of these arose from the fact that the "case in chief for the CIC involved no *viva voce* evidence or documents other than the cases and decisions it filed". The Hearing Committee stated the question to be "how should the Hearing Panel approach and weigh this evidence?" (at para 11). It discussed *Phillips 2021* and *Malik*, distinguishing the latter decision on its facts. The Hearing Committee then offered these comments:

> [13] Applying the principles from *Phillips v Law Society of Saskatchewan* to this case, the cases filed by the CIC may, if we so find, be properly admitted as *prima facie* evidence in support of the disciplinary charges but they are not proof of the disciplinary charges. The weight to be accorded to the judicial decisions is for the discipline committee to assess together with the evidence tendered by [Mr. Xiao-Phillips]. The burden of proof ultimately lies with the CIC and [Mr. Xiao-Phillips] has no obligation to proffer evidence.

[46] In this passage, not only did the Hearing Committee disclose a proper understanding of how the decisions could be used, but it expressly recognized that the "burden of proof ultimately lies with the CIC and [Mr. Xiao-Phillips] has no obligation to proffer evidence". In the paragraphs that follow these statements, the Hearing Committee demonstrated that it complied with this self-direction. As part of this it noted that in the hearing it "had to take into account the evidence of [Mr. Xiao-Phillips] – given in chief by affidavit, cross-examination, and questions from the panel to [Mr. Xiao-Phillips]" (at para 14). It pointed to limitations that arose because Mr. Xiao-Phillips "did not have the opportunity to cross-examine the authors of the decisions that the CIC filed" (at

para 15). However, it further concluded that the “lack of ability to cross examine the triers of fact did not impact [Mr. Xiao-Phillips’s] ability to provide a full defence”.

[47] Yet, Mr. Xiao-Phillips invites us to find that the Hearing Committee reversed the onus of proof when it responded to his argument that he had no ability to cross-examine the members of the courts and tribunals who had issued the decisions that are referred to in the complaint. In this regard, the Hearing Committee wrote as follows:

> [16] The lack of ability to cross examine the triers of fact did not impact [Mr. Xiao-Phillips’s] ability to provide a full defence. Where the reasons did not clearly disclose a *prima facie* case we did not find against [Mr. Xiao-Phillips] and where we did find a *prima facie* case there was ample evidence in the decisions to understand fully the complaints detailed therein. We further had [Mr. Xiao-Phillips’s] evidence.

[48] I see this passage as an expression of the Hearing Committee’s conclusion that where the evidence presented by the CIC did not prove the charge, it dismissed it, as it did in connection with two of the counts. In that regard, I view the statement that it had found a “prima facie case” as a slip only given the use of prima facie evidence elsewhere in the Committee’s reasons. It said as much when it wrote as follows:

> [18] The Panel agrees that *prima facie* evidence existed for each and every charge in the Amended Formal Complaint but for charges 1(i) (frivolous and vexatious) and 3 (failing to fulfill an undertaking). Accordingly, we assessed and weighed the evidence of [Mr. Xiao-Phillips] in relation to the conclusions reached by the various tribunals and courts upon which the charges in the Formal Complaint were derived. Careful consideration was given to the explanations of [Mr. Xiao-Phillips] and the supporting evidence he filed.

[49] Based on the entirety of the Hearing Committee’s analysis, I take it to be indicating that it approached its task as being one to determine if the allegations were made out in the records of the proceedings filed before it by the CIC. Indeed, as the mixed results of the *Conduct Decision* demonstrate, the Hearing Committee found that some parts of the complaint were made out in the evidence, but others were not.

[50] It is necessary to be clear about one thing. The Hearing Committee must be understood to have treated the decisions filed with it as evidence of what occurred before the courts and the CIRB. However, it was not improper for it to do so. Its use of the decisions as evidence of these events is consistent with the direction given in *Phillips 2021* that it is permissible for a disciplinary tribunal, in a case like this, to rely on findings of fact made in previous proceedings to which the

lawyer participated as evidence. Indeed, as I will later discuss, *Groia* not only confirmed the appropriateness of a law society disciplinary body considering comments made by a judge when assessing if an advocate's actions crossed the boundary into professional misconduct, but it described the presiding judge as having "a comparatively advantageous position to evaluate the lawyer's conduct relative to the law society, who only enters the equation once all is said and done" (at para 102).

[51] Mr. Xiao-Phillips also argues that the procedure followed by the Hearing Committee was unfair, because the Hearing Committee looked beyond the decisions themselves into the proceedings to which the decisions related. The Hearing Committee addressed this issue in the *Conduct Decision*, stating as follows:

> [17] At this point we want to make it clear that we, as a panel, relied upon the decisions and cases from which the charges arise and did also rely upon interlocutory decisions within the same matter that shed light on the matter and were filed by the CIC. All of these cases were at [Mr. Xiao-Phillips's] disposal and he had the opportunity to address them in his evidence.

[52] I observe that the interlocutory decisions mentioned formed part of CIC's evidence filed with the Hearing Committee. Mr. Xiao-Phillips does not identify any finding made against him in connection with which he would have led more or different evidence, if he had known the Hearing Committee were going to consider the mentioned interlocutory decisions. In short, he knew the case he was to meet, and he had the opportunity to do so. I can see no procedural unfairness in any of this. For the same reason, I see also no merit to Mr. Xiao-Phillips's argument that the CIC did not adequately identify what parts of the record it relied upon before the Hearing Committee.

[53] In conclusion, I am satisfied that the Hearing Committee did not place the burden on Mr. Xiao-Phillips to disprove the allegations made against him.

C. The Hearing Committee's reliance on the decisions

[54] Closely aligned with Mr. Xiao-Phillips's argument based on the burden of proof is his contention that the Hearing Committee erred in law by "failing to admit only findings of fact as opposed to inadmissible *opinions and legal conclusions* in relation to the issues to be determined in the cases filed with it" (emphasis added). This allegation demands a closer scrutiny of the Hearing Committee's approach to the complaints, as revealed in the *Conduct Decision*.

[55] *Cowessess No. 1* addressed an application made by Mr. Xiao-Phillips on behalf of his client, Cowessess First Nation No. 73 [Cowessess] "alleging intimidation and coercion of one of its witnesses" during a hearing between Cowessess and Saskatchewan Government and General Employees' Union [SGEU]. It was said that this violated s. 95(i) of the *Canada Labour Code*, RSC 1985, c L-2. This assertion was supported by an affidavit sworn by a Cowessess employee, Claudette Alexson. Ms. Alexson averred that after she had been identified as a witness, she received a call from an SGEU official, Don Regel, who advised her that the "proceeding was 'costing your band money'" and who also "indicated that legal counsel for Cowessess is a liar and incompetent". Ms. Alexson stated that she "did not understand why Don Regel was contacting [her] and saying these things" and that as "a result of receiving the telephone call from Don Regel, [she] felt that it would be wrong for [her] to testify". The CIRB dismissed the application made by Mr. Xiao-Phillips. The complaint before the Hearing Committee was that Mr. Xiao-Phillips's allegation was frivolous or vexatious or both.

[56] The Hearing Committee began by examining Ms. Alexson's affidavit in detail. After performing its own analysis, it wrote that when "the panel reviewed the affidavit of the witness we all immediately concluded that nothing from that evidence could be construed as intimidating or coercing a witness, a conclusion that was reached by the CIRB that initially received the affidavit" (*Conduct Decision* at para 35).

[57] The Hearing Committee next quoted eight paragraphs from *Cowessess No. 1*, including the following two that expressed the CIRB's views on the matter:

> [31] There is simply nothing in Cowessess' allegations even remotely approaching the concepts of "intimidation" or "coercion". Moreover, unless a witness is also a represented party, nothing prohibits any party in a proceeding from attempting to contact that person for evidence about the case. There is no property in a witness: *Murphy Canada Exploration Company* v. *Novagas Canada Ltd*., 2009 ABQB 585.
>
> [32] On Cowessess' own facts, the Board could not find that Mr. Regel's call would cause a reasonable person to consider that they had been intimidated or coerced from testifying in a *Code* proceeding. Neither did those facts, as pleaded, convince the Board there was any intimidation or coercion by the SGEU or Mr. Regel directed towards Ms. Alexson.

[58] At this juncture, the Hearing Committee did not comment on the conclusions reached by the CIRB. Instead, it provided a summary of the justification given by Mr. Xiao-Phillips in his affidavit for making the allegation he did against Mr. Regel (see para 37). In substance, he

explained that he did so as a way to impugn the credibility of Mr. Regel and because he felt he had a professional obligation to inform the CIRB of witness tampering. Following this, the Hearing Committee indicated why it found Mr. Xiao-Phillips's justification to be unpersuasive:

> [38] In cross-examination, [Mr. Xiao-Phillips] could not explain to the satisfaction of the Hearing panel:
>
> > (a) Why the credibility of the witness was an important consideration for any further hearings before the CIRB;
> >
> > (b) How the witness's credibility was, in fact, impugned by any of the material filed or by the application itself;
> >
> > (c) Why it was proper to bring this as an unfair labour practice complaint instead of simply cross-examining the witness on the matter (to the extent that the witness's credibility was put at issue in any future hearing);
> >
> > (d) How the evidence would lead to the conclusion that there was "improper influence of a witness or witness tampering" (as set out in paragraph 20 of [Mr. Xiao-Phillips's] affidavit);
> >
> > (e) What ethical or professional guidelines that he was referring to when he indicated that he had an obligation to inform the CIRB of the witness's conduct;
> >
> > (f) Why these ethical or professional guidelines necessitated an unfair labour practice complaint; or
> >
> > (g) How the purpose for the complaint had actually been accomplished, as he asserted, particularly in relation to impugning the credibility of the witness.

[59] Only after this complete review did the Hearing Committee express its conclusion on the matter:

> [39] [Mr. Xiao-Phillips] brought forward an application that had no legitimate factual basis or remotely achievable goal (winning the application was not necessary; merely impugning SGEU's witness was sufficient in [Mr. Xiao-Phillips's] view), and for which he had no understanding of the "ethical" considerations that he claimed to be a principal motivating factor. Moreover, his conclusion that he successfully accomplished the goals of the application shows a complete disconnect from the stated and supportable conclusions of the CIRB. The only credibility damaged was that of [Mr. Xiao-Phillips] and his client. The CIC has made out that [Mr. Xiao-Phillips] advanced frivolous and/or vexatious arguments and positions in relation to this charge.

[60] Nothing in this paragraph suggests that the Hearing Committee did not reach its own, independent, conclusion that Mr. Xiao-Phillips had advanced a frivolous or vexatious argument or position as demonstrated in *Cowessess No. 1*. It did not simply adopt the determinations made by the CIRB.

[61] *Cowessess No. 2* arose out of SGEU's allegation that Cowessess had failed in its obligation to bargain collectively. Mr. Xiao-Phillips, who represented Cowessess, explained that his client

could not engage in collective bargaining because it needed to meet with Health Canada as the sole decision-maker on matters of funding and because of a related need for a band meeting. The theory of the CIC was that this was a frivolous position because Mr. Xiao-Phillips had been told, repeatedly, that Health Canada would not engage in such discussions and would only discuss health programs and service delivery. The CIRB's decision into the matter included the following statements at page 18:

> The Board finds that Mr. Phillips continued to raise the prospect of discussing collective bargaining with Health Canada even after repeatedly being told that Health Canada would not engage in such discussions and would only discuss health programs and service delivery.
>
> The Board finds that Mr. Phillips was being told one thing by Health Canada (that they would not meet if the SGEU is present and would not discuss collective bargaining) and relaying entirely different information to his client in both December 2015 and January 2016 (the first meeting will be without the SGEU, this is good first step, etc.) He also continued to reference a "first meeting" without the SGEU and then a second meeting that would include the SGEU when he wrote to the SGEU's Mr. Regel on January 11, 2016, knowing full well that Health Canada had repeatedly told him that they would not be able to speak to the collective agreement or union activities.
>
> This is not a situation of a message that has been misunderstood. Mr. Phillips was conveying completely contradictory and inaccurate information to both his client and to the SGEU than what he had been told by Health Canada.

[62] The Hearing Committee began its analysis in respect of this count by recounting the allegations made by Mr. Xiao-Phillips to the CIRB on behalf of Cowessess. It stated that the positions taken by Cowessess were "accurately described by the CIRB", thus indicating that it had independently evaluated what those positions were (at para 41). Following this, the Hearing Committee reproduced some of the "CIRB's comments in relation to [the] matter" (at para 42). Having done this, the Hearing Committee then summarized Mr. Xiao-Phillips's evidence about the complaint, as set out in his affidavit and as given by him in cross-examination. The Hearing Committee then offered its analysis of the situation, as follows:

> [44] In his materials and cross-examination, [Mr. Xiao-Phillips] failed to fully explain certain conclusions of the CIRB – conclusions that were naturally reached on the evidence before the CIRB. Of particular concern is the question of whether the Band Council needed to meet with Health Canada prior to meeting with SGEU, the CIRB found it did not. Clear evidence from his own witnesses from Health Canada was that any such meeting between Health Canada and Cowessess would not address collective bargaining and that Health Canada refused to discuss collective bargaining – the need for such a meeting was his main excuse to the CIRB for the delay. [Mr. Xiao-Phillips's] position that the CIRB was wrong is unsustainable. Moreover, the evidence clearly shows that [Mr. Xiao-Phillips] continued to advise SGEU on the status of booking meetings with Health Canada when he had been

> told by Health Canada that the meetings would not address unionization or collective bargaining.
>
> [45] The second major concern is that [Mr. Xiao-Phillips] advanced the argument that a meeting with Band membership was required prior to conducting collective bargaining with SGEU, but that was not the evidence before the CIRB and [Mr. Xiao-Phillips] did not provide evidence that could remotely dislodge the conclusion that the CIRB made from the evidence before it. The necessity for a meeting with band membership appears to be made from whole cloth.
>
> [46] [Mr. Xiao-Phillips] did advance evidence that the Chief and Council had significant matters that they were dealing with besides the collective bargaining issue with SGEU, but he could not and did not advance any evidence of why or how the priorities were determined and why that impacted the Band Council and its commitments to the collective bargaining process. We must remember that his two main excuses for delay – Health Canada meeting and Band membership meeting – were creations of [Mr. Xiao-Phillips] and not based in reality. How then do we give this excuse which also lacks probative evidence any sway?
>
> [47] The Hearing Panel concludes that although not every complaint of the CIRB is necessarily made out or that every complaint suggests the advancement of frivolous and/or vexatious arguments, the evidence clearly shows that significant and serious arguments, as discussed above, were advanced without any factual or legitimate basis. The charge is made out.

[63] I am again satisfied from these paragraphs that the Hearing Committee did not simply take the CIRB's conclusions and adopt them as the basis for finding that Mr. Xiao-Phillips's conduct was unbecoming a lawyer. Rather, its reasons show an assessment of the situation at hand. In this regard, it determined that the CIRB's conclusions "were naturally reached" based on the evidence and it described Mr. Xiao-Phillips's "position that the CIRB was wrong [as being] unsustainable". Finally, the Hearing Committee also agreed that "not every complaint of the CIRB is necessarily made out", yet it found the substance of the charge had been proven.

[64] In short, in connection with the two matters I have just reviewed, the Hearing Committee referred to the conclusions that were reached by the CIRB about Mr. Xiao-Phillips's conduct, but its findings do not rest solely on those opinions. Instead, it conducted its own evaluation of Mr. Xiao-Phillips's conduct. I am satisfied that the same can be said of the use to which the Hearing Committee put of the decisions in the other proceedings referred to in the complaint.

[65] There is no merit to Mr. Xiao-Phillips's submission that the Hearing Committee erred in law by misusing the decisions.

D. The copying of the CIC brief

[66] Mr. Xiao-Phillips notes in his factum that the Hearing Committee had asked the parties to provide it with an electronic copy of their submissions to make "things easier if in fact the panel does quote from your briefs". Mr. Xiao-Phillips now says that the Hearing Committee used the CIC's brief in substitution for doing its own analysis into the complaint. He supports his contention with the claim that 74% of the *Conduct Decision* contains text that is identical to the Law Society's brief. Based on the extent of this copying, Mr. Xiao-Phillips contends that the Hearing Committee did not independently assess his case.

[67] While I have not attempted to verify if Mr. Xiao-Phillips has correctly quantified the overlap between the CIC brief and the *Conduct Decision*, I am satisfied that the Hearing Committee did, in effect, cut large tracts from the CIC brief and paste them into its decision. However, I am unconvinced that the copying that has occurred in this case gives rise to a reasonable apprehension that the Hearing Committee failed to make its own independent decision.

[68] There are, of course, circumstances where the fact that a court or tribunal has copied extensively from the submissions of a party is problematic, for example, because it provides evidence that the adjudicative body has not exercised its own independent judgment. However, in *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 49, [2013] 2 SCR 357, the Supreme Court confirmed that "copying in reasons for judgment is not, in itself, grounds for setting the judge's decision aside". Instead, it is only "if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the trial judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, [that] the presumption of judicial integrity is rebutted and the decision may be set aside".

[69] Much of the overlap between the CIC's brief and the *Conduct Decision* is represented by the text of the decisions that form the basis of the complaint. Given that the allegations made in Count 1 and Count 2 were that Mr. Xiao-Phillips's conduct was unbecoming "as demonstrated by" these decisions, it was inevitable that they would be quoted extensively by the Hearing Committee. The fact that the decisions are quoted, and presented similarly, in both places is no more relevant

than the fact that parts of them were also quoted in the brief of law that Mr. Xiao-Phillips had filed with the Hearing Committee.

[70] Yet, other parts of the *Conduct Decision* that appear copied from the CIC brief go beyond merely reproducing the text of the decisions. This fact requires a closer examination into whether the Hearing Committee undertook its own independent analysis of the complaint. Again, I will approach this by considering the Hearing Committee's analysis of the individual counts.

[71] Dealing first with Count 1(a), pertaining to *Cowessess No. 1*, paragraphs 34 to 38 of the *Conduct Decision* contain an identification of the complaint, an explanation of the evidence, including a reproduction of substantial portions of *Cowessess No. 1*, and a summary of Mr. Xiao-Phillips's evidence. Much of this appears to be lifted directly out of the CIC brief. However, there are two important points to note. First, Mr. Xiao-Phillips has not suggested that the statements made in these parts are inaccurate. Second, the substantive reasons for why the Hearing Committee concluded that Mr. Xiao-Phillips's conduct was unbecoming were not copied. These reasons are found in paragraph 39 of the *Conduct Decision*, which I have previously quoted in full. Because it was not copied at all, that paragraph must be taken to represent the Hearing Committee's independent assessment of the situation.

[72] The same pattern appears in connection with the other counts. Repeatedly, the Hearing Committee reproduced parts of the CIC's brief of law to summarize the complaint, the decision to which the complaint related, and Mr. Xiao-Phillips's evidence as found in his affidavit and as given by him under cross-examination. Sometimes, but not always, the Hearing Committee added to the copied narrative, by interspersing its own analysis within the parts that were taken from the CIC brief. In the case of *every* count, the Hearing Committee concluded its analysis with an expression of its reasons for why it either found, or in two cases did not find, that the complaint was made out on the evidence before it. *None* of the concluding analysis in connection with the counts was copied from the CIC's brief.

[73] Considering all of this, I am satisfied that the *Conduct Decision* cannot be impugned because of the copying that occurred. Mr. Xiao-Phillips has not rebutted the presumption of adjudicative integrity and impartiality. While it would have been better had the Hearing Committee used more of its own words when explaining the background to the complaints and summarizing

parts of the evidence, I am unable to conclude that the Hearing Committee failed to assess the issues and make an independent decision on them. To the contrary, the reasons show that in connection with each count, it considered the issues independently and impartially, as demonstrated by the divided outcome in relation to the complaints.

[74] In summary, the *Conduct Decision* cannot be impugned because parts were copied from the CIC brief.

E. Standard of proof for a finding of conduct unbecoming

[75] Mr. Xiao-Phillips argues that proof of Count 2 depended on the evidence showing that his conduct was a marked departure from that expected of Law Society members more generally. He also says that the Hearing Committee did not make the findings of fact that would support the conclusion that his practice fell to this degree.

[76] In advancing this position, Mr. Xiao-Phillips relies on *Strother v Law Society of British Columbia*, 2018 BCCA 481, 437 DLR (4th) 640 [*Strother*]. In that case, Savage J.A., speaking for the British Columbia Court of Appeal, referred to *Martin, Re*, 2005 LSBC 16 [*Martin*], and *Lawyer 12 (Re)*, 2011 LSBC 35, and stated as follows:

> [64] … in my view, it is important to state with clarity the accepted test for professional misconduct. The test is that articulated by the Law Society in *Martin* and *Lawyer 12*: a hearing panel will consider whether the lawyer's conduct was a *marked departure* from the conduct expected of lawyers. Put another way, the lawyer's conduct must display culpability of a *gross or aggravated nature, rather than a mere failure to exercise ordinary care*. While I agree with Mr. Strother that not every breach of professional obligations constitutes professional misconduct, the operationalized definition he proposes adds a different focus.
>
> (Emphasis added)

[77] The proposed marked departure standard was mentioned almost in passing in Mr. Xiao-Phillips's factum. It gained slightly more prominence in his counsel's oral submissions. The Law Society did not address it at all in its factum or in its counsel's oral submissions.

[78] These omissions are significant. The arguments made before us did not engage with the differences that exist between the statutory regime regarding the professional discipline of British Columbia lawyers and that in this province under the *Legal Profession Act*. In this regard, s. 38(4)(b) of the *Legal Profession Act*, SBC 1998, c 9 contemplates that a lawyer can be found to

have committed "one or more" of possible offences including professional misconduct *or* conduct unbecoming. To that effect, I observe that the hearing panel in *Martin* characterized the impugned conduct as a professional misconduct issue before noting that term was not defined by statute (at paras 138 and 150). It proceeded to develop the marked departure standard for professional misconduct without referring to the statutory definition for conduct unbecoming.

[79] Comparatively, this province's legislation and jurisprudence frame this type of professional disciplinary offence as a question of conduct unbecoming. The term "professional misconduct" does not appear in the *Legal Profession Act* and, for the most part, the *Law Society of Saskatchewan Rules* speak of conduct unbecoming without any mention of professional misconduct. A finding of professional misconduct is only addressed under Rule 801, which deals with possible discipline imposed in other provinces for the purpose of the part of the *Rules* concerning national mobility and interjurisdictional practice, seemingly recognizing the differences in the regulatory regimes in different jurisdictions.

[80] This Court addressed the issue of the definition of conduct unbecoming in *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, 324 Sask R 108, application for leave to appeal to SCC refused, 2009 CanLII 39473. Justice Wilkinson began by noting the deference owed to benchers who "are in the best position to determine issues of misconduct and incompetence" (at para 26, citing *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 880). She went on to outline various commentary discussing the definition of professional misconduct. Although she noted these comments may be informative, she held that "[t]hey cannot be taken to supersede or displace the existing statutory definition of 'conduct unbecoming' found in *The Legal Profession Act, 1990*" (at para 60). After reproducing that statutory definition, she explained the flexible standard to be applied to a determination of conduct unbecoming in this province:

> [62] The definition in the Act is expansive, and conduct unbecoming may be established through intentional conduct, negligent conduct or total insensibility to the requirements of acceptable practice (as in professional incompetence). In the last two instances, where practitioners have been careless or merely incapable in some aspect, moral turpitude is not, typically speaking, a feature of the unacceptable behaviour. The section provides that the conduct in question need not be disgraceful or dishonourable to constitute conduct unbecoming. It is abundantly clear that moral turpitude is no longer an active requirement.

[81] In *Hesje v Law Society of Saskatchewan*, 2015 SKCA 2, [2015] 3 WWR 104 [*Hesje*], this Court rejected the more exigent standard proposed by the member where "an isolated decision

made in good faith is not conduct unbecoming, or that a wilful and reckless failure to maintain even the most minimal standards of competence and quality of service is required for conduct unbecoming" (at para 64). Instead, the Court reiterated that "negligent conduct can be conduct unbecoming and moral turpitude is not a necessary element of conduct unbecoming" (at para 63).

[82] Similarly, in *Merchant 2014*, Ottenbreit J.A. succinctly explained that the "definition of conduct unbecoming is necessarily broad and can encompass a wide range of potentially unethical conduct" and "the degree of fault required to be established in any case will vary depending on the particulars of the allegation and its context" (at para 62). This jurisprudence was also recently canvassed in *MacKay v Law Society of Saskatchewan*, 2021 SKCA 99.

[83] My take-away from these cases is that, in this province, any discussion of the applicable standard must be centered around the statutory definition of conduct unbecoming. That definition will, in some circumstances at least, support the conclusion that a finding of conduct unbecoming on the part of a lawyer depends on proof of more than what the British Columbia Court of Appeal described as a "mere failure to exercise ordinary care" or a mere mistake or error in judgment (*Strother* at para 64). I say this because the conduct is only "unbecoming" if the lawyer's act is either "inimical to the best interests of the public" or if it "tends to harm the standing of the legal profession". Yet, neither of these statutory standards is precisely the same as "marked departure". In this regard, this Court's jurisprudence is clear that a finding of conduct unbecoming can be grounded in negligence and moral turpitude is not required (see *Hesje* at para 63), which approaches the "failure to exercise ordinary care" rejected in *Martin*. Similarly, requiring "culpability of a gross or aggravated nature" (*Strother* at para 64) harkens to the "failure to maintain even the most minimal standards of competence" standard rejected in *Hesje* (at para 64).

[84] Ultimately, considering the need to apply a variable and contextual degree of fault to allegations of conduct unbecoming as directed in *Groia*, I can see no error in the *Conduct Decision* simply because the Hearing Committee declined to frame its analysis by considering if Mr. Xiao-Phillips's conduct represented a marked departure from the conduct expected of lawyers. As I see it, the Hearing Committee very appropriately approached the matter by assessing Mr. Xiao-Phillips's conduct against the statutory standard that is applicable in this province.

[85] Moreover, and in any event, the Hearing Committee did *not* rest its conclusion that Mr. Xiao-Phillips's conduct was unbecoming simply because he had failed to take care. I begin my explanation for this conclusion by observing that Mr. Xiao-Phillips's argument about marked departure relates only to Count 2. The Hearing Committee found that Mr. Xiao-Phillips had filed "witness statements that were *clearly* improper". It also observed that "it is not uncommon for lawyers to miss filing deadlines or even an appearance simply because mistakes happen, but the *repetitive nature and the continuous disregard* of clear direction from the CIRB cannot be forgiven in the absence of an acceptable explanation" (at para 81, emphasis added). In addition, the letters to the court that formed the foundation for Count 2(c), pertaining to *Fond Du Lac*, were found by the Hearing Committee to be "aggressive in tone", to have made arguments that were "nonsensical" and to have been "*obviously* not proper". The Hearing Committee added that "the failure to request appropriate remedies of the Court makes them nothing more than an odd haranguing of the Judge by a lawyer appearing before the Court". This was said to be "not the type of legal service that should be condoned and is clearly not competent in approach or manner" (at paras 60 and 61, emphasis added). In connection with Count 2(d), Mr. Xiao-Phillips was found to be wilfully blind, and was rearguing matters previously decided against him and "could not keep clear what was occurring on the file or he attempted to revive certain aspects of his case which were already resolved" (at para 75).

[86] In short, the *Conduct Decision* shows that the Hearing Committee did not rest its findings against Mr. Xiao-Phillips in connection with Count 2 on him by simply failing to exercise ordinary care or committing a mistake or an error in judgment. For these reasons, I would reject Mr. Xiao-Phillips's argument that the Hearing Committee erred by failing to scrutinize Count 2 by applying a sufficiently strict standard.

F. The findings of conduct unbecoming

[87] To this point, I have examined the alleged errors of the Hearing Committee that Mr. Xiao-Phillips says infected each of the Hearing Committee's findings. I now turn to consider the grounds of appeal that relate to each specific finding of conduct unbecoming. Before I do so, it is appropriate for me to address two preliminary points.

[88] The first preliminary point relates to the standards of review. As observed in *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 81 [*Abrametz CA*], quoting from *O'Toole v Law Society (New Brunswick)*, 2007 NBCA 14 at para 20, 312 NBR (2d) 258, the question of whether a lawyer's acts or omissions constitute conduct unbecoming is one of mixed fact and law, as it requires "the application of specific rules of conduct to a particular set of circumstances". Although *Abrametz CA* was overturned in *Abrametz SCC*, in doing so the Supreme Court specifically found that this Court "did not err in identifying the applicable standard of review" (at para 105). The application of these standards of review would lead to the conclusion that, except to the extent that Mr. Xiao-Phillips can point to the Hearing Committee having committed an extricable error of law, he can succeed in his challenge to the Hearing Committee's specific findings that the counts of the complaint were made out only if those findings were the product of palpable and overriding error. Before us, Mr. Xiao-Phillips argued that the discretionary standard should apply to the question of whether the facts as found by the Hearing Committee amounted to conduct unbecoming. This Court applied that standard in *The College of Physicians and Surgeons of Saskatchewan v Leontowicz*, 2023 SKCA 110 at para 42, [2024] 3 WWR 12, a case involving the professional discipline of a doctor. However, I see no need to sort out any difference in this jurisprudence here. As I will explain, the Hearing Committee's findings withstand scrutiny no matter the lens through which they are viewed.

[89] The second preliminary point concerns another issue relating to the interpretation of the complaint. As I have noted, both Count 1 and Count 2 allege that Mr. Xiao-Phillips was guilty of conduct unbecoming a lawyer "as demonstrated by" the decisions that are then listed. Nonetheless, the Hearing Committee approached Count 1 as if it asserted nine separate counts of conduct unbecoming, and not as a single allegation with the counts serving as particulars. Likewise, it analyzed Count 2 as four separate allegations of conduct unbecoming. This is apparent based not only on the overall organization of the *Conduct Decision* but also on its concluding paragraph, in which the Hearing Committee stated that Mr. Xiao-Phillips "faced *fourteen charges* of conduct unbecoming and [that] all but two are proven by the CIC" (at para 88, emphasis added). I will discuss later why I make note of the approach taken by the Hearing Committee in this regard. For the time being I simply observe that neither Mr. Xiao-Phillips nor the Law Society suggested that the Hearing Committee erred in understanding the complaint in this way and, as such, I will proceed on the same basis.

1. Count 1(a): *Cowessess No. 1*

[90] I have already discussed the facts of *Cowessess No. 1*, but to recap, the Hearing Committee found that Mr. Xiao-Phillips had committed conduct unbecoming by making an unfounded allegation of witness tampering. Mr. Xiao-Phillips invites this Court to conclude that the Hearing Committee's findings in relation to *Cowessess No. 1* are problematic because the Hearing Committee "failed to consider or misapprehended [his] submissions and evidence". The footnoted references said to support this allegation point to paragraphs 18 to 21 of his affidavit, and portions of the written brief that he filed before the Hearing Committee.

[91] Far from failing to consider or misapprehending paragraphs 18 to 21 of Mr. Xiao-Phillips's affidavit, the Hearing Committee substantially summarized their contents in paragraph 37 of the *Conduct Decision*. Mr. Xiao-Phillips has not alleged that this synopsis misstates the evidence he gave in his affidavit. Mr. Xiao-Phillips also does not particularize which of the several arguments made in the brief he had filed with the Hearing Committee that he now contends were overlooked or misapprehended prior to expressing the conclusion given by it in paragraph 39 of the *Conduct Decision*, which, as I have noted, contains the core of its reasoning in relation to this count.

[92] As I see it, Mr. Xiao-Phillips can only succeed in challenging Count 1(a) if it is a product of palpable and overriding error. His submissions do not identify a specific error. This omission does nothing to assist in the identification of a palpable mistake by the Hearing Committee, let alone one that is overriding, having regard to the accepted definitions of both terms.

[93] In the circumstances, Mr. Xiao-Phillips's remaining arguments concerning Count 1(a) reduce to the suggestion that this Court should come to a different conclusion than did the Hearing Committee as to whether his conduct was unbecoming. That is not this Court's function in matters such as this.

2. Count 1(b): *Cowessess No. 2*

[94] As with Count 1(a), I have already reviewed many of the facts, and the Hearing Committee's consideration of this allegation. Mr. Xiao-Phillips again submits that the Hearing Committee failed to consider the evidence and the arguments he made to it. This submission has no more merit in relation to this count than it did in connection with the first.

[95] Mr. Xiao-Phillips does offer some particularization of this submission when he argues in his factum that "the findings of the Hearing Committee were contrary to the uncontradicted evidence that [*Cowessess No. 2*] did not accurately reflect the oral testimony that the CIRB had heard". The footnoted support for this assertion is to certain paragraphs in his affidavit and parts of his cross-examination. In a compendium, he also referred to many pages of extracts from the brief of law he had filed with the Hearing Committee which he says it ignored.

[96] Mr. Xiao-Phillips's argument overlooks that the Hearing Committee accepted that "not every complaint of the CIRB is necessarily made out or that every complaint suggests the advancement of frivolous and/or vexatious arguments" (at para 47). In other words, the Hearing Committee *accepted* Mr. Xiao-Phillips's submission that the CIRB may have made some mistakes in its fact finding. However, it also found enough in the uncontradicted record to conclude that this count had been made out.

[97] The facts that the Hearing Committee found to be uncontradicted included that Mr. Xiao-Phillips had "continued to advise SGEU on the status of booking meetings with Health Canada when he had been told by Health Canada that the meetings would not address unionization or collective bargaining" (at para 44), that he had not filed evidence that "could remotely dislodge the conclusion that the CIRB made from the evidence before it" as to the necessity of a band meeting before collective bargaining could occur (at para 45) and, ultimately, that his "two main excuses for delay – a Health Canada meeting and Band membership meeting – were creations of [his] and not based in reality" (at para 46). I can see no reviewable error in the findings by the Hearing Committee in relation to this count.

3. Counts 1(c) and 1(d): *Cowessess No. 3* and *Cowessess No. 4*

[98] These two decisions arose out of an application made by Mr. Xiao-Phillips on behalf of Cowessess for leave to assess the accounts of its former counsel, under the procedure set out in s. 67 of the *Act*. This application was dismissed by Brown J. in *Cowessess No. 3*. The appeal from that decision was dismissed by this Court in *Cowessess No. 4*. Both decisions contain statements harshly critical of the positions taken by Mr. Xiao-Phillips in the litigation. These were succinctly captured by Caldwell J.A. who stated "Brown J. observed in his fiat, the appellant made a number of *unsubstantiated* accusations of overcharging that are tantamount to allegations of fraud or other

unethical behavior" on the part of Cowessess's former counsel (*Cowessess No. 4* at para 6, emphasis in original).

[99] In its reasons, the Hearing Committee explained the context in which *Cowessess No. 3* and *Cowessess No. 4* were decided and then summarized both decisions. It observed that Mr. Xiao-Phillips had justified the allegations on the basis that he had advanced them in good faith, and that the factum he had filed with this Court had been reviewed and approved by another lawyer in his office with revisions incorporated therein. The Hearing Committee then reviewed the details that came out of the cross-examination of Mr. Xiao-Phillips. After all this, the Hearing Committee concluded as follows:

> [55] The argument of [Mr. Xiao-Phillips] that he brought the argument in good faith is beyond comprehension. How can it be that an application made without an evidentiary basis alleging deplorable conduct by another person be in good faith? Another way to characterize [Mr. Xiao-Phillips's] defence is that he did not know better and put his arguments forward blindly – the panel suggests that a proper characterization would be that the arguments were put forward with wilful blindness, which is certainly not good faith. The frivolous attack against another member of the Law Society is clearly conduct unbecoming as such an attack harms the other member's standing and the standing of the profession. No matter how it is characterized the application was vexatious and/or frivolous as there was no evidentiary basis for advancing the application or the appeal. The fact that another lawyer reviewed the factum for the Court of Appeal does not absolve [Mr. Xiao-Phillips] of his duties. The charges 1(c) and 1(d) are made out.

[100] Mr. Xiao-Phillips makes three main arguments in connection with these conclusions. First, he says the Hearing Committee committed the same mistake as was identified in *Law Society of British Columbia v Harding*, 2022 BCCA 229, 471 DLR (4th) 354 [*Harding*], wherein the British Columbia Court of Appeal stated as follows:

> [146] With respect to Mr. Harding's in-court statements, the LSBC Panel did not follow the approach in *Groia*: it did not consider whether the statements were made in good faith and whether Mr. Harding had a reasonable basis for them and could have misapprehended the law; and it did not consider the surrounding context of his closing submissions, including his duty as a resolute advocate in the context of the stakes in the case. Rather, the LSBC Panel relied primarily on the trial judge's findings without considering the context relevant to professional misconduct.

[101] However, this passage does not assist Mr. Xiao-Phillips. Unlike what occurred in *Harding*, the Hearing Committee undertook precisely the type of analysis that *Groia* demands, as exemplified by its conclusion that Mr. Xiao-Phillips's "arguments were put forward with wilful blindness, which is certainly not good faith" (at para 55). Mr. Xiao-Phillips disagrees with the Hearing Committee's finding, but it was one available on the evidence.

[102] Mr. Xiao-Phillips next complains that the Hearing Committee failed to undertake its own analysis, and instead simply relied on the decisions of Brown J. and this Court. I have already explained why I do not accept this argument generally. Specifically in relation to these counts, the Hearing Committee's independent analysis is amply demonstrated by its rejection of the excuses Mr. Xiao-Phillips offered for his actions which did not form part of the analysis by Brown J. or this Court, including the "fact that another lawyer reviewed the factum for the Court of Appeal does not absolve [Mr. Xiao-Phillips] of his duties" (*Conduct Decision* at para 55).

[103] Finally, Mr. Xiao-Phillips asserts that "in the absence of an allegation of incompetence which was not made in relation to [*Cowessess No. 3*] and [*Cowessess No. 4*], a lawyer cannot be found guilty of conduct unbecoming for a sincerely held but mistaken legal argument". However, Mr. Xiao-Phillips was not found to have acted in a way that was unbecoming a lawyer simply because he made a legal mistake. He was found to have done so because he was wilfully blind to the fact his arguments were without merit.

4. Counts 1(e) and 2(c): *Fond Du Lac*

[104] These two counts arose out of Mr. Xiao-Phillips's conduct in the context of a small claims action brought to recover his law firm's unpaid legal fees. *Fond Du Lac* contains the directions of the Provincial Court judge relating to the hearing of the matter. It is highly critical of the assertions made by Mr. Xiao-Phillips in various letters he had sent to the Court surrounding a requested adjournment.

[105] In the *Conduct Decision*, the Hearing Committee summarized the complaint. It quoted at length from *Fond Du Lac*. It recounted in detail the reasons offered by Mr. Xiao-Phillips for his actions as set out in his affidavit and under cross-examination. The Hearing Committee concluded its analysis in connection with Count 1(e) as follows:

> [60] The letters that [Mr. Xiao-Phillips] sent to the Court are extremely unusual: they do not follow normal practice (which is to either accept the Court's decision or request judicial review at the end of the case if prejudice or a miscarriage of justice actually occurred); they are very aggressive in tone to the Court; and, the arguments put forward are nonsensical. The appropriate strategy should have been obvious – when the adjournment was not granted by the Court, [Mr. Xiao-Phillips] should have worked with opposing counsel to either gain consent for an adjournment or prepare for the forthcoming court appearance. The tone of the letters alone supports a charge of conduct unbecoming as they are disrespectful to the Court. The lack of respect to the court combined with

> arguments that had no properly discernible or achievable goal is proof that the charge found in 1(e) is made out.

[106] The Hearing Committee also made the following findings in relation to Count 2(c):

> [61] The question to be answered regarding the charge of 2(c) was whether the provision of legal services was competent? The answer is no. The letters are obviously not proper and the failure to request appropriate remedies of the Court makes them nothing more than an odd haranguing of the Judge by a lawyer appearing before the Court. This is not the type of legal service that should be condoned and is clearly not competent in approach or manner. This charge too is made out.

[107] As he did with other counts, Mr. Xiao-Phillips offers the same generalized submission that the Hearing Committee failed to consider the submissions and authorities he had filed. I reject this for the same reasons I have rejected it in connection with the other counts.

[108] Mr. Xiao-Phillips also argues that the Hearing Committee did not afford him procedural fairness because it made this finding without any amendment having been made to the complaint to allege that he was uncivil. However, this argument is based on a misunderstanding of the Hearing Committee's reasons. Although it said that the "tone of the letters [Mr. Xiao-Phillips sent] alone supports a charge of conduct unbecoming as they are disrespectful to the Court", this was not the basis for its finding that Mr. Xiao-Phillips had acted in a way that was unbecoming a lawyer because he was uncivil or disrespectful. Rather, as I read the *Conduct Decision*, the Hearing Committee considered that he had been uncivil or disrespectful as one of the constellations of facts leading to the conclusion that he had conducted himself in a way that was unbecoming of a lawyer.

5. Count 1(f): *Lunn*

[109] This complaint arose out of actions taken by Mr. Xiao-Phillips while representing his brother in a Small Claims matter. In a decision, the judge communicated his conclusion that the parties had been mistaken as to the manner in which damages must be proven and he determined he would hear additional evidence on the point. The judge also provided the parties with guidance on the manner in which that evidence could or should be presented. This prompted Mr. Xiao-Phillips to write a series of letters that (a) challenged the procedure that the judge ordered be followed, (b) requested the making of several procedural orders, (c) sought to retract substantive positions taken at trial, and (d) raised what the judge described as "suspicions" and unsubstantiated allegations against a party who was adverse to Mr. Xiao-Phillips's brother. After a review of what had occurred before him, the judge wrote as follows in *Lunn*:

> [10] I do not have to cite case law for the now accepted proposition that the central objectives of *The Small Claims Act, 1997* is to create a Court which will provide a timely, cost effective, and efficient means to resolve relatively simple and relatively nominal monetary claims. Implicit in this purpose is the concept of proportionality. In the vast, and I do mean vast, number of cases, matters in this Court are resolved without the need for serial interlocutory applications. In the vast, and again, I do mean vast, number of matters, a request to the Court for direction or interim relief is handled in a simple and straight forward fashion. A request for a direction or the assistance of the Court is sought by correspondence and the reasons for that request are set forth therein. The Court will, either on an ex parte basis or upon directing a hearing, resolve the matter to the satisfaction of the parties. In that regard, the Court has the freedom to direct the practice and procedure of the Court to suit the needs of individual litigants.
>
> [11] For reasons that I cannot fathom, this relatively simple process does not work in the instant circumstances. I can no longer sanction, either in this matter, or on other matters into the future, counsel providing multiple letters to the Court seeking multiple orders, presumably on an ex parte basis, with little if any evidence in support other than counsel's 'suspicions' and 'concerns' based on vague allegations as to what the law might be but with no legal authority cited for the proposition put before the Court, which are often sought on short notice with a corresponding request for an adjournment also sought on short notice.

[110] In its decision, the Hearing Committee reviewed all of this. It also summarized Mr. Xiao-Phillips's evidence put forward to explain his actions. It then set out why it found that this count had been proven:

> [65] From cross-examination and [Mr. Xiao-Phillips's] materials, it is unclear why he believed that his letter of April 18, 2016 was the appropriate means to challenge the decision of the Court to hold a further hearing on the issue of damages (as opposed to, for instance, an application for judicial review). The decision having already been determined against his client, a letter to the Court advising that his client disagreed with the decision is neither normal nor accepted practice. [Mr. Xiao-Phillips] continued sending correspondence to the Court asking for other relief (apparently without considering the necessity of speaking to the matter in court) in a continued bid to challenge the judge's prior decisions. This correspondence includes reference to telephone calls between Phillips and witnesses not called during the trial. Included in this package is an entirely hearsay affidavit sworn by [Mr. Xiao-Phillips's] client.
>
> [66] Similar to the case above, a decision having been rendered against his client, [Mr. Xiao-Phillips] sent a number of letters to the Court to challenge its determinations. The arguments are not convincing or relevant to the central issue that the Court raised – how to determine the level of damages. [Mr. Xiao-Phillips], neither during cross-examination nor in his own materials, posited a cogent explanation of his goals or how his arguments would further the goals of his client. The arguments were vexatious and certainly frivolous and the charge is made out.

[111] Mr. Xiao-Phillips advances several arguments in relation to these conclusions. Most persuasively, he says that the Hearing Committee made no finding that he did anything other than write letters that were "vexatious and certainly frivolous". He invites this Court to find that this is

a situation where the guidance of *Groia* leads to the conclusion that he is being punished for simply following a bad or ill-advised procedural path. While I see some superficial attraction to this submission, it is not one that I can ultimately accept.

[112] I would once again reiterate my agreement that a lawyer does not demonstrate unbecoming conduct simply because they advance an argument or take a position that is later determined to be frivolous or vexatious. However, as I see it, that is not what the Hearing Committee did here. While it could have been clearer in its reasoning, I interpret its statement that Mr. Xiao-Phillips had not "posited a cogent explanation of his goals or how his arguments would further the goals of his client", as saying he had no reasonable basis to do what he did.

[113] Mr. Xiao-Phillips's remaining submissions, including that the Hearing Committee did not adequately address his arguments or evidence, amount to nothing more than the suggestion that this Court should draw different conclusions than did the Hearing Committee on the evidence. This is not the assertion, let alone the demonstrated existence, of a reviewable error.

6. Counts 1(g) and 2(d): *Sun Country*

[114] These complaints arose out of an action by Mr. Xiao-Phillips's client, a medical doctor, against Sun Country Regional Health Authority [Sun Country]. Sun Country had applied for summary judgment dismissing the claim against it. The medical doctor had brought an application designating the proper officer of Sun Country for the purposes of questioning. Sun Country had requested an adjournment, which Mr. Xiao-Phillips resisted on behalf of his client. This opposition was based on the allegation, made without any evidentiary foundation, that reasons given for the adjournment request were false and that it was sought to avoid the designation of the officer. The Hearing Committee looked at the matter and concluded that "draw[ing] such inference without further evidence of intention would be asinine and the Court found accordingly" (at para 69). The latter is most certainly a fair representation of the findings of Kalmakoff J. (as he then was) who wrote as follows in *Sun Country*:

> [58] To begin, with respect to the adjournment of the application on March 14, 2017, I would not order costs against Sun Country. On that date, Sun Country had a valid reason for seeking and [*sic*] adjournment, and counsel for Sun Country had communicated their intention to do so to counsel for Dr. Mamchur well in advance. When the present application was heard on April 24, Mr. Phillips chose to advance the argument that Sun Country's counsel had participated in an abuse of process by asking for the adjournment. Mr. Phillips invited the court to infer, on the basis of no more than wild speculation, that

> [Sun Country's employee] had instructed counsel for Sun Country to ask for an adjournment so that she could avoid the prospect of being questioned. He also implied that counsel for Sun Country did so, and thereby misled the court on March 14.
>
> [59] As I have commented previously in this decision, there was no basis in evidence for the argument advanced by Mr. Phillips on Dr. Mamchur's behalf in that respect. That type of conduct before the court must be discouraged, and costs are thus appropriate.

[115] Justice Kalmakoff also expressed concern that Mr. Xiao-Phillips was seeking amendments that had been refused by a different judge in a decision later upheld by this Court which he also found were "inaccurate, convoluted and confusing" (at para 62). Although Mr. Xiao-Phillips's client was partially successful in his application, Kalmakoff J. awarded costs against the client. In doing so, Kalmakoff J. offered comments that both criticized the drafting of the pleadings and spoke of the need to discourage such attempts to relitigate matters (see paras 63–65).

[116] The Hearing Committee reviewed all of this. It also summarized Mr. Xiao-Phillips's evidence. In doing so, it observed that he "could not cogently explain what facts could potentially lead to the inference that [Sun Country's employee] had given instructions to mislead the Court as to the reasons for the adjournment" and had been "unable to identify any evidentiary support for the proposition that he was advancing that the 'true' reason for the adjournment on March 14, 2017 was other than those reasons given by counsel for the plaintiff" (at para 73). In this context, the Hearing Committee noted Mr. Xiao-Phillips's acknowledgement that the "defence and counterclaim being addressed by Justice Kalmakoff had components in the defence which were almost identical to the amendments to the defence that were not permitted" pursuant to the earlier decisions of the courts and his further agreement that the pleadings were not presented in accordance with the applicable rules of court. Finally, the Hearing Committee explained why these facts resulted in a finding against Mr. Xiao-Phillips under both Counts 1(g) and 2(d):

> [74] [Mr. Xiao-Phillips's] explanations are wholly inadequate on several fronts. The most glaring is the allegations he made against the Sun Country executive member without any evidentiary basis – it should go without saying that if you are to allege a sinister motive that one should have some evidence. [Mr. Xiao-Phillips] admitted it was an inference but could not articulate any evidence from which the inference was drawn other than the provincial reorganization. [Mr. Xiao-Phillips's] assertion that he was not impugning the character of opposing counsel is an example of willful blindness: he argued that she accepted instructions that were, in essence, intended to subvert justice and mislead the Court. [Mr. Xiao-Phillips's] argument that he was following instructions throughout offers no cover to him – a lawyer has a duty to act in accordance with the code and it cannot be that the excuse of "my client so instructed me" absolves counsel of all responsibility. Moreover, [Mr. Xiao-Phillips] did not attempt to explain how the client reached the

> conclusion that they both shared. *These arguments were frivolous and, again, most certainly vexatious – and were certainly not competently made*.
>
> [75] We have some sympathy for [Mr. Xiao-Phillips] regarding the poor drafting of pleading and the poor quality of the product put before the Court as the matter was becoming factually complex and voluminous, but [Mr. Xiao-Phillips] had already been to the Court of Appeal and his arguments for much of the pleadings had been rejected and as noted by Mr. Justice Kalmakoff the proposed amendments were already rejected by the Court and were therefore *res judicata.* [Mr. Xiao-Phillips] either could not keep clear what was occurring on the file or he attempted to revive certain aspects of his case which were already resolved – either way it falls below the standard of reasonable competency. Both charges arising from this case are made out.
>
> (Emphasis added)

[117] As with many of the counts, Mr. Xiao-Phillips asserts that the Hearing Committee failed to consider or misapprehended the submissions and evidence he gave. Beyond a footnoted reference that points generally to his written submissions and affidavit, he offers only two particulars to support this part of his argument.

[118] First, he writes in his factum that *Groia* required the Hearing Committee to consider "how the lawyer modified his … behaviour" and "whether they 'pay heed to the judgment's direction' thereafter". He roots this argument in the following passage from *Groia*:

> [110] Part and parcel of the presiding judge's response is how the lawyer modified his or her behaviour thereafter. The lawyer who crosses the line, but pays heed to the judge's direction and behaves appropriately from then on is less likely to have engaged in professional misconduct than the same lawyer who continues to behave inappropriately despite the judge's instructions.

[119] Based on this statement by the Supreme Court, Mr. Xiao-Phillips argues that this Court should find error in the *Conduct Decision* because "there was no evidence before the Hearing Committee that [he] failed to 'pay heed' to the direction of the court and modify his behaviour". However, as I see it, paragraph 110 of *Groia* provides no assistance to Mr. Xiao-Phillips. To explain why this is the case, I must put that passage in context.

[120] Paragraph 110 of *Groia* is the concluding paragraph of part of a broader discussion about the relative importance of a judge's reaction when the allegation of professional misconduct is based on courtroom behaviour. At the beginning of this section of *Groia*, Moldaver J. expressed his agreement that "when the impugned behaviour occurs in a courtroom, what, if anything, the judge does about it becomes relevant". One of the reasons he gave for this is the previously quoted statement that the presiding judge has "a comparatively advantageous position to evaluate the

lawyer’s conduct relative to the law society, who only enters the equation once all is said and done” (at para 102). In the paragraphs that follow, which culminate at paragraph 110, Moldaver J. explained why, depending on the case, the judge’s reaction may have more or less importance. As part of this, he rejected an argument made by Mr. Groia, that “law societies should rarely, if ever, initiate disciplinary proceedings if the presiding judge took no issue with the lawyer’s behaviour” (at paras 103 and 104). Of course, this idea, even had the Supreme Court taken a different view, would not assist Mr. Xiao-Phillips. The final point I would make about all of this is that, immediately before making the statement relied upon by Mr. Xiao-Phillips, Moldaver J. emphasized that the “judge’s reaction is not conclusive of the propriety of the lawyer’s conduct”. Instead, “it is simply one piece of the contextual analysis”, and its “weight will vary depending on the circumstances of the case” (at para 109).

[121] In this overall context, paragraph 110 does not stand for the proposition that Mr. Xiao-Phillips asserts. It does not lay down a rule that before a lawyer can be found to have acted in a professionally inappropriate way as a result of courtroom behaviour, that lawyer must have first failed to “pay heed” to a judge’s direction. Paragraph 110 might be of assistance to Mr. Xiao-Phillips if his argument had been that he improved his behaviour after he was admonished by Kalmakoff J. But that is not the submission he offered in this Court. Indeed, I see the overall discussion in *Groia* about the relevance of the judge’s reaction to in-court conduct to work against Mr. Xiao-Phillips’s position in this appeal, as it underscores the appropriateness of the Hearing Committee having considered the views of the judges and tribunal members before whom Mr. Xiao-Phillips appeared in its overall assessment of his conduct.

[122] The other specific argument made by Mr. Xiao-Phillips in relation to Count 1(g) is that the “Hearing Committee failed to consider that the underlying proceeding concerned allegations of bad faith by the opposing party in its contractual dealings with [his] client, that the stakes of the case were high, that there was little opportunity to reflect upon the matter as it was discovered just prior to argument, and that the argument in question concerned abuse of process in relation to which ‘strong language’ is necessary”.

[123] I can accept that it would be an aggravating fact if Mr. Xiao-Phillips had acted with deliberation. However, the converse is not true. He has identified no authority for the proposition

that a lawyer can be excused for making an unfounded allegation because they had only a minimal opportunity to reflect before doing so. If there are circumstances when this idea might have traction, they are not present here because the arguments and positions that the Hearing Committee determined to be the foundation for the findings of conduct unbecoming were not taken in the heat of the moment. Rather, they were, by their nature, the product of deliberation.

7. Counts 1(h), 2(a) and 2(b): *Cowessess No. 5*, *Cowessess No. 6* and *Cowessess No. 7*

[124] These three related counts arose out proceedings before the CIRB involving Cowessess and SGEU. I have already considered all of the arguments that Mr. Xiao-Phillips raised in connection with Count 2(a) (pertaining to *Cowessess No. 6*) and Count 2(b) (pertaining to *Cowessess No. 7*), that is the allegations that he had failed to provide a quality of service generally expected of a competent lawyer in connection with these matters. I therefore need only address Mr. Xiao-Phillips's additional arguments relating to Count 1(h) (pertaining to *Cowessess No. 5*). However, because of the intertwining of facts, and the Hearing Committee's reasons, I will spend a moment briefly explaining some of its findings in connection with Counts 2(a) and 2(b).

[125] The starting point is s. 27(1)(b) of the *Canada Industrial Relations Board Regulations, 2012*, SOR/2001-520, which obligates a party to provide a list of witnesses along with a "summary of the information that is expected to be provided". The CIRB rejected justifications given by Mr. Xiao-Phillips for filing witness statements that it had found to be "essentially useless" (*Cowessess No. 5* at para 5).

[126] *Cowessess No. 6* is a letter from the CIRB addressed to Mr. Xiao-Phillips and counsel representing SGEU. It forms part of the factual context for *Cowessess No. 7*, which is a decision of the CIRB providing the reasons for making a procedural order. In that decision, the CIRB noted that the matter had been "a novel case for the Board" because "[n]ever before in this panel's experience has the Board had to spend so much time actively pushing a matter along" (at para 7). After recounting in great detail what had occurred, it noted that it was the "master of its own procedure" and "must ensure that parties are not prejudiced through undue delay" (at para 29). The CIRB then offered the following comments:

> [30] This case, however, is stunning. Rarely, if ever, does the Board have to take such an active role in attempting to complete a matter properly. Cowessess' continuing failures

> to be prepared for the Board's oral hearings, to comply with the *Regulations* and to respect Board orders has come close to prejudicing the SGEU's legitimate expectation for a fair and expeditious hearing.
>
> [31] Cowessess has failed, despite Board orders and without any reasonable excuse, to provide the SGEU with the names of its reply witnesses, including proper witness summaries. Cowessess was further obliged, pursuant to LD 3526, to provide any further documents to SGEU.

[127] The Hearing Committee devoted seven pages of the *Conduct Decision* to these three complaints. At the conclusion of its discussion, it made the following findings about them:

> [81] The long history of delay before the CIRB was clearly frustrating to the board and they detailed their long litany of complaints against [Mr. Xiao-Phillips] which in our opinion he failed to rebut or explain away. The *issue of frivolous and or vexatious arguments is made out in this context as he was placing witness statements that were clearly improper before the Board and his explanation to this hearing panel for his actions had no factual connection to the evidence*. The charge is made out regarding frivolous arguments. However, this is primarily an example of incompetent representation. Although rare it is not uncommon for lawyers to miss filing deadlines or even an appearance simply because mistakes happen, but the repetitive nature and the continuous disregard of clear direction from the CIRB cannot be forgiven in the absence of an acceptable explanation. This level of repeated error and disregard is not competent and not only harmed [Mr. Xiao-Phillips's] reputation but that of the standing of the profession. The charges are made out.
>
> (Emphasis added)

[128] The only part of paragraph 81 that relates to Count 1(h) is the Hearing Committee's finding that the "issue of frivolous and or vexatious arguments is made out in this context as [Mr. Xiao-Phillips] was placing witness statements that were clearly improper before the Board and his explanation to this hearing panel for his actions had no factual connection to the evidence".

[129] In this appeal, Mr. Xiao-Phillips alleges that the Hearing Committee failed to consider his evidence and arguments. However, I see nothing material that is not captured in the following summary given by the Hearing Committee:

> [77] [Mr. Xiao-Phillips's] reply is found at paragraphs 125 to 132 of his affidavit. Those paragraphs provide:
>
> > (a) The motion by SGEU was only a letter;
> >
> > (b) The witness identification forms filed by Cowessess when read in conjunction with his client's written representations and the specific witness statements of SGEU provided an appropriate basis upon which SGEU could anticipate the evidence to be adduced;
> >
> > (c) Later, [Mr. Xiao-Phillips] filed revised witness identification forms: paragraph 130.

> [78] In cross-examination and the materials filed by [Mr. Xiao-Phillips], it was established:
>
> > (a) The witness identification forms provided no detail as to the proposed testimony of the witnesses to be called by Cowessess;
> >
> > (b) In relation to [Mr. Xiao-Phillips's] position that the evidence to be tendered could be surmised from the written representations of [Mr. Xiao-Phillips] and the materials filed by SGEU, the witness identification form for Alvin Delorme Jr. was reviewed. It was determined that [Mr. Xiao-Phillips's] written representations do not refer to Alvin Delorme Jr. at all. The SGEU witness identification forms have only passing reference to Alvin Delorme Jr. The properly completed witness identification form for Alvin Delorme Jr. contains much more extensive information, including information not addressed in the written representations or SGEU witness identification forms;
> >
> > (c) [Mr. Xiao-Phillips] did not directly address why he did not comply with the clear directions from the CIRB as detailed in paragraph 31 of the decision as to what the witness identification forms should contain.

[130] Mr. Xiao-Phillips's other arguments in relation to Count 1(h) seek to diminish the seriousness of his misconduct. However, this does nothing to identify an error in the Hearing Committee's analysis.

8. Conclusion relating to the individual counts

[131] I can find no error in the Hearing Committee's specific findings in relation to the complaints against Mr. Xiao-Phillips.

[132] There is a final point to be made. As I explained at the outset of this part of my reasons, I have analyzed Mr. Xiao-Phillips's arguments based on the understanding that the Hearing Committee approached Count 1 and Count 2 as containing multiple allegations of conduct unbecoming, and not a single charge in each count. I note this because, if Count 1 and Count 2 were to be interpreted as containing a *single* allegation each, supported by particulars, an error in the fact-finding by the Hearing Committee in connection with the particulars might not provide a basis for the conclusion that the overall finding in connection with the count was made in error. When I step back from all the particulars and look at the overall scope of Mr. Xiao-Phillips's conduct, even if some small part of his arguments had some traction – and in my view none of them do – it would not form the foundation for a conclusion that any of the errors were sufficiently significant to override the fundamental conclusions of the Hearing Committee that his conduct was unbecoming a lawyer "as demonstrated" in the decisions brought before it.

G. The duplication issue

[133] Mr. Xiao-Phillips argues that if the Hearing Committee was not mistaken in how it approached the issue of intent required under Count 1, *R v Kienapple*, [1975] 1 SCR 729, prevents him from also being convicted of Count 2. Under *Kienapple*, an accused person cannot be punished twice for essentially the same offence.

[134] This Court has applied *Kienapple* in the context of administrative proceedings against lawyers (see *Merchant 2014* at para 91, and *Abrametz CA* at para 119, rev'd on other grounds *Abrametz SCC*). For the *Kienapple* principle to apply, there must be a sufficient factual and legal nexus between the charges. It is "a *sine qua non* for the operation of the rule against multiple convictions that the offences arise from the same transaction" (*R v Prince*, [1986] 2 SCR 480 at 491). The required legal nexus will be shown if "there is no additional and distinguishing element that goes to the guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle" (*Prince* at 498–499). The latter requirement was illustrated in *Merchant 2014* wherein Ottenbreit J.A. explained why the *Kienapple* principle did not operate to preclude multiple findings of conduct unbecoming arising out of the same underlying facts:

> [92] The counts refer to different actions by Mr. Merchant. The gist of count 1 is Mr. Merchant personally not paying the settlement money as MLG was ordered to do. The gist of count 2 is Mr. Merchant assisting M.H. by setting up the scheme which allowed M.H. to receive and spend a loan equivalent to the net monies that were available after the legitimate fees of MLG were paid thereby assisting M.H. to avoid paying pursuant to the Smith order. There are distinct elements to each count, as they refer to two separate actions. The essential element on count 1 is failure to pay into court the settlement proceeds that clearly came into Mr. Merchant's hands. The essential element on count 2 is assisting M.H. to thwart the Smith order.

[135] The Law Society agrees that *Kienapple* applies, in a general way, but says that the nexus it requires before a second charge is stayed is absent in connection with the overlapping charges here.

[136] I am satisfied that each of the charges contained in Count 2 arise out of a factual transaction that overlaps with a charge found in Count 1. However, the elements of the misconduct alleged in each are different. The substance of the allegations made under Count 1 involved Mr. Xiao-Phillips advancing frivolous or vexatious arguments or positions whereas the substance of the allegations made under Count 2 is professional incompetence.

[137] Counts 2(a) and 2(b) arise from the same facts as Count 1(h). However, the focus of Count 1(h) was Mr. Xiao-Phillips providing an argument before the CIRB in relation to witness statements that had no factual connection with the evidence. In contrast, the competency findings regarding Counts 2(a) and 2(b) pertained to missed filing deadlines, a failure to follow the direction of the CIRB, and missing a case management conference.

[138] Count 2(c) related to the *Fond Du Lac* matter, as did Count 1(e). However, the conviction on the latter charge was premised on Mr. Xiao-Phillips's communications which were described to be both "very aggressive in tone to the Court" and in making arguments that were "nonsensical", which were not required findings for the Hearing Committee to conclude that he had demonstrated conduct unbecoming of a lawyer (*Conduct Decision* at para 60).

[139] Finally, Counts 2(d) and 1(g) both arose from the *Sun Country* litigation. Count 1(g) was made out because Mr. Xiao-Phillips had a "sinister motive" without supporting evidence (at para 74). He was found guilty of conduct unbecoming because of his "poor drafting of pleading and the poor quality of the product put before the Court" (at para 75).

[140] I add as a final point that even if Mr. Xiao-Phillips had convinced me that the application of *Kienapple* should have resulted in the stay of one or more of the charges found in Count 2, I could not see it changing the final outcome of his professional discipline. While this might affect in a limited respect the particulars of the conduct unbecoming the substantive foundation for both counts would remain undisturbed. As observed in *R v Ramage*, 2010 ONCA 488 at para 59, 257 CCC (3d) 261, the operation of the rule "is often of academic interest only" since, even when the *Kienapple* principle is not applied, the judge or tribunal must still remain cognizant of the overlapping facts when considering what sentence should be imposed, for example, when determining if a sentence should be cumulative.

[141] In this case, Mr. Xiao-Phillips has not alleged any error by the Hearing Committee in relation to the penalty other than its refusal to accept the joint submission. Even if I had concluded that *Kienapple* should have been applied, I do not see this as a case where it would change the penalty that the Hearing Committee determined to be appropriate.

H. Rejection of the joint submission

[142] As noted earlier, the parties filed a joint submission as to penalty agreeing that an appropriate penalty was a reprimand and an award of costs in the amount of $15,000, inclusive of all fees and disbursements. They also filed an agreed statement of facts.

[143] The agreed statement of facts recorded that Mr. Xiao-Phillips had been subject to an "interim suspension as identified in a confidential review hearing decision". It also explained that, for this reason, Mr. Xiao-Phillips had been unable to practice, for 71 days, commencing on April 2, 2019, and "did not receive income during that time". Beginning on June 11, 2019, Mr. Xiao-Phillips was able to resume his practice subject to conditions, which included the appointment, at his own expense, of a practice supervisor. Finally, it stated that "[s]ubject to a finding of conduct unbecoming in any other discipline proceeding, it will fall to that future hearing committee to determine what credit [Mr. Xiao-Phillips] should receive for the interim suspension having regard also to the sanction imposed in this case". The agreed statement of facts did not disclose the circumstances leading to the interim suspension. However, it included the conditions that governed Mr. Xiao-Phillips's practice and a November 30, 2021 report of the practice supervisor, Paul Korpan, K.C.

[144] The CIC also filed separate written submissions. In them, the CIC explained that its agreement to the joint submission was "driven by" the fact that the interim suspension "was previously imposed" on Mr. Xiao-Phillips and was also informed by the fact that since the conclusion of the period of the interim suspension, Mr. Xiao-Phillips had "practiced pursuant to a number of practice restrictions and conditions, most notably a requirement that he practice under the supervision of another member of the legal profession".

[145] Apart from his submission based on *Kienapple*, Mr. Xiao-Phillips's sole ground of appeal relating to the penalty is that the Hearing Committee failed to properly follow the principles set out in *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204 [*Anthony-Cook*], when it rejected the joint submission on penalty and imposed a 71-day suspension.

[146] Under the *Anthony-Cook* framework, a sentencing judge cannot depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute

or it is otherwise not in the public interest. This threshold means that the sentence must be so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system" (at para 33, quoting from *R v Druken*, 2006 NLCA 67 at para 29, 215 CCC (3d) 394). Further, when assessing a joint submission, the sentencing judge should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts" (*Anthony-Cook* at para 33, quoting from *R v O.(B.J.)*, 2010 NLCA 19 at para 56, 252 CCC (3d) 498).

[147] Because of the high threshold that *Anthony-Cook* prescribed for departing from a joint submission on sentence or penalty, it also endorsed a set of procedures that "reflect practical wisdom gained from the experience of our trial and appellate courts" (at para 50). One part of this is that, if the judge is not satisfied with the sentence, fairness requires that the judge "notify counsel that he or she has concerns, and invite further submissions on those concerns" (at para 58).

[148] Before I begin my consideration of Mr. Xiao-Phillips's submissions I must make a preliminary point. In this Court, the Law Society agreed with Mr. Xiao-Phillips that *Anthony-Cook* applied. However, it said that the Hearing Committee departed from the joint submission in accordance with the principles established by the Supreme Court in that case.

[149] There is case law that would tend to call into question the applicability of the *Anthony-Cook* test in a case like this one, when the parties have only presented their joint penalty recommendation after there has been a contested hearing on the merits. (See, for example, *R v Frampton*, 2018 NLCA 23 at para 28; *R v Sidhu*, 2022 ABCA 66 at para 32, 411 CCC (3d) 329; *R v Dunkers*, 2018 BCCA 363 at para 44). As summarized by one commentator, where the parties' joint sentencing position develops after a contested hearing and the sentencing body "has concerns about the joint recommendation, the judge should 'indicate the concerns' and adjourn the hearing to 'permit further submissions'" (E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, loose-leaf (Rel 3, March 2024) 3d ed (Toronto: Thomson Reuters, 1988) at §18:452, citing *Frampton*. See also the Honourable Judge Gregory Koturbash, *A Guide to Conducting Sentencing Hearings in Canada* (Toronto: LexisNexis Canada, 2023) at §10.03, citing *Sidhu*, and Gary R. Clewley, Paul G. McDermott & Rachel Young, *Sentencing: The Practitioner's Guide*, loose-leaf

(Rel 1, March 2024) (Toronto: Thomson Reuters, 1995) at §1:88). However, I note also the existence of at least one contrary voice. (See Clayton C. Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis Canada, 2020) at §3.69).

[150] In this case, the parties *agreed* that the Hearing Committee acted correctly when it applied the *Anthony-Cook* framework and we do not have the benefit of submissions from them that perhaps the Hearing Committee could have applied a less stringent test. For these two reasons, as well as because I have concluded that the Hearing Committee did not err in its application of the stricter *Anthony-Cook* test, I leave the question of its applicability in a case like this one to a future appeal.

[151] This preliminary observation having been made, I turn to consider if the Hearing Committee misapplied the *Anthony-Cook* test. This requires a closer examination of what took place before the Hearing Committee.

[152] Near the outset of the hearing, the chairperson of the Hearing Committee stated that it was "incumbent" upon him to share with the parties that, as matters then stood, the Hearing Committee was "not prepared to accept the Joint Submission, although, we are, by no means, precluding acceptance". He further advised that "before we can accept the Joint Submission, we have a number of concerns that counsel will want to address". These were then outlined. The hearing was adjourned to allow the parties to consider their respective positions.

[153] Before the hearing resumed, the parties filed a further agreed statement of facts to supplement the agreed statement of facts that had previously been filed. Mr. Xiao-Phillips also provided written submissions. The further agreed statement of facts disclosed that Mr. Korpan's supervision of Mr. Xiao-Phillips's practice had ended on February 7, 2022. However, the agreement gave no details about the complaint that led to Mr. Xiao-Phillips's interim suspension or the imposition of the practice conditions. Instead, it explained that the "propriety of the interim suspension imposed upon [Mr. Xiao-Phillips] on April 2, 2019, conduct of the investigation thereafter, and similar such issues are the subject of disagreement" between the CIC and Mr. Xiao-Phillips. It also said that the parties considered that because they had agreed on the penalty in relation to the matters before the Hearing Committee, "it is not appropriate to address those issues unless the Joint Submission is rejected".

[154] At the outset of the reconvened hearing, and prior to receiving oral submissions, the Hearing Committee advised the parties that it was not prepared to accept the joint submission without receiving additional information, which was to be particularized. The parties made oral submissions. Mr. Xiao-Phillips was also offered the opportunity to call more evidence, but he declined to do so. At the conclusion of the hearing, the Hearing Committee ordered that Mr. Xiao-Phillips receive a 71-day suspension, which had already been served, and a reprimand. He was also ordered to pay costs in the amount of $15,000.

[155] The *Penalty Decision* was released several weeks later. The Hearing Committee reviewed at length the guidance given in *Anthony-Cook* and several other authorities. Following this, the Hearing Committee then gave detailed reasons as to why it could not accept the joint submission.

[156] Mr. Xiao-Phillips does not allege the existence of any overt legal error in the Hearing Committee's summary of the applicable principles or in any specific part of its analysis. Instead, his complaint rests on what he describes as the very limited degree to which the Hearing Committee departed from the joint submission. In this regard, he says that since the 71-day suspension that the Hearing Committee ordered had already been served, it is difficult to see how the Hearing Committee concluded that the agreed-upon penalty was unfit. In doing so, he invokes this Court's decision in *Rault v Law Society of Saskatchewan*, 2009 SKCA 81, [2010] 1 WWR 678 [*Rault*], and the decision of the Ontario Law Society Appeal Panel in *Law Society of Upper Canada v Cooper*, 2009 ONLSAP 7 [*Cooper*].

[157] In *Rault*, a Law Society discipline committee rejected a joint submission that a member be allowed to resign in the face of discipline and, instead, imposed a sentence of disbarment without eligibility to apply for readmission for five years. *Rault* predated *Anthony-Cook*. However, I do not distinguish it on that basis. Rather, I do so because this Court found that the disciplinary body had erred because its reasons did not reflect that it "understood it was constrained to consider the joint submission" and it did not indicate "why [the agreed-upon penalty] was inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest" (at para 28).

[158] In contrast, the Hearing Committee's reasons show that it understood the constraining effect of the joint submission and it expressed in detail why it was nonetheless necessary to reject

the agreed-upon penalty. A key paragraph in the *Penalty Decision* focused on the need to protect the public's confidence in the integrity of the legal profession, and the demand that this created for a form of suspension:

> [49] As mentioned above in section 5.1 it is imperative that the general public understands that such conduct is not countenanced and is deserving of a significant sanction. Imposing a sentence of a reprimand and partial costs without clearly recognizing that the conduct in these matters also warrants a suspension would undermine the general public's confidence in the LSS to appropriately regulate its members.

[159] After many more pages of analysis, the Hearing Committee brought its discussion together under a heading titled "Synthesis of the Penalty Principles and Facts". This part of its reasons merits reproduction, as it shows how far removed this case is from *Rault*:

> [57] Based on the evidence before the Discipline Hearing the Hearing Committee was of the view that the facts of the case could support a suspension of between 3-6 months given the gravity of the offences, the lack of [Mr. Xiao-Phillips's] insight regarding his actions, the need for specific and general deterrence, protection of the public, public confidence in the LSS to regulate its members, and impact on the victims. It must be noted that we had no knowledge of the interim suspension and practice conditions also related to the matter – we did not know that sanctions had already been imposed. We are still of the view, despite the Joint Submission, the supporting materials, and the oral submissions of counsel, that a 3 month suspension should be the range for the type and number of offences of which we found [Mr. Xiao-Phillips] guilty. However, taking into account the inexperience of [Mr. Xiao-Phillips], expense/benefits of the Practice Supervisor, and the served 71 days of suspension combined with the growth of [Mr. Xiao-Phillips] as a professional (as evidenced by the Affidavit of the Practice Supervisor) and the insight he has gained according to his counsel, we determined that in this instance a 3 month suspension is not warranted. Furthermore, we took note that [Mr. Xiao-Phillips] also reports being in a more stable situation regarding his personal life. We have accepted his submissions that he has learned since the Amended Formal Complaint was laid and the imposition of the *ex parte* suspension by the LSS Executive Director.
>
> [58] If [Mr. Xiao-Phillips] had not had a Practice Supervisor for 2.5 years we would have certainly imposed such a penalty upon him. If [Mr. Xiao-Phillips] had not served the 71 day suspension and been under practice supervision we would have certainly considered imposing at least a 3 month suspension.
>
> [59] The Hearing Committee holds that a suspension is warranted to reflect the severity or gravity of the offences, to give a proper message of general and specific deterrence, to reflect the impact on the victims, protection of the public and to ensure that public retains confidence in the LSS to regulate its members. The inexperience of [Mr. Xiao-Phillips] at the time of the offences, the lack of previous discipline, the remediation of his approach to practice, and the damage to his reputation arising from a reprimand and conviction has convinced us that any suspension beyond the 71 days served would be overly harsh and would serve little to protect the public further – the public has been protected by the suspension and the lengthy practice supervision already completed.
>
> [60] We concluded that accepting the joint submission would bring the Law Society's regulatory process into disrepute and is against the public interest as stated in *Anthony-Cook* and *Merchant* referenced above. In particular we believe the Joint submission must

not be followed, as per the reasoning of the Supreme Court of Canada in *Anthony-Cook* as applied in this regulatory context:

> [33] In *Druken,* at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest **if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system".** And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), **when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".** [emphasis added]

(Emphasis in original)

[160] The Hearing Committee therefore squarely focused on why there was a compelling need for the sentence of a 71-day suspension, even if it had already been served. It explained why the public interest required a departure from the joint submission.

[161] This was also not, as Mr. Xiao-Phillips suggests, a practically inconsequential change to the sentence. It was viewed by the Hearing Committee as integral to the Law Society's obligation to govern the profession in the public interest, and to maintain the public confidence in that regulatory regime. I see no legal error in the Hearing Committee's conclusion on this point.

[162] This also illustrates why the guidance found in *Cooper* does not help Mr. Xiao-Phillips. In that case, a law society appeal panel stated that "generally, a hearing panel should not 'tinker' with the joint submission, as long as it is not contrary to the public interest, by substituting another penalty that is also within a range of reasonableness" (at para 19). However, a suspension, even if the time has been served, is of a different character than a mere reprimand. Again, the Hearing Committee explained why a reprimand was not adequate.

[163] I would make one last point. Mr. Xiao-Phillip's arguments in this case related to the penalty that was imposed for these disciplinary offences. His appeal did not involve a challenge to the proceedings or orders that led to the original suspension. The order made by the Hearing Committee in effect used that suspension for the purpose of imposing a penalty in this case. No argument was made to the Court as to the appropriateness of banking time served under a suspension for use in another proceeding. I would not want these reasons to be taken as deciding this issue.

[164] For these reasons, I must dismiss Mr. Xiao-Phillips's appeal against the professional discipline he received.

V. CONCLUSION

[165] For the reasons I have given, I would dismiss Mr. Xiao-Phillips's appeal. I would order costs in favour of the Law Society under Column 3 of this Court's tariff of costs.

"Leurer C.J.S."
Leurer C.J.S.

I concur. "Jackson J.A."
Jackson J.A.

I concur. "McCreary J.A."
McCreary J.A.