THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

ROBERT IAN HISTED

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

HEARING DATES:

19 October 2017, 25 February 2019, 25-27 June 2019

PANEL:

Jacob P. Janzen (Chair)

Richard Buchwald

Lynne McCarthy (PR)

APPEARANCES:

Rocky Kravetsky for the Law Society

Philip Cramer for Robert Ian Histed

REASONS FOR DECISION

Introduction

1. Robert Ian Histed ("Mr. Histed") is a practicing member of the Law Society of Manitoba ("the Society").

2. Mr. Histed was retained in April 2014 by B.J. who was charged with assault cause bodily harm. The victim of the assault was B.J.'s girlfriend K.F. Tragically, K.F. took her own life in October 2014. Notwithstanding the death of the victim, the Crown proceeded with the prosecution of B.J. He was convicted at trial of assault cause bodily harm. The Court of Appeal upheld the conviction.

3. Ms. Sheila Seesahai was at all material times in 2014 the Crown attorney having conduct of the B.J. prosecution. In December 2014 and then in various ways and contexts through to the hearing before this panel, Mr. Histed asserted that Ms. Seesahai caused K.F.'s death. In April 2015 and then in various ways and contexts through to the hearing before this panel, Mr. Histed asserted that Ms. Seesahai had committed extortion in the course of her conduct of the matter. In particular, these assertions were the basis of arguments In Queen's Bench and the Court of Appeal that the charges against B.J. be stayed for crown misconduct. The arguments were unsuccessful.

4. Mr. Michael Mahon from the Department of Public Prosecutions complained to the Society about Mr. Histed in March 2015 and again in December 2015. In his responses to the Society to the complaints, Mr. Histed asserted misconduct by Mr. Michael Mahon and Ms. Seesahai.

5. By citation dated 12 July 2017, the Society charged Mr. Histed with four counts of professional misconduct. All four counts related, directly or indirectly, to his assertions of Crown misconduct in connection with the B.J. matter. Rules alleged breached were rule 3.2-2 (honesty and candour), 3.2-2C (informed and independent advice), 5.1-1 and 5.1-2 (treating tribunal with candour, fairness, courtesy and respect), rule 7.2-1 (courtesy and good faith), and rule 7.2-4 (no abusive or offensive communication).

6. The hearing before this panel began on 19 October 2017. Mr. Histed was then acting on his own behalf. He entered a plea of not guilty to all counts in the citation, confirmed he had no objection to any members of the panel, and confirmed he was not a member of any other Law Society. He moved for a summary dismissal of the citation or a permanent adjournment of proceedings pursuant to it. This panel dismissed the motion and issued its reasons in November 2017.

7. The hearing reconvened on 25 February 2019. Mr. Cramer was now acting on behalf of Mr. Histed. Mr. Kravetsky for the Society filed an affidavit of Ms. Susan Billinkoff. He discontinued certain portions of the citation. Mr. Cramer filed an affidavit of Mr. Histed. The hearing adjourned to 26 February 2019 for the cross-examination of Mr. Histed on his affidavit.

8. On 26 February 2019, the hearing was adjourned due to a health issue arising in the family of a panel member.

9. The hearing reconvened on 25 June 2019. Mr. Histed was examined briefly in direct by Mr. Cramer. Mr. Histed corrected and clarified a few matters in his affidavit. Mr. Kravetsky then cross-examined Mr. Histed.

10. The hearing adjourned on 26 June 2019 at Mr. Cramer's request.

11. The hearing concluded on 27 June 2019 with closing submissions from Mr. Kravetsky and from Mr. Cramer. The panel reserved its decision.

12. The Code transgressions alleged all consist of statements made by Mr. Histed. That he made the statements, to whom he made them, and when he made them, was not in dispute. Mr. Histed admitted them, and they were in any event a matter of the documentary record.

Our Decision

13. The panel finds Mr. Histed guilty of four counts of professional misconduct as charged in the citation.

The Evidence

14. The citation was entered as exhibit #1.

15. The affidavit of Susan Billinkoff was entered as exhibit #2. Ms. Billinkoff is legal counsel in the Complaints Resolution Department of the Society. She was assigned conduct of the complaints of Mr. Mahon against Mr. Histed. Attached to her affidavit were the documents relevant to these proceedings. References in these reasons to those documents will be as "S.B. tab#".

16. The affidavit of Mr. Histed was entered as exhibit #3. References in these reasons to his affidavit will be by paragraph number. Part of exhibit #3 was a letter from Mr. Cramer dated 25 February 2019 advising that certain paragraphs of Mr. Histed's affidavit not be read by the panel in view of the discontinuance of portions of the citation.

17. Email exchanges between Ms. Seesahai and Mr. Histed between 23 October 2014 and 21 November 2014 were entered as exhibit #4.

18. Mr. Histed gave brief evidence in direct. He corrected a few errors in the text of his affidavit (ex. #3). He was cross-examined.

The Citation

19. A full-text copy of the citation as amended by Mr. Kravetsky is attached as an appendix to these reasons.

20. Count 1 of the citation alleges a breach of rules 3.2-2 (honesty and candour) and 3.2-2C (informed and independent advice), alleging that Mr. Histed advanced on no adequate basis the positions that Ms. Seesahai caused the death of K.F. and committed extortion.

21. Count 2 of the citation alleges a breach of rules 5.1-1 and 5.1-2 (treating tribunal with candour, fairness, courtesy and respect), alleging that Mr. Histed misrepresented facts to the Court in a court brief dated 15 January 2016, in oral argument before Justice McKelvey on 6 June 2016, and in a court brief dated 18 October 2016. The first court brief is at S.B. tab#56. The transcript of argument before Justice McKelvey is at S.B. tab #57. The second court brief is at S.B. tab #60.

22. Count 3 of the citation alleges a breach of rule 7.2-1 (courtesy and good faith), alleging breaches in Mr. Histed's email to Ms. Seesahai of 22 December 2014 (S.B. tab #17), and in letters to the Society dated 6 April 2015 (S.B. tab #20 and tab#22), 4 June 2015 (S.B. tab #27), 24 December 2015 (S.B. tab #41), 30 December 2015 (S.B. tab #41, S.B. tab #42, S.B. tab #47, S.B. tab #48), and 25 January 2016 (S.B. tab # 51).

23. Count 4 alleges a breach of rule 7.2-4 (no abusive or offensive communication), alleging breaches in the same communications identified under count 3.

Susan Billinkoff's Affidavit

24. Mr. Histed was retained by B.J. in April 2014 to defend B.J. on a charge of assault cause bodily harm. The victim of the alleged assault was K.F. At the material time, accused and victim were cohabiting in a domestic relationship.

25. B.J. was granted interim judicial release on 8 April 2014. One condition of release was that B.J. have no communication or contact with K.F. This release condition notwithstanding, there was regular contact between K.F. and B.J. That there was contact between them was known to both Mr. Histed and to Ms. Seesahai, the Crown having conduct of the matter, no later than September 2014.

26. On 20 May 2014 Ms. Seesahai wrote to Mr. Histed (S.B. tab #5) confirming a voice mail that Mr. Histed was acting for B.J., advising that the Crown was awaiting medical records, advising that the Crown was considering upgrading the charge to one of aggravated assault but "was waiting to make that decision until the medical report comes in", and advising that the Crown would certainly be seeking a custodial sentence.

27. A few emails followed in July and August 2014. By mid-August, a preliminary inquiry date had been set for 9 April 2015.

28. On 5 September 2014 Ms. Seesahai wrote to Mr. Histed (S.B. tab #9). This is the full text of the email.

    "I met with the complainant [K.F.] and Victim Services this morning. She indicated that as a result of the assault that your client broke her tooth. She had to have a veneer installed to fix it, which she had done at the Stafford Dental Clinic. In my view, this together with the broken nose, lacerated ear (ripped earlobe), dislocated jaw and other injuries makes this an aggravated assault. I will see if I can get records from Stafford Dental Clinic about the treatment of the broken tooth. If your client will consider pleading guilty to ACBH for a PSR, I would still be willing to entertain such a plea. Otherwise, I will have a charge of aggravated assault sworn in order that it can be determined at the prelim whether he ought go to trial on aggravated assault on these facts. Please advise if your client is willing to consider a plea to ACBH for a PSR in order that I can have the aggravated assault sworn and process determined on it.
    [K.F.] indicates that she and your client have been having some contact. Your client has told her repeatedly to "go to Victim Services and get the charges dropped." He apparently went so far as to tell her that she should go more than once, go several times to Victim Services if that's what it takes. I trust you will give your client the appropriate advice about these contacts; I am not going to ask for a police investigation at this time due to the complainant's wishes, but such behavior amounts to a possible obstruction charge so he needs to stop that immediately.

She also indicated that she knows your son. I am drawing that to your attention now in case you were unaware, so that you may consider whether there is any resulting conflict on your part."

29. Mr. Histed replied the same day (S.B. tab #10). This is the full text of his email.

"A chipped tooth is not an aggravated assault, alone or in combination with the other bodily harm you mentioned.
As you would appear to have no case, I would propose the following:
1) My client attends for an AFM assessment and completes any recommendations.
2) My client accesses an anger management program, and on completion of that, the Crown enters a stay of proceedings.

I will not be responding to the balance of the threats, implied or otherwise in your correspondence.

Please address any further (polite) correspondence you may have for me to downtownlegal@shaw.ca.

Thank you."

30. The next communication was an email from Mr. Histed to Ms. Seesahai on 10 September 2014 (S.B. tab#11). This is the full text of his email.

"[B.J.] tells me that [K.F.] has been persistently contacting him in spite of the recognizance that is in place. From what she has said he is deeply concerned that she is immanently [sic] going to kill herself. She has been hospitalized recently for the despair she feels about the present status of things. She appears to be homeless.

From what he has described, I feel there may be some validity to this. You met with her last week and I think you would agree that she wants contact with him.

It would be sad and ironic indeed if the measures meant to protect her result in a tragedy.

Please identify some reasonable terms that we can agree to relax the no contact order pending this matter's apparently lengthy journey through the legal system."

31. Ms. Seesahai replied by email the same day (S.B. tab#12). This is the full text of her email.

"I have spoken with Victim Services and given this substantial thought today. I understand the concerns your client has, but I am not prepared to relax the no-contact conditions at this time.

Having said that, Victim Services will keep in good contact with her. If my position changes on this issue, I will contact you."

32. Mr. Histed replied later the same day (S.B. tab#12). This is the full text of his reply.

"I have passed this on to my client. He is convinced that she is going to commit suicide.

Please ask Victim Services to take all possible measures to protect her." [emphasis added]

33. There was no further or other communication between Mr. Histed and Ms. Seesahai from 5 September 2014 until 23 October 2014.

34. Tragically, in the early morning hours of 23 October 2014, K.F. took her own life. Mr. Histed learned of this from B.J. Mr. Histed advised Ms. Seesahai of the suicide later that morning by email (Ex #4).

35. By email dated 28 October 2014 Mr. Histed invited Ms. Seesahai to stay the charge against B.J. , and in an email of 5 November 2014 Ms. Seesahai indicated that she would not be making a decision until December, needing to "assess the file in view of the evidence". They then relatively quickly agreed on changes to B.J.'s release conditions (all emails in ex #4).

36. Ms. Seesahai wrote to Mr. Histed on 22 December 2014 (S.B. tab #17). She advised that she had that morning met with a witness to the alleged assault of K.F. She gave a detailed account of this witness's evidence and advised that the Crown might pursue a Khelawon application with respect to K.F.s disclosures. She concluded by saying "The Crown will proceed to preliminary inquiry on April 9/2015."

37. Mr. Histed replied later that same morning (S.B. tab #17). This is the full text of his email:
"While you may be able to establish necessity, I think you have an insurmountable hurdle with respect to reliability, given the complainant's state of intoxication and for other reasons that are obvious from your email.
Had you considered how the actions of the Crown have impacted my client? We warned you more than once that the complainant was suicidal as a result of the no contact order you refused to vary. It was stressed to you that the threat was very serious and that a tragedy was imminent.
[K.F.] committed suicide as a direct, foreseeable result of a decision you made. My client suffered a terrible loss as a consequence.
You should not be handling this matter as you are in a conflict of interest. You should be contacting your insurer rather than proceeding with a preliminary inquiry."

38. Mr. Ari Millo assumed conduct of the B.J. prosecution from Ms. Seesahai at some time prior to the preliminary inquiry.

39. On 23 March 2015 Michael Mahon of Manitoba Prosecution Services wrote to the Society (tab #18). He complained that Mr. Histed's assertions in his email to Ms. Seesahai of 22 December 2015 (S.B. tab#17) that the complainant "committed suicide as a direct, foreseeable result of the decision you made" and "you should be contacting your insurer rather than proceeding with a preliminary inquiry" constituted professional misconduct.

40. The Society initiated an investigation into the complaint. It requested an explanation from Mr. Histed (S.B. tab #19).

41. In his response dated 6 April 2015 (S.B. tab #20), Mr. Histed admitted sending the email. He said (p.3) "[K.F.]'s death was the preventable result of the negligent conduct of Ms. Seesahai". Mr. Histed specifically denied that the statements complained of were in any way unprofessional. The statements were (p. 4) a "candid" and "measured" expression of his opinion and that (p. 4) he "could have gone quite a bit further about what I thought of her [Ms. Seesahai] causing the death of the complainant."

42. In the same response, he did in fact go further. He stated that (p. 3) "Ms. Seesahai has zealously prosecuted cases with no hope of conviction for reasons which are not apparent to me", he said that (p. 2) "Ms. Seesahai was completely unreasonable, and appeared to be committed to prosecuting [B.J.] to the fullest extent possible regardless of the strength of the case", he said that (p. 4) Ms. Seesahai's "lack of objectivity was obvious", and he said that (p. 4) "My personal opinion is that she [Ms. Seesahai] should be prosecuted for criminal negligence causing death."

43. The statements in the above paragraph from Mr. Histed's response (i.e., S.B. tab #20) are specifically included as particulars in support of counts 3 and 4 of the citation.

44. Also in the same response Mr. Histed said that the threatened upgrade of the assault cause bodily harm charge to aggravated assault constituted extortion. In support of this contention, he cited, and included a copy of, a Common Pleas case from the year 1856.

45. Also in the same response, Mr. Histed stated that K.F. "suffered from mental health issues, the details of which are not specifically known to me, but I believe she had been hospitalized more than once."

46. Also in the same response he made the claim that he had discussed these matters with Ms. Seesahai by telephone. He said (p. 2) "I believe I had some telephone contact with Ms. Seesahai about the matter [i.e., bail variation]" and again, referring to his email of 10

September 2014 (S.B. tab #11) that (p.3) "I followed that up with a telephone call to urge Ms. Seesahai to show some compassion. It was futile."

47. On 2 June 2015 (S.B. tab #25), the Society advised Mr. Histed of its conclusion. It issued a reminder to him with respect to his professional obligations under the Code, specifically with respect to his obligations under rule 7.2-1 and 7.2-4. It said Mr. Histed had breached his duty to treat a fellow lawyer with courtesy and good faith, and his duty to communicate with another lawyer in a professional tone. It observed that Ms. Seesahai's position "appeared to be following Manitoba Justice policy and the recommendations of the Lavoie Inquiry Report" (p. 2) and that "the gravity of the allegations you levelled against Ms. Seesahai through voicing your personal views makes this situation especially troubling."(p.3)

48. On 4 June 2015 (S.B. tab #27) Mr. Histed acknowledged receipt of the Society's determination and then posed a question: "Am I correct in concluding that the Law Society does not consider extortion by Crown Attorneys to be within it's jurisdiction?" On 8 June 2015 the Society replied (S.B. tab #28) that Ms. Seesahai's conduct had not been the subject of its investigation. It advised Mr. Histed that he was free to file a complaint if he wished to. Mr. Histed did not reply. He did not file a complaint.

49. A Court of Queen's Bench resolution conference was scheduled for 17 June 2015. Mr. Histed filed a pretrial brief dated 4 June 2015 (S.B. tab #30). In it Mr. Histed asserted (in paragraph 3 thereof): "The complainant [K.F.] was despondent about the Crown's refusal to vary the accused's bail to allow contact with her. The Crown was repeatedly warned that she was suicidal over this. Counsel for the accused implored the Crown again and again to relax the no contact order to permit even limited contact, but to no avail. The complainant took her own life in late October, 2014 arguably as a result of the no contact order."

50. On 3 December 2015 the Society received a second complaint from Mr. Mahon concerning Mr. Histed (S.B. tab #37). The primary subject of this complaint was Mr. Histed's conduct at a pre-trial conference on 18 September 2015.

51. By its letter to Mr. Histed of 22 December 2015 (S.B. tab#40), the Society requested an explanation from Mr. Histed, including now an explanation as to the pretrial brief of 4 June 2015 (S.B. tab #30).

52. Mr. Histed provided his explanation in a letter of 24 December 2015 (S.B. tab #41). The text of the letter:

    "I am not sure what the complaint is. However, I am sure that this is an attempt to abuse the process of the Law Society to derail the defence of a criminal proceeding that I have conduct of.

The accused in that matter is bringing an application to stay the proceedings against him as an abuse of process as a result of the Crown driving the complainant [K.F.] to suicide. The Court is well aware of this and took no action to censure me in any way. The court will hear that application in the new year and give judgment accordingly. Mahon is rightly embarrassed at the conduct of his colleague [Ms. Seesahai] and is attempting to use you to silence the dissent. His conduct is deplorable, as well for condoning the extortion that you were apprised of previously and saw fit to ignore."

53. Mr. Histed sent two follow-up letters to the Society on 30 December 2015. In the first (S.B. tab #42), he reiterated that "It is not only my opinion, but that of my client that the complainant's death by suicide was preventable by the Crown", and he said "It seems the real complaint is that they don't like being accused of causing the complainant's suicide." The circumstances are "arguably among the clearest of cases where a judicial stay of proceeding is warranted." He said "I am just doing my duty to my client." He enclosed a copy of the Supreme Court decision in *R. v. Babos*. In the second (S.B. tab #47), he wrote that "I don't think her [Ms. Seesahai's] attempt to extort a guilty plea from the accused can be separated from her unreasonable refusal to vary the no contact condition.....On the civil standard which applies to Charter applications, her refusal to do so was a contributing cause of the death of the complainant. I also happen to think it was heartless, negligent and reprehensible." He questioned the Society's impartiality given "undisputed evidence that [Ms. Seesahai] committed extortion."

54. On 25 January 2016 Mr. Histed provided to the Society (S.B. tab #51) what he described as a "supplementary response" to the complaints against him. He asserted that the claim that Ms. Seesahai caused the death of K.F. "is a factual statement", a view of Mr. Histed's shared by his client B.J. He concluded:
"In summary, Seesahai recklessly caused the death of the complainant while committing extortion against both my client and the complainant herself. Mahon's complaint is a collateral attack on my client's right to make full answer and defence and an attempt to prevent this misconduct from being exposed.
Michael Mahon should apologize to my client for attempting to defeat the course of justice with this complaint."

55. On or about 15 January 2016 Mr. Histed filed a Motion for a judicial stay alleging prosecutorial misconduct (S.B. #45). In support, he filed an affidavit of B.J. (S.B. tab #55) and a Court brief (S.B. tab #56). In the Court brief Mr. Histed asserted (p.6) that in its communication to him of 5 September 2014 (S.B. tab#9) "the Crown threatened to have the accused charged with obstructing justice because he allegedly told the complainant how to request of Victim Services that his charges be dropped." In the same brief, he asserted (p.7) that "The Crown Attorney was asked to take all possible measures to protect the

complainant". Also in the same brief he asserted (p.7) "Her suicide was the foreseeable result of the decision made by the Crown, and in fact the Crown was specifically warned of that likelihood and the reasons it should be taken seriously."

56. On 6 June 2016 Justice McKelvey heard B.J.'s motion that the proceedings against him be stayed on the grounds of crown misconduct. The Crown misconduct at issue was causing the death of K.F. and committing extortion.

57. In submissions made on 6 June 2016 before Justice McKelvey (S.B. tab #57), Mr. Histed asserted (p.5-p.6) that "when [Ms. Seesahai] made the threat [in her letter of 5 September 2014] she wasn't really threatening the accused,... she was threatening the complainant [K.F.]. That's a threat to the complainant, that is an extortion on the complainant not merely the accused." In the same submission he asserted (p. 7) "the accused was proposing that the... no contact order be lifted, that he would go and take some programs, and proposing a resolution of the proceedings other than in the usual course..." He asserted further (p.8) "if you look at the threat made by Ms. Seesahai... if the Victim Services thing continues then she's going to have obstruction charges laid, clearly that's the kind of threat that would've deterred and apparently did deter [K.F.] from having any further contact with Victim Services and thereby cut her off from a possible source of support and a possible source of assistance in dealing with the situation." He asserted (p. 10) that "there was an act by [Ms. Seesahai], a criminal act in my respectful submission, extortion that led to this poor woman's death."

58. Justice McKelvey issued her Judgment on 31 August 2016 (S.B tab #58). She dismissed the motion. She concluded (at paragraph 25) that "The Crown was entitled, in the circumstances, to withhold its consent to the variance request of the accused's release conditions. Ultimately, any change in an accused's conditions of release rests with the court." She determined (paragraph 38) that "the conduct constituted operational plea bargaining tactics in the context of communications between counsel" and that "the records are not illustrative of any Crown-generated efforts to terminate [K.F.]'s ability to communicate her wishes to Victim Services with respect to the accused, or to the charge."

59. In a pretrial brief dated 18 October 2016 (S.B. tab #60) Mr. Histed asserted (p. 4) that "[K.F.] killed herself, in substantial part, because of the delay and the Crown's decision to maintain the NCO during that lengthy Crown delay." He asserted (p. 10) that "The course chosen by the Crown was with full knowledge of the serious and imminent risk the complainant would kill herself because of the NCO."

60. On 28 October 2016, Justice McKelvey convicted B.J. of assault cause bodily harm. (S.B. tab #63).

61. In a statement of claim (S.B. tab #65) filed by Mr. Histed on 12 October 2016 on behalf of B.J., it is asserted (in paragraph 12) that "[Ms. Seesahai] also threatened to have the plaintiff charged with obstruction if [K.F.] did not stop imploring Victim Services to have the charge against him dropped". It is asserted (in paragraph 13) that "The threat to charge the plaintiff with obstruction was made for the purpose of deterring [K.F.] from exercising her statutory right under The Victims Bill of Rights to request to have the charge against the plaintiff dropped". It is asserted (paragraph 16) that "It was foreseeable, and [Ms. Seesahai] was specifically warned on September 10, 2014 that the suicide of [K.F.} was imminent if the no contact order was not varied." It is asserted (in paragraph 19) that "As a result of the threats by [Ms. Seesahai], [K.F.] broke off contact with her and Victim Services and was thereby deprived of support and services of The Government of Manitoba that could have saved her life." It is asserted (in paragraph 21) that "The suicide of [K.F.] was the foreseeable result of the reckless and unlawful acts of [Ms. Seesahai] aforesaid."

62. B.J. appealed his conviction to the Court of Appeal. The appeal was heard on 25 October 2017. The court dismissed his appeal with reasons dated 9 February 2018 (S.B tab #67). The court observed (in paragraph 39) that "To insist, as the accused does, that [K.F.]'s suicide was a result of the Crown's actions, specifically its decision not to consent to contact between her and the accused is highly speculative." It agreed (in paragraph 43) with the trial judge that "no Crown misconduct occurred here."

Mr. Histed's Affidavit, exam and cross-exam

63. Mr. Histed described (paras. 3-9) an education, volunteer and summer employment background in the 1980s where he provided direct care to persons who suffered from severe psychiatric disorders and supervision and counseling for persons who were suicidal. He said (para. 58) that "Based on my education and extensive experience providing care to suicidal individuals, it was sadly obvious that the likelihood of [K.F.] taking her own life was very high." He said (para. 127) that "my background and experience in mental health, my education and my 24 years as a barrister ...uniquely qualified me to make that assertion" (i.e., the assertion that there was no evidence contrary to the claim that the Crown drove K.F. to suicide).

    In cross-examination, he acknowledged (pp. 33-37) that he has never given expert testimony as a psychologist, is not a qualified nurse, and in his background had not done any formal psychological assessments, those being done by nurses and doctors.

64. Mr. Histed, throughout his affidavit and cross-examination, reiterated his conviction that the Crown caused the death of K.F. and committed extortion.

65. He reiterated his view (as to the cause death allegation) that he "is not aware of any [evidence to the contrary] in this case" (para. 116) and "there was no evidence to the contrary" (para. 127).

66. He stated (para. 58) that K.F. had a number of "serious risk factors" for suicide. "She suffered from a combination of a pre-existing major mental disorder (Bipolar psychosis), opioid addiction and depression related to the assault and a no contact order." He said "Based on my education and extensive experience providing care to suicidal individuals, it was sadly obvious that the likelihood of [K.F.] taking her own life was very high".

    He acknowledged in cross-examination (cross, p. 56-57) that K.F. "suffered from a severe mental disorder, she had an opioid addiction, she was clinically depressed because she couldn't be with her partner", she "suffered from bipolar disorder", and she had had "hospital admissions", that she had a history of attempting to kill herself in the past, and that she was having issues with her family. He was asked (cross p. 57) "you knew that she had had some kind of horrible incident in her childhood" to which he replied "that I didn't know." His attention was drawn (cross, p. 119) to a reference in the Victim Services records to "pain of memories" of "horrible things I [i.e., K.F.] went through as a child". He replied "I have no idea what that refers to."

67. Part of the police report (S.B. tab#15) includes the information that "At 1530 hrs the deceased texted her boyfriend with a threat of suicide. He indicated that he did not want to get back together". Mr. Histed (cross p. 103) admitted that he had not attached this page of the police report to B.J.'s affidavit of 30 December 2015 (S.B. tab #55).

68. Mr. Histed learned on 12 September 2014 from B.J. that K.F. had broken off contact with Victim Services (cross p. 48), (direct p. 17), (para 57).

69. Mr. Histed stated (cross, p. 44ff.) that he had on one occasion spoken with K.F. The call was "before these emails, possibly late August" (cross, p. 50-51). The call "didn't seem important at the time" (cross p. 47), "I don't have a note of it" (cross p. 47), "I didn't make any records of it" (cross p. 47). "What [K.F.] said to me at the time was how could she -- she phoned me trying to find out how she could get the prosecution stopped" (cross p. 47). Mr. Histed testified that he told her that if she wanted to communicate with the Crown, the best way was to go through Victim Services. (cross p. 47).

70. Mr. Histed was pressed (cross p. 60-ff) on what he did, given his belief that K.F. was in mortal danger. He confirmed that what he did was send two emails. (cross p. 63 "Q. That's what you did and that's all you did? A. That's all I did."), (cross p. 161 "I did everything I

could. There was nothing more that I could have done"), (cross p. 163 "there was nothing else that I could do".)

71. Mr. Histed was pressed (cross p. 75) on why a bail review was not undertaken after 12 September 2014. (That was the day on which B.J.'s other assault charge was stayed and on which Mr. Histed learned from B.J. that K.F. had broken off contact with Victim Services.) Mr. Histed replied that "I didn't think it would succeed" and "I didn't think we would get anywhere" (cross p. 75) and a bail review "was a waste of time and money" and "I thought it would be futile" (cross p.77).

72. He affirmed (aff. Para 115) that Ms. Seesahai's decisions were "fully consistent with long-standing Manitoba Justice domestic violence policy".

73. Mr. Histed had difficulty pinning down when he received the police reports (S.B tab #14 and #15). In his affidavit, he stated that it was "approximately January 6, 2015 "(para. 63). In cross –examination (pp. 91 & ff) he was far less sure of the date. In any event he had received them prior to his preparing B.J.'s affidavit of December 2015.

74. Mr. Histed received the redacted Victims Services Records (S.B. tab#13) in March 2016.

Mr. Kravetsky's Submission

75. Mr. Kravetsky submitted that much of what needed to be proven was not in dispute. At issue was whether Mr. Histed had any reasonable basis for making the statements that he made, as well as how he said what he said. He submitted that the statements made were unsupported by actual facts or actual evidence. He submitted that in *Groia v. Law Society of Upper Canada* (2018 SCC), Mr. Groia's misbehaviour stopped after he was cautioned. This was in contrast to Mr. Histed, whose allegations escalated after the Society's reminder. He submitted that Mr. Histed made no independent investigations into the causes of K.F.'s death, and consulted no experts. He submitted that Ms. Seesahai was acting within the parameters of her department's policies, and had regard to her obligations under the Lavoie Report. He submitted that Mr. Histed used intemperate language in allegations against Ms. Seesahai and Mr. Mahon, and did so based on no new information. He submitted that, logically, if Mr. Histed had had evidence that varying bail conditions would save a life, then chances of success on a bail review application would not be remote.

Mr. Cramer's Submission

76. Mr. Cramer submitted that Mr. Histed's conduct reflected his honest beliefs based on a reasonable analysis of the evidence. He said that lawyers are entitled to be wrong. Every case has a winner and a loser. He said that the practice of criminal law requires tenacity and courage. It requires a willingness at times to suggest controversial and unpleasant things, if done with an honest belief and based on one's understanding of the law and appreciation of the facts. He said that a lawyer is entitled to act on the instructions of their client and also to believe their client. Based on the *Funk Estate v. Clapp* [1986] B.C.J. No. 122 (C.A.) decision, he said that one may make an argument as to the cause of a suicide without the benefit of expert medical evidence. He submitted that convicting Mr. Histed would have a chilling effect on resolute advocacy, that it would send the message that lawyers' main concern should be that of being civil. He said that even if Mr. Histed went over the top from time to time, being over the top with zealous representation is preferable to being chilled and frightened. He characterized Mr. Histed as a fearless and zealous advocate in the best tradition of the bar.

The Code provisions

77. The citation alleges breaches of rule 3.2-2 of the Code. The rule reads: "When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter." Accompanying commentary includes: "A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results."

78. The citation alleges breaches of rule 3.2-2C of the Code. The rule reads: "A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice." Accompanying commentary includes: "Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed"; "A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based"; and "A lawyer should not provide advice if the lawyer's personal views of the client, others involved or the issue will affect the lawyer's independence on the matter."

79. The citation alleges breaches of rule 5.1-1 of the Code. The rule reads: "When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect." Accompanying commentary includes: "A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal. A lawyer's role is to

present the evidence on behalf of a client fairly without assertion of any personal knowledge of the facts at issue."

80. The citation alleges breaches of rule 5.1-2 of the Code. The rule includes: "When acting as an advocate, a lawyer must not:

    (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

    (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

    (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

    (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal."

81. The citation alleges breaches of rule 7.2-1 of the Code. The rule reads: "A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice." Accompanying commentary includes: "The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system;" and "A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested to advise and represent a client in a complaint involving another lawyer."

82. The citation alleges breaches of rule 7.2-4 of the Code. The rule reads: "A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer."

Analysis: that the Crown caused the death of K.F.

83. Mr. Histed first made the claim that Ms. Seesahai caused the death of K.F. in his email to Ms. Seesahai of 22 December 2014. Though often thereafter expressed in stronger language (for example, "criminal negligence cause death" in his letter to the Society of April 2015), it is a position Mr. Histed maintained steadfastly, through to and including at the hearing before this panel.

84. In his justification of the claim to the Society in April 2015 (S.B. tab #20), Mr. Histed gives a defining role to his client B.J.'s communications to him based on K.F.'s communications to B.J. ("as I was given to understand,[K.F.] had tried repeatedly to have [B.J.]'s bail varied through Victim Services" (p. 2)); and to Mr. Histed's own communications to Ms. Seesahai ("I believe I had some telephone contact with Ms. Seesahi about the matter" (p. 2), he sent an email in which "I tried to explain to her [Ms. Seesahai] the gravity of the situation" (p. 3), and "I followed that [the email] up with a telephone call to urge Ms. Seesahai to show some compassion. It was futile." (p. 3).)

85. The same type of justification is put forward in Mr. Histed's pre-trial brief of 15 June 2015. "The complainant was despondent about the Crown's refusal to vary the accused's bail to allow contact with her. The Crown was repeatedly warned that she was suicidal over this. Counsel for the accused implored the Crown again and again to relax the no contact order to permit even limited contact, but to no avail." (S.B. tab #30, para. 3).

86. That he gave himself a defining role was underscored by Mr. Histed in his affidavit where he (in para. 127) described himself as "uniquely qualified" to make assertions about the cause of K.F.'s death.

87. Mr. Histed's justification in our view raises multiple problems for Mr. Histed.

88. First, there was no telephone contact between Mr. Histed and Ms. Seesahai. There was no telephone discussion concerning possible bail variation. There was no telephone call in which Mr. Histed "urged" Ms. Seesahai to show compassion. Mr. Histed acknowledged as much tacitly in his affidavit in that the affidavit contains no reference to these telephone discussions. Mr. Histed acknowledged as much explicitly in cross-examination when he admitted that all he had done was send two emails. Thus, there were no phone calls between himself and Ms. Seesahai. That is, and in other words, Mr. Histed misrepresented to the Society the nature of his communication to Ms. Seesahai.

89. Second, Mr. Histed embellishes substantially his email communication with Ms. Seesahai. There were two emails, both on 10 September 2014 (the first at S.B. tab #11, the second at

S.B. tab #12). The second makes no mention of varying bail conditions. It reiterates B.J.'s concern that K.F. is suicidal and asks that Victim Services take all possible measures to protect K.F. The first expresses B.J.'s concern that K.F. is suicidal, of which concern Mr. Histed says "there may be some validity to this." The email says that K.F. has been hospitalized "over the despair she feels about the present status of things". It refers to her being homeless. The email then does not itself identify any bail variation that would address the concern. Rather, it invites Ms. Seesahai to do so. It invites her to identify "reasonable terms that we can agree to relax the no contact order." To the knowledge of both Mr. Histed and Ms. Seesahai , B.J. and K.F. were already in regular contact. From Ms. Seesahai's response, this was a level of contact she was prepared to tolerate. Given this, it is quite simply unclear from the email what type of bail variation if any would be responsive to the concern that K.F. was suicidal.

90. In any event, those two emails constitute in full Mr. Histed's communications to Ms. Seesahai on the putative relationship between varying bail conditions and K.F.'s suicide.

91. The two emails cannot accurately be described as "repeated warnings" to the Crown that K.F. was suicidal over the Crown's refusal to vary the no contact order. They cannot accurately be described as Mr. Histed "imploring the Crown again and again to permit even limited contact."

92. Thus we have misrepresentation and embellishment by Mr. Histed in his characterization of his communications to Ms. Seesahi. This is a serious matter. Having assigned to his communications with Ms. Seesahai a central and defining role in establishing Ms. Seesahai's culpability in the death of K.F., misrepresentation and embellishment as to those communications is damaging. It shows Mr. Histed to be an unreliable witness in his account of his own behaviour. In our view it also constitutes an admission by him that the email record by itself and as it stands is an inadequate evidentiary foundation for the claim being made against Ms. Seesahai.

93. As noted, Mr. Histed did not provide to Ms. Seesahai the particulars of the changes which in his view were needed to the bail conditions. In his pre-trial brief of 15 June 2015 in the passage already quoted he states the variation needed was "to permit even limited contact". In his letter to the Society of April 2015 Mr. Histed suggests (p.2) that bail conditions be varied "to allow people to attend counseling together or to allow limited contact".

94. But in his affidavit Mr. Histed has a different account. At para. 117, he affirms: "I knew that telephone contact was not enough for [K.F.] who could not face life without being allowed to be together with [B.J.]. This is something that seems to have been misunderstood by the

Crown and the courts all the way through. Her despair was not over the fact that he was not permitted to call her, it was because they could not live together as a couple." At the hearing before us in cross-examination, he testified (p. 82-83): "This is what the Court of Appeal and Justice McKelvey didn't really understand. It wasn't that she [K.F.] couldn't talk to him [B.J.], but it was that they couldn't be together as a couple, otherwise he was going to jail. And that was -- I mean it wasn't the fact that she couldn't communicate with him. It was the fact that they couldn't be a couple". Based on this testimony, the life-saving measure needed was not a variation ("relaxation") of the no contact order. What was needed was the removal altogether of the no contact order.

95. Needless to say, this is not what Mr. Histed communicated to Ms. Seesahai in his email of 10 September 2014. It is not what he asked her to do. It is not what he asked her to consider doing.

96. In any event, this remarkable testimony begs the question of how Mr. Histed could know or claim to know any of these things about K.F. He did not interview her. (In cross-examination he recalled a telephone conversation with her in August of 2014; the call had not made a sufficient impression on him to mention it earlier). He did not interview any family members. He did not consult any professionals. He did not requisition (by court order or other means) any hospital records. He gave no weight to what Ms. Seesahai reported, notwithstanding that Ms. Seesahai had interviewed K.F.

97. It appears, and we conclude, that the primary, if not quite exclusive, source of Mr. Histed's "knowledge" about K.F. was B.J., the person charged with assaulting K.F. and the person expected to benefit directly from any relaxation in bail conditions. Whatever the value of B.J. as a source of information, he is in this context of dubious value as a source of evidence. Mr. Histed is aware of this. His conviction that the Crown's case against B.J. could not proceed after K.F.'s death was premised in part on an argument that the statements made by K.F. to the police were inadmissible. There would be reliability issues. If K.F.'s statements to the police were not sufficiently reliable to be admissible, what of K.F.'s statements made to B.J. about varying bail conditions? What of K.F.'s statements to B.J. about her attempts to obtain a variation through Victim Services? What of anything B.J. had to report of K.F.'s preferences? We pose these questions not to answer them, but rather to highlight the fragility of a reliance in this context on B.J. as an evidentiary source.

98. To summarize, Mr. Histed's evidence for the claim that the Crown caused K.F's death, as described by Mr. Histed himself to the Society and in his pre-trial brief, consisted of his own emails, the crucial one of which did not in fact describe what bail variation would be needed, and of his client B.J., the person charged with the assault of K.F. In other words, his

witness list consisted of himself and of the perpetrator of the assault on K.F. This is an inadequate evidentiary basis for a claim of any kind, never mind a claim of a serious nature.

99. Mr. Histed was, in a sense, perfectly aware of this. He was pressed in cross-examination on why a bail review application was not attempted, after Ms. Seesahai on 10 September 2014 indicated she was not then prepared to consent to a variation in bail conditions. After all, as Mr. Histed would have it portrayed, a variation was a matter of life and death for K.F. This portrayal notwithstanding, he testified that a bail review application would have been "futile" and "a waste of money". In our view, this is a frank admission by Mr. Histed that he lacked any evidentiary basis whatever for his claim.

100. The failure to bring a bail review application is made more damaging by a development unmentioned by Mr. Histed in his letter to the Society of April 2015. On 12 September 2014 Mr. Histed was advised by B.J. that K.F. had broken off contact with Victim Services. This was a mere two days after the email exchange of 10 September 2014. That email exchange had concluded with Ms. Seesahai indicating that Victim Services would keep in good contact with K.F. and with Mr. Histed's request that Victim Services "take all possible measures to protect her." Mr. Histed did not advise Ms. Seesahai of this new information. He did not with this new information ask Ms. Seesahai to reconsider her position on bail variation. He did not with this new information undertake a bail review application. He did nothing with this new information.

101. In due course Mr. Histed came into possession of the police records relating to K.F.'s death (S.B. tab #14 and tab #15) and to the redacted Victim Services Records (S.B. tab #13). On their face, and in case there was any doubt, these documents paint a picture of a vulnerable young woman deeply troubled by a myriad of factors, some in the present and some in the past, some reaching back into her childhood. They amplify the factors Mr. Histed himself testified to (as described in paragraph 66 herein). It is self-evident that only an expert, if anyone, could opine on the cause or causes of K.F.'s death.

102. Is Mr. Histed such an expert? In his affidavit he made the claim (para. 127) that he was "uniquely qualified", citing specifically his background and education in mental health. That he was "uniquely qualified" supported his assertion that there was "no evidence to the contrary" in this case. Mr. Histed is quite right to recognize that this assertion needed expert evidence to be supportable.

103. By bringing his "unique qualifications" into play, Mr. Histed acknowledges that the case is indeed one which requires medical expertise. But supposing Mr. Histed to have this expertise, then Mr. Histed 's value to B.J. would not be as an advocate. His value to B.J.

would lie in being the expert witness that the case requires. As Mr. Histed knows, or at least should know, he cannot be both B.J.'s advocate and B.J.'s expert witness. As advocate, his "expertise" has no evidentiary weight or value.

104. In any event, Mr. Kravetsky's cross-examination ably showed that Mr. Histed has no special medical expertise, and his "medical" opinions are due no special weight.

105. One item of "evidence to the contrary" deserves special mention. It is the police report of Officer Jan DeVries (S.B. tab #15). It reads in part as follows: "At 1530 hrs the deceased texted her boyfriend with a threat of suicide. He indicated that he did not want to get back together." Mr. Histed nowhere mentions or references this entry in the police report. Tellingly, Mr. Histed did not attach the page of the police report containing this disclosure as an exhibit to B.J.'s affidavit of 30 December 2015 (S.B. tab #55). He did not attach it as an exhibit to his affidavit in this proceeding.

106. Mr. Cramer argued, based on the *Funk Estate v. Clapp* (B.C.C.A.) ([1986 B.C.J. No. 122) decision, that an allegation as to the cause of suicide need not be supported by expert evidence. We do not find the *Funk* decision helpful. *Funk* is a case in which a prison inmate, Funk, committed suicide by hanging himself with his belt. Prison policy required staff to remove belts from inmates as a precaution against suicide risk. Prison staff had breached policy in failing to remove Funk's belt from him. At issue was the question of whether in these circumstances expert evidence was needed on the cause of suicide. In the matter before us, there was no breach of any policy and there was no Crown wrongdoing.

107. Mr. Cramer argued that Mr. Histed's position would be vindicated if the Crown's conduct was merely a contributing cause of K.F.'s death. The Crown's conduct need not be **the** cause. We note that Mr. Histed himself rarely made this concession. Even so, Crown conduct downgraded to being merely a contributing cause still requires a showing that there was Crown wrongdoing. We are satisfied that Mr. Histed at no time had an adequate evidentiary basis for this claim.

Analysis: Extortion by threatened charge upgrade

108. The allegation of extortion is first made by Mr. Histed (S.B. tab # 20) in his April 2015 explanation to the Society in response to Mr. Mahon's first complaint to the Society. The evidentiary basis of the allegation was Ms. Seesahai's letter to him of 5 September 2014 (S.B. tab #9).The extortion alleged is the potential upgrade of the charge facing B.J. from assault cause bodily harm to aggravated assault. Mr. Histed cited a Common Pleas case from 1856 in support. After Mr. Histed received the Society's reminder letter (S.B. tab#25), he

promptly repeated the allegation in further correspondence to the Society of 4 June 2015 (S.B. tab #27).

109. Counts 3 and 4 of the Citation characterize the repetition of the allegation as "unnecessary" and as "made without due consideration of such information as was available to you and, in any event, without any, or any sufficient factual basis".

110. The Society had issued a reminder to Mr. Histed and closed its file on the initial complaint. The letter was, therefore, not relevant to the determination of that complaint. It was written in the direct face of the reminder. It was not itself a complaint to the Society against Ms. Seesahai. It was not part of an argument being made on behalf of B.J. to an adjudicative body that had authority over B.J. Its legal basis was a mid- 19th century case. In our view, the letter of 4 June 2015 was a gratuitous insult of Ms. Seesahai.

Analysis: Extortion by threatened obstruction of justice charge

111. This alleged extortion was allegedly committed in the same Crown letter of 5 September 2014 (S.B. tab #9). While this allegation took various forms through the years, this is how Mr. Histed explained it in cross-examination (cross p. 43): "[Ms. Seesahai]'s threatening to have [B.J.] prosecuted for obstructing justice if the complainant doesn't stop asking Victim Services to stay the charge. So extortion can be committed by threatening a third party with the intent that somebody else do something. So in this case, what [Ms. Seesahai] said and the way my client understood it and I understand the way [K.F.] understood it, was that if [K.F.] didn't stop bothering Victim Services and [Ms. Seesahai] to drop the charge, that [Ms. Seesahai] would initiate a police investigation to have [B.J.] prosecuted for obstruction of justice".

112. Our first difficulty is that this is a complete misdescription of the plain text of Ms. Seesahai's letter.

113. A second difficulty is that, as Mr. Histed himself acknowledged (cross p. 132 ff.), B.J.'s conduct as described in the letter would in fact be obstruction of justice if that conduct occurred as actually described by Ms. Seesahai.

114. Tied into the second is a third, namely that Mr. Histed has no evidence, beyond the letter itself, as to what K.F. told Ms. Seesahai or, for that matter, as to what Ms. Seesahai told K.F.

115. A fourth difficulty is that there is no basis whatever in the record for the suggestion that either Ms. Seesahai or Victim Services wished in any way to curtail contact with K.F. or to curtail K.F.'s contact with them. To the contrary, Ms. Seesahai, by her letter of 10 September 2014 (S.B. tab #12) wrote of Victim Services keeping in contact with K.F., an idea that Mr. Histed himself endorsed. This email exchange is flatly inconsistent with the premise of this branch of Mr. Histed's extortion allegation.

116. We note that, on or about 30 December 2015 (S.B. tab #55), Mr. Histed prepared for B.J.'s signature an affidavit. That affidavit includes references to conversations between B.J. and K.F. Nothing in that affidavit references, directly or indirectly, the understanding of the letter of 5 September 2014 that founds Mr. Histed's allegation.

117. In other words, and in conclusion, there is no evidentiary basis whatever to Mr. Histed's extortion allegation.

Analysis: Misrepresentations to the Court

118. Count 2 of the Citation alleges misrepresentations of facts to the Court in Court briefs and in oral argument.

119. In a Court brief of 15 January 2016 (S.B. tab #56) Mr. Histed asserted (p. 6) that Ms. Seesahai "threatened to have the accused charged with obstructing justice because he allegedly told the complainant [K.F.] how to request of Victim Services that his charges be dropped". This threat was supposedly made in Ms. Seesahai's letter to Mr. Histed of 5 September 2014 (S.B. tab #9).

120. A reading of the plain text of Ms. Seesahai's letter confirms that this assertion is a misrepresentation of the letter's contents.

121. In oral argument before Justice McKelvey on 6 June 2016 (S.B. tab #57) Mr. Histed asserted that (p. 5, lines 28 & ff) "when the Crown attorney in this case made that threat she wasn't really threatening the accused, My Lady, she was threatening the complainant. That's a threat to the complainant, that is an extortion on the complainant not merely the accused."

122. A reading of the plain text of Ms. Seesahai's letter confirms that this assertion is a misrepresentation of the letter's contents.

123. In a Court brief dated 18 October 2016 (S.B. tab #60) filed in respect of a motion to dismiss the charges against B.J. for delay Mr. Histed asserts (para 4) that "the complainant

killed herself, in substantial part, because of the delay and the Crown's decision to maintain the NCO during that lengthy Crown delay".

124. There is no evidentiary basis for this assertion.

Analysis: Being discourteous and uncivil

125. Mr. Histed's communications to the Society in response to the complaints of Mr. Mahon are peppered with statements insulting to and of the character and motivation of both Mr. Mahon and of Ms. Seesahai. Examples of these statements are described above in paragraphs 52-54 of these reasons. These statements are prima facie breaches of the Code.

126. As a general rule, personal attacks of this nature against those who complain to the Society are irrelevant to the Society's investigation. The Society is interested in investigating the merits of a complaint. The character and motivation, whether noble or base, of the person making the complaint to the Society is generally irrelevant to this undertaking. Nothing makes this case an exception to this general rule.

127. Mr. Histed himself acknowledged (for example, at para. 115 of his affidavit) that the Crown's actions were "fully consistent with long-standing Manitoba Justice domestic violence policy". It is the policy, it seems then, not the people, that is the true object of Mr. Histed's grievance. This being the case, targeting the character and motivation of those acting in accordance with that policy seems particularly ill-judged.

128. On 2 June 2015 the Society (S.B. tab #25) reminded Mr. Histed of his duties under Rule 7.2 of the Code. Many of Mr. Histed's insulting statements were made after he received this reminder.

129. Mr. Cramer in his submission focussed on the importance and value of zealous advocacy. The Society itself is not an adjudicative body having authority over Mr. Histed's client B.J. Many of the insults were included in communications to the Society, not in submissions made in forums having adjudicative authority over B.J.

Conclusion

130. A conspicuous feature of the *Groia* case is that Mr. Groia promptly modified his behaviour after his conduct was called into question by the Court. A conspicuous feature of the case before this panel is that Mr. Histed did not modify his behaviour after the Society reminded him in June 2015 of his professional obligations under the Code. That reminder notwithstanding, Mr. Histed continued to advance a suite of baseless allegations.

131. Mr. Cramer argued that Mr. HIsted was engaged in zealous advocacy. In our view, advocacy, no matter how zealous, must nevertheless be founded on an honest and reasonable assessment of the evidence. Based on the materials and evidence before this panel, we conclude that Mr. Histed's conduct at issue in the citation was not founded on an honest assessment of the evidence. It was not founded on a reasonable assessment of the evidence. We conclude that he transgressed the Code as alleged in the citation.

Dated December 13th, 2019.

(Jacob P. Janzen, Chair)

(Richard Buchwald)

(Lynne McCarthy)(PR)

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

ROBERT IAN HISTED

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

CITATION

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THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

ROBERT IAN HISTED

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

CITATION

TO: ROBERT IAN HISTED, of the City of Winnipeg, in the Province of Manitoba, lawyer, and a member of The Law Society of Manitoba.

TAKE NOTICE that a hearing will be held by a panel of the members of the Discipline Committee, established by the Benchers of The Law Society of Manitoba to consider charges of professional misconduct laid against you by the Complaints Investigation Committee of The Law Society of Manitoba. If you are found guilty of professional misconduct, you may be disbarred and your name struck off the Rolls of The Law Society of Manitoba or you may be suspended from practising law or you may otherwise be dealt with by the Discipline Committee panel under the provisions of *The Legal Profession Act* and the *Rules of The Law Society of Manitoba*. A statement of the charges forms part of this notice and is as follows:

THAT YOU, the said **ROBERT IAN HISTED**, called to the Bar in the Province of Manitoba on the 20th day of June, 1991, and entered as a lawyer in the Rolls of The Law Society of Manitoba under the provisions of *The Legal Profession Act*, and being a member of The Law Society of Manitoba, by your actions, as particularized herein, did commit professional misconduct in that:

1. While representing your client **B. J.** from and after approximately April 5, 2014 as to matters arising from criminal charges you acted contrary to rules 3.2-2 and 3.2-2C of the *Code of Professional Conduct* in that you failed to provide your client with advice that was honest, candid, based upon sufficient knowledge of the relevant facts and based on an adequate consideration of the applicable law and that was independent of your personal views.

Particulars

a) You persistently advanced on behalf of **B. J.** the position that the complainant, **K. F.** had been caused to commit suicide by reason of the refusal of Sheila Seesahai, Crown Attorney to agree to remove or revise terms of interim release requiring that he not contact **K. F.** when:

i) there was no evidence, or no sufficient evidence, to support this assertion;
ii) you had taken no steps, or no adequate steps, to ascertain whether this assertion was factually correct;
iii) you did not consider evidence to the contrary that was known to you;
iv) you did not consider that **B. J.** was in frequent contact with **K. F.** despite those no-contact provisions and took no steps to investigate the extent content and effect of that contact; and
vi) you were influenced and motivated by your own opinion of Ms. Seesahai.

b) You persistently advanced on behalf of **B. J.** the position that Ms. Seesahai had engaged in "extortion" by threatening **B. J.** with charges of obstruction of justice when, in fact Ms. Seesahai made no such threat;

c) You persistently advanced on behalf of **B. J.** the position that Ms. Seesahai had engaged in "extortion" by threatening **B. J.** when she notified you that **B. J.'s** efforts to induce **K. F.** to seek to have the charges dropped "amounts to a possible obstruction charge so he needs to stop that immediately" even though:

i) in the same communication Ms. Seesahai had communicated to you the basis for her statement, being that **K. F.** had told her that in his prohibited contact with her, **B. J.** had repeatedly told **K. F.** to go to Victims Services and get the charges dropped;
ii) you had no basis to believe that **B. J.** had not made those repeated statements to **K. F.**
iii) you had no basis to believe that **K. F.** had not imparted to Ms. Seesahai the information stated in Ms. Seesahai's communication to you.

2. While representing your client **B. J.** from and after approximately April 5, 2014 as to matters arising from criminal charges you acted contrary to rules 5.1-1 and 5.1-2 of the *Code of Professional Conduct* in that you failed to treat the Court with candour, fairness, courtesy and respect.

Particulars

X discontinued

~~a) At a pre-trial conference on September 18, 2015 before Madam Justice Suche you:~~

~~i) raised your voice and gestured angrily while making inflammatory comments to her after being told that she intended to order you to complete a pre-trial brief;~~
~~ii) refused to respond to her questions regarding matters pertinent to the pre-trial.~~

b) You misrepresented facts to the Court in a brief dated January 15, 2016 filed in support of a motion alleging abuse of process on the part of the Crown as follows:

i) You stated that in correspondence to you, Sheila Seesahai, a Crown Attorney "threatened to have the accused charged with obstructing justice because he allegedly told the complainant how to request of Victim Services that his charges be dropped." when in fact the communication, which you maintained in your possession, stated:

> " **K. F.** indicates that she and your client have been having some contact. Your client has told her repeatedly to "go to Victim Services and get the charges dropped." He apparently went so far as to tell her that she should go more than once, go several times to Victim Services if that's what it takes. I trust you will give your client the appropriate advice about these contacts; I am not going to ask for a police investigation at this time due to the complainant's wishes, but such behavior amounts to a possible obstruction charge so he needs to stop that immediately."

ii) In oral argument before Madam Justice McKelvey on June 6, 2016 you made submissions to the effect that Ms. Seesahai had threatened **B. J.** with a charge of obstruction of justice and that she had thereby deterred **K. F.** from maintaining contact with Victim Services when there was no factual basis for those submissions;

iii) In the same brief you asserted as a fact that "**K. F.'s** suicide was the foreseeable result of the decision made by the Crown" when there was no basis for that assertion and when you:

- were aware of evidence to the contrary;
- were not qualified to determine the cause or causes of **K. F.'s** suicide; and
- had sought no professional advice and had made no other investigation into the cause or causes of **K. F.'s** suicide.

c) You misrepresented facts in a brief dated October 18, 2016 filed in respect of a motion to dismiss or stay the charges against **B. J.** for delay as follows:

i) You stated: "The complainant killed herself, in substantial part, because of the delay and the Crown's decision to maintain the NCO [No Contact Order] during that lengthy Crown delay."
ii) You stated, also, relying on an affidavit you had drafted: "The course chosen by the Crown was with full knowledge of the serious and imminent risk that the complainant would kill herself because of the NCO"

when:

iii) There was no, or no sufficient, factual basis to make those statements;
iv) You had sought no professional advice and had made no other investigation into the cause or causes of **K. F.'s** suicide;
v) You were aware of other facts that may have been relevant to formulating an opinion as to the cause of **K. F.'s** suicide but you did not fully and fairly disclose those to the court.

3. While representing your client **B. J.** from and after approximately April 5, 2014 as to matters arising from criminal charges you acted contrary to rule 7.2-1 of the *Code of Professional Conduct* in that you failed to be courteous and civil and to act in good faith toward persons with whom you had dealings in the course of the matter.

Particulars

a) In an email to Ms. Seesahai dated December 22, 2014 you stated: " **K. F.** committed suicide as a direct, foreseeable result of a decision you made" when you had no information, or no sufficient information, to make that assertion and when, in any event, it was unnecessary for you to do so.

b) By letter dated March 23, 2015, Michael Mahon, Assistant Deputy Attorney General complained to The Law Society of Manitoba ("the Society") about comments you had made in your email of December 22, 2014 sent to Sheila Seesahai, Crown Attorney that

i) the complainant, **K.F.** "committed suicide as a direct, foreseeable result of a decision you [Ms. Seesahai] made;" and
ii) "You should be contacting your insurer rather than proceeding with a preliminary inquiry";

c) After Mr. Mahon's said letter was forwarded to you by the Society for your response to the complaint, you wrote to the Society by letter dated April 6, 2015 in which you asserted:

i) **K.F.** death was the preventable result of the negligent conduct of Ms. Seesahai."
ii) "Ms. Seesahai has zealously prosecuted cases with no hope of conviction for reasons which are not apparent to me."
iii) "Ms. Seesahai was completely unreasonable, and appeared to be committed to prosecuting **B.J.** to the fullest extent possible regardless of the strength of the case."
iv) referring to Ms. Seesahai, that "Her lack of objectivity was obvious"
v) "My personal opinion is that she [Ms. Seesahai] should be prosecuted for criminal negligence causing death"

when:

vi) those assertions were neither necessary nor relevant to your substantive response to the complaint; and in any event
vii) each of those assertions was made without any, or any reasonable, basis in fact.

d) By letter dated June 2, 2015 the Society:

i) advised you that it had concluded its investigation into Mr. Mahon's complaint of March 23, 2015;
ii) reminded you of your duties under Rule 7.2 of the *Code of Professional Conduct*; and
iii) advised you that it was closing its file in relation to that complaint;

which letter, therefore, required no further response or comment from you;

e) You wrote to the Society an unsolicited letter dated June 4, 2015 in which

you:

i) asserted "the fact Ms Seesahai committed extortion in relation to my client": and added:
ii) "Am I correct in concluding that the Law Society does not consider extortion by Crown Attorneys to be within its jurisdiction?"

which statements were unnecessary and were made without due consideration of such information as was available to you and, in any event, without any, or any sufficient, factual basis.

~~f) At a pre-trial conference on September 18, 2015 before Madam Justice Suche, you were discourteous and disrespectful of Crown Attorney Ari Millo by:~~

~~i) raising your voice and gesturing angrily while making inflammatory comments concerning him;~~
~~ii) personally attacking him with disparaging comments.~~

discontinued

g) At a pre-trial conference on September 18, 2015 before Madam Justice Suche, you were discourteous and disrespectful of the Manitoba Justice Public Prosecutions Service ("PPS") by:

i) making disparaging remarks about PPS and its lawyers;
ii) accusing PPS of complicity in the death of **K. F.**
iii) accusing PPS of causing the death of **K. F.**
iv) stating that PPS had "disposed of the complainant".

h) On December 3, 2015 the Society received a further complaint from Mr. Mahon ("the December Mahon Complaint") ~~in relation to your conduct at the pre-trial conference of September 18, 2015, a copy of which complaint letter was forwarded to you by the Society;~~

discontinued

i) You responded to the December Mahon Complaint by letter to the Society dated December 24, 2015 in which you asserted that:

i) the complaint was "an attempt to abuse the process of the Law Society to derail the defence of a criminal proceeding";
ii) the Crown, meaning PPS, had driven **K. F.** to suicide;
iii) Mr. Mahon was attempting to "silence the dissent";

iv) Mr. Mahon was condoning extortion;

when there was no factual basis for those assertions and, in any event, no need to make them and when you were aware that your correspondence would, in the ordinary course, be provided to Mr. Mahon.

j) You sent to the Society a further unsolicited response to the December Mahon complaint by emails dated December 30, 2015 in which you asserted that:

i) "It seems the real complaint is that they don't like being accused of causing the complainant's suicide"
ii) "I don't think her [Ms. Seesahai's] attempt to extort a guilty plea from the accused can be separated from her unreasonable refusal to vary the no contact condition."
iii) Ms. Seesahai's "refusal" to vary the conditions of interim release was a "contributing cause of the death of the complainant and "I also happen to think it was heartless, negligent and reprehensible."
iv) there was "undisputed evidence" that Ms. Seesahai "committed extortion"

when there was no factual basis for those assertions and, in any event, no need to make them and when you were aware that your correspondence would, in the ordinary course, be provided to Mr. Mahon.

k) You sent to the Society a further unsolicited response to the December Mahon Complaint by letter dated January 25, 2016 in which you asserted that:

i) Ms. Seesahai caused the death of
ii) Ms. Seesahai "recklessly caused the death of the complainant while committing extortion against both my client and the complainant herself";
iii) Mr. Mahon's complaint was "a collateral attack on my client's right to make full answer and defence and an attempt to prevent this misconduct from being exposed";
iv) "Michael Mahon should apologize to my client for attempting to defeat the course of justice with this complaint."

when there was no factual basis for those assertions and, in any event, no need to make them and when you were aware that your correspondence would, in the

ordinary course, be provided to Mr. Mahon.

4. While representing your client **B. J.** from and after approximately April 5, 2014 as to matters arising from criminal charges you acted contrary to rule 7.2-4 of the *Code of Professional Conduct* in that you sent correspondence and made communications to others that were abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

Particulars

a) In an email to Ms. Seesahai dated December 22, 2014 you stated: "**K. F.** committed suicide as a direct, foreseeable result of a decision you made" when you had no information, or no sufficient information, to make that assertion and when, in any event, it was unnecessary for you to do so.

b) By letter dated March 23, 2015, Michael Mahon, Assistant Deputy Attorney General complained to The Law Society of Manitoba ("the Society") about comments you had made in your email of December 22, 2014 sent to Sheila Seesahai, Crown Attorney that

i) the complainant, **K. F.** "committed suicide as a direct, foreseeable result of a decision you [Ms. Seesahai] made;" and
ii) "You should be contacting your insurer rather than proceeding with a preliminary inquiry";

c) After Mr. Mahon's said letter was forwarded to you by the Society for your response to the complaint, you wrote to the Society by letter dated April 6, 2015 in which you asserted:

i) **K. F.'s** death was the preventable result of the negligent conduct of Ms. Seesahai."

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v) "My personal opinion is that she [Ms. Seesahai] should be prosecuted for criminal negligence causing death."

when;

vi) those assertions were neither necessary nor relevant to your substantive response to the complaint; and in any event
vii) each of those assertions was made without any, or any reasonable, basis in fact.

d) By letter dated June 2, 2015 the Society:

i) advised you that it had concluded its investigation into Mr. Mahon's complaint of March 23, 2015;
ii) reminded you of your duties under Rule 7.2 of the *Code of Professional Conduct*; and
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which letter, therefore, required no further response or comment from you;

e) You wrote to the Society an unsolicited and unnecessary letter dated June 4, 2015 in which you:

i) asserted "the fact Ms Seesahai committed extortion in relation to my client": and added:
ii) "Am I correct in concluding that the Law Society does not consider extortion by Crown Attorneys to be within its jurisdiction?"

which statements were unnecessary and were made without due consideration of such information as was available to you and, in any event, without any, or any sufficient, factual basis.

~~f) At a pre-trial conference on September 18, 2015 before Madam Justice Suche, you were discourteous and disrespectful of Crown Attorney Ari Millo by:~~

discontinued

~~i) raising your voice and gesturing angrily while making inflammatory comments concerning him;~~
~~ii) personally attacking him with disparaging comments.~~

discontinued

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iii) accusing PPS of causing the death of **K. F.** ;
iv) ~~stating that PPS had "disposed of the complainant"~~.

discontinued

h) On December 3, 2015 the Society received a further complaint from Mr. Mahon ("the December Mahon Complaint") ~~in relation to your conduct at the pre-trial conference of September 18, 2015, a copy of which complaint letter was forwarded to you by the Society;~~

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complainant and "I also happen to think it was heartless, negligent and reprehensible."

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iii) Mr. Mahon's complaint was "a collateral attack on my client's right to make full answer and defence and an attempt to prevent this misconduct from being exposed"

iv) "Michael Mahon should apologize to my client for attempting to defeat the course of justice with this complaint."

when there was no factual basis for those assertions and, in any event, no need to make them and when you were aware that your correspondence would, in the ordinary course, be provided to Mr. Mahon.

AND THEREFORE you did commit professional misconduct.

YOU OR YOUR COUNSEL are required to appear before the Chairperson of the Discipline Committee on **Tuesday, August 8, 2017 at 12:00 noon** at the offices of The Law Society of Manitoba, 219 Kennedy Street, Winnipeg, Manitoba, to set a date for the hearing of the charges against you. If you or your counsel do not attend at the said time and place, the Chairperson of the Discipline Committee, in accordance with The Rules of The Law Society of Manitoba, may proceed to set a date for the hearing in your absence.

DATED at the City of Winnipeg, in the Province of Manitoba, this 12th day of July, 2017.

Kristin Dangerfield
Chief Executive Officer
The Law Society of Manitoba