

**THE LAW SOCIETY OF MANITOBA**

IN THE MATTER OF:

ROBERT IAN HISTED

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

HEARING DATE:

October 19, 2017

PANEL:

Jacob P. Janzen (Chair)

Richard Buchwald

Lynne McCarthy (PR)

APPEARANCES:

Rocky Kravetsky for the Law Society

Robert Ian Histed on his own behalf

## REASONS FOR DECISION

### **Introduction**

1. Robert Ian Histed (“Mr. Histed”) is a practicing member of the Law Society of Manitoba (“the Society”).
2. By citation dated 12 July 2017 (entered as exhibit #1), the Society charged Mr. Histed with four counts of professional misconduct. All four counts related, directly or indirectly, to matters arising from Mr. Histed’s representation of a client B.J.
3. By motion dated 22 September 2017, Mr. Histed moved for summary dismissal of the citation, or in the alternative, for a permanent adjournment of proceedings pursuant to it. The grounds cited in the motion are that the citation is an abuse of process and that there is no reasonable basis in fact or law for the citation.
4. This panel heard Mr. Histed’s motion on 19 October 2017.
5. After hearing submissions from Mr. Histed and from the Society, and after consideration of the materials provided to the panel, the panel ordered that the motion be dismissed. It advised that its reasons for doing so would be provided in due course. These are this panel’s reasons.

### **Preliminary Matters**

6. Mr. Histed at the outset entered a plea of not guilty to the citation. He confirmed that he is not a member of any other Law Society. He confirmed that he had no objection to any of the members of the panel.
7. Mr. Histed then sought an order under s. 78(1) of the *Legal Profession Act* that the panel make an order excluding members of the public from the hearing. He moved for the exclusion order notwithstanding that no members of the public were in fact present.

8. In support, Mr. Histed argued that the hearing would include information that was subject to solicitor-client privilege. This was information that the public should not hear. In particular, given that B.J. is involved in both ongoing criminal and civil proceedings with the Crown, he argued this was information that the Crown should not hear.
9. Mr. Kravetsky argued that an exclusion order was not necessary in that no member of the public was present. He argued that insofar as the primary motion had as its basis an allegation of abuse of process by the Society, the Society and the public had a special interest in the hearing being public, if possible. He pointed out that the Society itself has an obligation to protect solicitor-client privilege in any matter or proceeding before it.
10. After deliberating, the panel declined to make an exclusion order. An exclusion order should be made only if such an order is necessary to prevent a serious risk to the administration of justice. No members of the public were in fact present. S. 77 of the *Legal Profession Act* provides that those who, in exercising power or authority under the *Act*, obtain information that is subject to solicitor-client privilege, are themselves bound by the self-same solicitor-client obligation. There was, therefore, no serious risk that solicitor-client privilege would be improperly disclosed. We indicated that we were prepared to revisit the issue should a member of the public make an appearance.

### **The Evidence**

11. The citation was entered as exhibit #1, an affidavit of Mr. Histed's dated 19 September 2017 was entered as exhibit #M1, and the minutes of the meeting of the Complaints Investigation Committee of 14 June 2017 authorizing charges against Mr. Histed were entered as exhibit #M2.
12. Mr. Histed was retained by B.J. in April 2014 to defend B.J. on a charge of assault cause bodily harm.

13. The victim of the alleged assault was K.F. One condition of B.J.'s release from custody pending trial was that there be no communication or contact between B.J. and K.F.
14. There were communications between Mr. Histed and the Crown having conduct of the charge. Those communications included efforts by Mr. Histed to persuade the Crown to consent to vary the no contact condition. They included efforts by the Crown to persuade the accused through Mr. Histed to dispose of the matter by guilty plea. One communication from Mr. Histed to the Crown in September 2014 expressed an apprehension that K.F. was at risk of killing herself.
15. No guilty plea was entered. The interim judicial release no contact condition was not varied. On or about 23 October 2014, tragically, K.F. took her own life.
16. Notwithstanding the death of K.F., the Crown made the decision to proceed with the charge against B.J.
17. Mr. Histed on B.J.'s behalf applied to stay the charge against B.J. alleging an abuse of process. The application was dismissed in August 2016.
18. The matter proceeded to trial in April 2017. After trial, B.J. was convicted and sentenced to probation and community service.
19. B.J. has appealed the conviction. The Crown has appealed the sentence. The hearing of both appeals was scheduled for 25 October 2017.
20. In October 2016, Mr. Histed on B.J.'s behalf filed a statement of claim naming as defendants the Crown who had conduct of the B.J. matter into December 2014 and the Government of Manitoba. The claim alleges that the defendants are culpably responsible for the death of K.F.
21. The defendants have moved to strike out the statement of claim. The hearing of that motion is pending.

## The Citation

22. Count One alleges a breach of rules 3.2-2 and 3.2-2C of the *Code of Professional Code* (“the Code”) “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”. The particulars cited in support of the charge allege Mr. Histed persistently advanced the position on behalf of B.J. that (a) the Crown caused the death of K.F., (b) the Crown had engaged in “extortion” by threatening K.F. with charges of obstruction, and (c) the Crown had engaged in “extortion” by threatening B.J. with charges of obstruction.
23. Count two alleges a breach of rules 5.1-1 and 5.1-2 of the Code “in that you failed to treat the Court with candour, fairness, courtesy and respect”. The particulars cited in support of the charge allege (a) misconduct in manner at a pre-trial conference before Madam Justice Suche, (b) misrepresenting facts to the Court in a brief filed in support of a motion alleging abuse of process by the Crown, and (c) misrepresenting facts in a brief filed in support of a motion to dismiss or stay for delay the charges against B.J.
24. Count three alleges a breach of rule 7.2-1 of the Code “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”. The particulars cited in support of the charge allege, inter alia, (a) the making of an assertion in an email to the Crown of 22 December 2014 that “[K.F.] committed suicide as a direct, foreseeable result of a decision you [the Crown] made”, (b) the making of assertions of a like nature in a number of separate gratuitous communications to the Society, and (c) misconduct at a pre-trial conference on 18 September 2015 before Madam Justice Suche.
25. Count four alleges a breach of rule 7.2-4 of the Code “in that you sent correspondence and made communication to others that were abusive, offensive or otherwise inconsistent with

the proper tone of a professional communication from a lawyer". The particulars cited in support of count four largely repeat the particulars cited in support of count three.

### **Submissions of Mr. Histed**

26. Mr. Histed submitted that what is at issue in the motion is his right to make certain arguments on B.J.'s behalf in ongoing criminal and civil proceedings. Specifically, at issue is his right to argue in those ongoing proceedings that the Crown caused the death of K.F. and committed extortion. The citation in effect prevents the making of these arguments in those ongoing proceedings. The citation is, therefore, prejudicial to B.J. It subverts B.J.'s right to make those arguments and it subverts his right to counsel to make those arguments. It in effect denies B.J.'s access to the Courts. This constitutes an abuse of process. This kind of denial of access constitutes a contempt as contemplated in the SCC decision in *B.C.G.E.U. v. British Columbia* [1988] 2SCR 214. The Code and the Society cannot interfere with counsel's proper representation of a client.
27. Mr. Histed emphasized the importance of the fact that proceedings involving B.J. were ongoing. The citation is an abuse of process due its timing. The situation would be completely different, he said, if all the proceedings involving B.J. were finished.
28. In the alternative, Mr. Histed submitted that the motion should be granted to avoid a multiplicity of proceedings, and the consequent possibility of conflicting decisions. The Court is the proper forum in which the merit of arguments of this nature should be adjudicated. Where the arguments are still before the Courts, it is not for the Society to determine what arguments can and cannot be made in open court.
29. Mr. Histed confirmed that there was a distinction to be made between the substance of an argument and the way or manner in which that argument is put forward. At issue in the motion, he stated, was the right to put an argument forward. Not at issue was the way or manner in which it may have been put forward.

30. Mr. Histed stated that the intention or purpose of the complainant to the Society was immaterial to his position. He was in any event in no position to assert what that intention or purpose was. What mattered was what the effect of the complaint and resulting citation was on the rights of B.J. Similarly, the intention or purpose of the Complaints Investigation Committee or the Society was not relevant to his argument. What mattered was the effect of the citation on the rights of B.J.
31. In his written brief, though not in oral argument, Mr. Histed submitted that there was no reasonable basis for the citation. He submitted that the requirement that allegations impugning the integrity of opposing counsel be made “with a reasonable basis” was a low standard. His conduct satisfied that low standard in the present instance.

#### **Submission of Mr. Kravetsky**

32. Mr. Kravetsky argued that, pursuant to the Society’s statutory mandate “to uphold and protect the public interest in the delivery of legal services”, it has the authority to make rules and establish standards governing the conduct of lawyers with each other, with the court, and with the public. The Society has the power and duty to enforce compliance with its rules and standards.
33. He submitted that lawyers are answerable to the Society for their conduct whether or not they are also answerable to the Court or to other entities or bodies. They are answerable to the Society whether or not the Court or the other entities or bodies to which lawyers are answerable choose to pursue sanctions against the lawyer for the same conduct.
34. He submitted that a stay as a remedy will be granted in only the clearest of cases and, ordinarily, only after a full hearing (para. 24).
35. He submitted that there was no evidence to suggest ill or improper motive on the part of the Society.

36. As to the argument that the citation and proceedings under it were prejudicial to B.J., Mr. Kravetsky submitted that all lawyers' conduct in representing clients is constrained by the Code. No client, including B.J., is entitled to legal services outside the constraints of the Code.

### **Analysis and Conclusion**

37. Mr. Histed moves for a summary dismissal or permanent adjournment on the grounds that the citation is an abuse of process and that there is no reasonable basis in fact or law for the citation. Given these grounds, one might anticipate an argument by the moving party based on ill or improper motive on the part of the Society. If Mr. Histed was tempted to mount such an argument, he did not yield to the temptation. He did not make such an argument. There was no evidence of ill or improper motive, as Mr. Histed conceded.

38. His principal argument was that the citation was an abuse of process in that it deprived B.J. of a right to advance certain positions. Mr. Histed qualified this principal argument in two ways. He qualified it, first, by distinguishing between the advancing of the position itself, on the one hand, from the way or manner in which the position is advanced, on the other. He identified the former but not the latter as the basis of the principal argument. He qualified it, second, by making the timing of the citation central. The citation was an abuse of process because B.J.'s litigation is still ongoing; it would not be an abuse of process if B.J.'s litigation were already complete.

39. Both qualifications appear sensible. Both create difficulty for the motion.

40. As to the first qualification, some of the citation particulars in fact do focus on the way or manner in which Mr. Histed advanced B.J.'s position rather than on the position itself. The particulars cited in support of count two, for example, include the allegation that Mr. Histed at a pre-trial "raised his voice and gestured angrily while making inflammatory comments" and "refused to answer [Justice Suche's] questions". The particulars cited in support of counts three and four include allegations of gratuitous representations made by Mr. Histed to the Society, a body before which B.J. has no matters pending. It follows, therefore, that



significant portions of the citation survive Mr. Histed's principal argument, given that significant portions of the citation speak to the way or manner in which a position is advanced.

41. From the second qualification, the qualification that the citation's abuse lies not in its substance but rather in its timing, it follows directly and is a concession that Mr. Histed's representation of B.J. is subject to the constraints of the Code. It follows directly and is a concession that Mr. Histed's representation of B.J. is subject to the Society's scrutiny.
42. Mr. Histed's principal argument, as qualified by him, thus reduces to the bare proposition that the Society is entitled to cite a lawyer for breaches of the Code but it is an abuse of process to do so while the alleged Code breaches are ongoing and in progress.
43. This proposition, when thus baldly stated, is quite obviously untenable. Yet Mr. Histed's principal argument is contingent on it.
44. The above considerations reflect this panel's acceptance of Mr. Kravetsky's submission that practicing law in Manitoba requires that such practice be Code compliant. No client is entitled to representation that is not in compliance with the Code.
45. Mr. Histed's secondary argument was that the citation be stayed to avoid a multiplicity of proceedings. As it appears to this panel, there is only one proceeding at the present time that has Mr. Histed's conduct as its focus. While it is true that there are other forums in which Mr. Histed's conduct might become a focus, as, for example, an order of costs made against him personally, a concern about multiplicity of proceedings is at this stage entirely hypothetical and conjectural.
46. But that a lawyer's conduct is or may be the subject of scrutiny from multiple sources simultaneously is a routine feature of the practice of law. Any lawyer stepping into a court of law is open to a number of simultaneous risks. One is the risk of offending one's client, another is the risk of offending adverse counsel or the adverse party, and another is offending the court. Yet another is offending against provisions of the Code.

47. What is also true is that the same, or substantially the same, arguments may be raised in several forums -- in a criminal proceeding, in a civil proceeding, and in proceedings before the Society. But this too is a routine feature of the practice of law. It cannot be a reasonable basis upon which a proceeding before the Society is summarily stayed.

48. As to Mr. Histed's submission that there was no reasonable basis for the citation, we make these observations. First of all, it is not clear to this panel that it has the jurisdiction to deal with a citation on the merits without a full hearing. The Rules do not provide for a summary consideration of a citation. Second, inquiries into allegations of professional misconduct are, by their nature, highly contextual and fact specific. This case is no exception. A full hearing is typically required to place the impugned conduct in its appropriate context. Third, Mr. Histed's submission as articulated did not in any event apply to many of the particulars cited in support of counts two, three and four of the citation. On its face, the citation discloses a cause of action. Only a full hearing can determine it on its merits.

49. Authorities were referenced by both the Society and Mr. Histed. A helpful statement of the legal principles to be applied in an application for a stay of proceedings is found in the recent *Isaac* decision out of the Law Society of Upper Canada (*LSUC v. Isaac*, 2017).

"[13] A stay of proceedings may be granted as a remedy only in the clearest of cases, in circumstances where there has been an abuse of process such as to contravene the community's sense of fair play and decency, which calls into question the integrity of the adjudicative system.....The onus is on the moving party to prove that the alleged abuse of the process justifies a dismissal or a permanent stay of the administrative law process."

50. The SCC in its recent decision in *Jodoin* (2017 SCC 26) explicitly acknowledges the parallel and complementary role of law societies in overseeing and sanctioning lawyers' conduct.

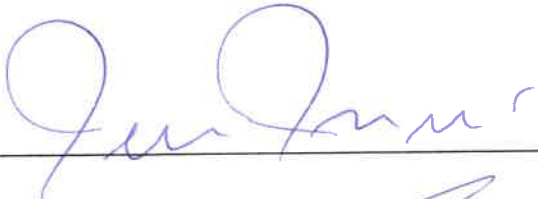
"[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. **However, there is nothing to prevent the law society from**


exercising in parallel its power to assess its members' conduct and impose appropriate sanctions." (emphasis added)

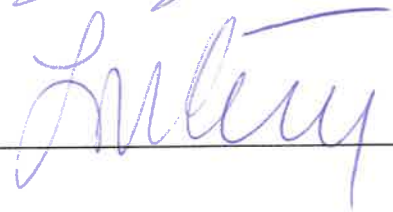
51. In *Smith* (Manitoba, 2010), the member applied for a stay of disciplinary proceedings on the grounds that a parallel proceeding was pending in the Court of Queen's Bench. The panel dismissed the application adopting the principle that "the power to adjourn proceedings should be exercised with care and only where there is a real risk of serious prejudice which could lead to injustice." (at para. 47).

52. This panel is satisfied that, based on the materials before it and the arguments made, no abuse or prejudice has been shown so as to justify granting the relief applied for. This panel is of the view that only a full hearing can adjudicate the citation on its merits. Mr. Histed's motion is denied.

Dated this 24<sup>th</sup> day of November, 2017.

  
\_\_\_\_\_ (Jacob P. Janzen, Chair)

  
\_\_\_\_\_ (Richard Buchwald)

  
\_\_\_\_\_ (Lynne McCarthy) (PR)