Court File No.: C60520

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JOSEPH PETER PAUL GROIA

Appellant

-and-

THE LAW SOCIETY OF UPPER CANADA

Respondent

FACTUM OF THE INTERVENER THE ADVOCATES' SOCIETY

October 15, 2015

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I. OVERVIEW

1. The Advocates' Society has intervened in this Appeal in order to provide assistance to the Court on two issues: (i) the appropriate standard to be applied under the *Rules of Professional Conduct* in disciplinary proceedings against advocates for uncivil courtroom conduct; and (ii) the admissibility and use in disciplinary proceedings of prior judicial decisions in which the lawyer was not a party.

2. Regarding the appropriate standard, the Society submits that:

- The Advocates' Society's *Principles of Civility for Advocates* and *Principles of Professionalism for Advocates* represent a considered view of what constitutes civil or uncivil conduct and are an appropriate standard against which conduct can be measured.
- Civility in the courtroom is central to the administration of justice and is consistent with the imperative of zealous advocacy. Nevertheless, advocates are not infallible and may occasionally falter. There must be an allowable margin of error so that advocates do not feel unduly constrained by the threat of prosecution for incivility.
- As found by the Divisional Court, disciplinary action for in-court conduct is only appropriate where that conduct undermines, or has the reasonable prospect of undermining, the administration of justice.

3. Regarding the admissibility and use of prior reasons, the Society submits that:

- The question of admissibility cannot be divorced from the question of relevance, that is, from the question of the purpose for which the prior reasons are sought to be admitted.

- Where prior reasons are sought to be admitted as evidence on the matters at issue in the disciplinary proceeding, their admissibility is governed by the Supreme Court's decision in *British Columbia (AG) v. Malik.*[1]
- In order to be admissible, the lawyer against whom they are sought to be admitted must have been either a party or a "participant" in the prior proceeding.
- A lawyer acting in a proceeding in the ordinary course can never be a "participant" in such a proceeding within the meaning of *Malik.* Consequently, the reasons from such a proceeding are inadmissible against the lawyer.

II. BACKGROUND

4. This appeal arises out of disciplinary proceedings brought against the appellant, Mr. Groia, by the respondent, the Law Society of Upper Canada (the "Law Society"). Those proceedings concerned Mr. Groia's conduct as defence counsel during the trial of his client, John Felderhof, on charges brought by the Ontario Securities Commission.

5. Part way through that trial, the prosecution brought an application to have Justice Hryn removed as the trial judge. That application was heard and dismissed by the Superior Court and an appeal to the Court of Appeal was also dismissed (the "Prior Proceedings"). These proceedings generated three decisions – the Superior Court's and the Court of Appeal's decisions on the merits (the "Merits Decisions") and the Superior Court's decision on costs (the "Costs Decision"). These three decisions will be referred to collectively as the "Prior Reasons".

6. The Law Society Hearing Panel admitted the Prior Reasons as evidence against Mr. Groia on the question of whether he had committed professional misconduct. Moreover, the Hearing Panel accepted the Law Society's submission that it would be an abuse of process for

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[1] 2011 SCC 18 [*Malik*].

Mr. Groia to re-litigate the "findings" in the Prior Reasons.[2] The Law Society Appeal Panel reversed the Hearing Panel on this point, finding that Mr. Groia was not bound by the Prior Reasons, though they were admissible as evidence against him on the misconduct question.[3] On appeal, the Divisional Court also found the Prior Reasons admissible, though it is unclear if it found they were admissible on the misconduct question, or solely as background and context to the proceeding.[4]

7. The Advocates' Society' interest in this case arose in response to the Hearing Panel's conclusion that an advocate could be bound, at a disciplinary hearing, by the comments of a judge made during the course of a hearing to which the advocate was not a party, at which the advocate had no opportunity to lead evidence, and from which the advocate had no right of appeal. This was of significant concern to the Society's membership, which comprises advocates across the Province from all sides of the courtroom.

8. Although the Law Society has now softened its position somewhat, saying that prior reasons are admissible but persuasive rather than binding, the same principles of procedural fairness are at stake. More importantly, the Law Society's position, if adopted, could drive a wedge between advocate and client by forcing the advocate to act in his or her own interests, rather than those of the client. The Law Society's position necessarily undermines the solicitor-client relationship that is at the heart of our legal system.

9. It is essential that the profession and the Law Society receive clear guidance from this Court regarding the use that can be made of prior reasons in circumstances where the lawyer was

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[2] *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94 at paras. 83 and 96 [Hearing Panel Decision].

[3] *Law Society of Upper Canada v. Groia*, 2013 ONLSAP 41 at para. 201 [Appeal Panel Decision].

[4] *Law Society of Upper Canada v. Groia*, 2015 ONSC 686 at para. 129 [Divisional Court Decision].

not a party to the prior proceeding. As explained below, the law is clear that such reasons are *inadmissible* as evidence on the matters at issue in a disciplinary proceeding.

III. LAW AND ARGUMENT – STANDARD UNDER THE RULES

1. The Advocates' Society's Principles Inform the Standard Under the Rules

10. The Advocates' Society published its *Principles of Civility for Advocates* in 2001 and in 2009 published its *Principles of Professionalism for Advocates* (together, the "*Principles*"). The *Principles* set out a list of guidelines for those who practise advocacy before the courts, administrative tribunals, and other fora. The Advocates' Society believes it is of the utmost importance to the administration of justice and the public's confidence in the profession that advocates adopt the *Principles* in their day-to-day practice.

11. Two of the guidelines articulated in the *Principles*, which The Advocates' Society submits are central to this appeal, are:

> Advocates should pursue the interests of their clients resolutely, within the bounds of the law and the rules of professional conduct, and to the best of their abilities. Advocates must "raise fearlessly every issue, advance every argument, and ask every question." At all times, however, they must represent their clients responsibly and with civility and integrity. The duty of zealous representation must be balanced with duties to the court, to opposing counsel and to the administration of justice.[5]

> The proper administration of justice requires the orderly and civil conduct of proceedings. Advocates should, at all times, act with civility in accordance with the *Principles of Civility for Advocates.* They should engage with

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[5] *Principles of Professionalism for Advocates*, #1 under "An Advocate's Duty to Clients and Witnesses".

> opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement.[6]

12. The *Principles* represent a considered view of what constitutes civil or uncivil conduct and are an important tool against which conduct can be measured. They have been used by the judiciary to inform the standard of conduct expected of advocates appearing before the courts. As a set of guidelines, the *Principles* represent an admissible and appropriate standard in terms of how advocates should conduct themselves.

13. The importance of civility in the courtroom cannot and does not diminish the essential role of the litigator as zealous advocate and the duty to "raise fearlessly every issue, advance every argument, and ask every question." At the same time, advocates "should engage with opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement." The imperative of zealous advocacy on the one hand and the importance of civility on the other are not incompatible. On the contrary, the highest level of effective advocacy exhibits forceful persuasion made in a courteous and dignified manner.

2. The Appropriate Standard

14. As a matter of practice, however, there may be times when an advocate finds that fearless and zealous representation of a client involves pushing up against the boundaries of civility. Advocates are only human and their patience and judgment may occasionally falter. The same is true for judges, who may occasionally misapprehend or overreact to the conduct of counsel in their courtrooms. Neither advocates nor judges should feel unduly constrained by the threat of subsequent disciplinary proceedings against counsel.

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[6] *Principles of Professionalism, ibid,* #1 under "An Advocate's Duty to Opposing Counsel".

15. With this in mind, The Advocates' Society submitted before the Law Society Appeal Panel that there must be an allowable margin of error and that disciplinary action is only appropriate for in-court conduct "where there exists egregious or continuous conduct that serves to threaten or undermine the integrity of the administration of justice."

16. Although not adopted by the Appeal Panel, this standard was adopted in large measure by the Divisional Court, which held:

> It is, therefore, ultimately necessary for a finding of professional misconduct for the uncivil conduct to have undermined, or to have had the realistic prospect of undermining, the proper administration of justice. Many different kinds of conduct may give rise to this effect. Such conduct will include, but is not limited to, repeated personal attacks on one's opponents or on the judge or adjudicator, without a good faith basis or without an objectively reasonable basis; improper efforts to forestall the ultimate completion of the matter at issue; actions designed to wrongly impede counsel from the presentation of their case; and efforts to needlessly drag the judge or adjudicator "into the fray" and thus imperil their required impartiality, either in fact or in appearance. Of special concern is any such conduct that could ultimately result in a decision that would amount to a miscarriage of justice.[7] [Emphasis added.]

17. The Advocates' Society respectfully agrees with and endorses the Divisional Court's approach to the standard that must be met before disciplinary action is appropriate for an advocate's in-court conduct. Having now heard three different standards from three different decision-makers, it is important that this Court adopt and support the clear standard set out by the Divisional Court.

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[7] Divisional Court Decision at para. 76.

IV. LAW AND ARGUMENT – PRINCIPLES OF ADMISSIBILITY

1. The Test Set Out in *Malik*

18. We begin by setting out, in brief, the correct framework for analysis when considering the admissibility of prior judicial reasons in Law Society disciplinary proceedings.

19. In Law Society disciplinary proceedings, the admissibility of prior reasons is addressed by Rule 24.08(2) of the Law Society's *Rules of Practice and Procedure*, which states:

> At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence. [Emphasis added.]

20. The rule states that prior reasons for decision may be admissible, but does not give any guidance as to the circumstances. Prior reasons will always be admissible for the limited purposes of proving that the prior proceedings took place and proving their outcome. If, however, prior reasons are sought to be admitted as evidence of the matters at issue in a disciplinary proceeding, then, as the Law Society accepts,[8] their admissibility is governed by the Supreme Court's decision in *British Columbia (AG) v. Malik*.[9]

21. The distinction between admitting prior reasons as context on the one hand, and admitting them as evidence of matters in issue on the other, is similar to the distinction between procedural facts and adjudicative facts in constitutional cases. Procedural facts provide the Court with background information regarding how the dispute arose in a constitutional case. Prior reasons are always admissible for this purpose in the disciplinary context – to provide narrative or background regarding the current proceeding. Adjudicative facts are the subject of live

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[8] Responding Factum of the Law Society of Upper Canada at para. 130.

[9] 2011 SCC 18 [*Malik*].

dispute between the parties in a constitutional case and must be proven. If prior reasons are sought to be admitted for this purpose in a disciplinary proceeding – to prove matters in issue – then the test set out in *Malik* must be satisfied.

22. In *Malik*, the issue was whether the findings of a judge in a prior application (to which only Mr. Malik was a party) were admissible as evidence in a subsequent proceeding against certain members of his family (in addition to Mr. Malik) who were not parties to the prior proceeding.[10]

23. Justice Binnie made clear that prior reasons are only admissible against the interests of a party if the parties to the subsequent proceeding were parties to or "participants in" the prior proceeding:

> ...a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless prevented from doing so by the doctrines of *res judicata*, issue estoppel, or abuse of process).[11] [Emphasis added.]

24. The meaning of this party/participant requirement is discussed in detail in the next section, but it is worth noting here that an advocate acting in the ordinary course can never be a party or participant in a proceeding for the purposes of the *Malik* test.

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[10] Mr. Malik had previously brought a *Rowbotham* application to have his defence funded by the government of British Columbia and in that application a number of his family members testified on his behalf regarding the properties and financial affairs of the Malik family and its business. The application was unsuccessful, but the provincial government subsequently loaned money to Mr. Malik to fund his defence. When Mr. Malik failed to repay the loan, the government sought and was granted an *Anton Piller* order to search the business and residential properties of the Malik family. In granting the order, the motion judge relied on the findings and conclusions set out in the prior reasons dismissing the *Rowbotham* application.

[11] *Malik* at para. 7.

25. Of course, even once the party/participant requirement is satisfied, a prior judgment must still be relevant in order to be admissible. Whether a prior judgment is relevant in a subsequent proceeding depends on the purpose or purposes for which it is sought to be admitted:

> Whether or not a prior civil or criminal decision is admissible in trials on the merits - including administrative or disciplinary proceedings - will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. ...[12] [Emphasis added.]

26. The fact that a prior judgment is admissible for one purpose does not determine whether it can be used for other purposes:

> The mere fact that the *Rowbotham* decision was properly before the chambers judge does not determine what use may properly be made of it.[13]

27. *Malik* makes clear that only the "findings and conclusions" of a prior judgment that can be relevant and admissible. This is reflected in the passage quoted above, where Justice Binnie states:

> ...a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the proceedings on similar or related issues.[14] [Emphasis added.]

28. *Malik* therefore establishes three necessary pre-conditions, all of which must be satisfied before a prior decision can be admitted in a subsequent proceeding – including administrative or disciplinary proceedings – *as evidence on matters at issue in that subsequent proceeding*:

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[12] *Malik* at para. 46.

[13] *Malik* at para. 39.

[14] *Malik* at para. 7.

1) The parties to the current proceeding must have also been parties to, or at least participants in, the prior proceeding;

2) Only the "findings and conclusions" of a prior judgment are admissible; **and**

3) The issues in the two proceedings must be "similar or related".

29. These are in addition to the ordinary evidentiary requirement that the prior decision must be relevant before it can be admitted.

30. In this case, as discussed below, none of the Prior Reasons was admissible because the first requirement was not satisfied – Mr. Groia was neither a party to nor participant in the Prior Proceedings. In addition, and as discussed below, the Prior Reasons do not contain any findings or conclusions relevant to the two purposes for which the Law Society suggests they were admissible. Thus, they were inadmissible in any event.

2. Advocates Are Not Participants in Court Proceedings

31. As discussed above, a prior judgment can only be admissible against an advocate in a disciplinary proceeding if the advocate was a party to or "participant" in the prior proceeding. There is no dispute that advocates are not parties to the proceeding in which they act. Similarly, there should be no dispute that advocates acting in the ordinary course can never be considered participants in the proceedings in which they act. This is clear both from the use of the term "participant" in *Malik*, and from the overriding policy considerations involved at issue. Each of these is discussed in turn.

(i) "Participant" Under the *Malik* Test

32. Justice Binnie's reasons in *Malik* leave no doubt that an advocate acting in the ordinary course cannot be considered a "participant" as that term is used in the decision.

33. In *Malik*, the term "participant" referred to someone who had testified as a witness, had a direct stake in the outcome of the proceedings that aligned with that of a party (Mr. Malik), and whose personal activities and relationships were squarely in issue. As noted by the Appeal Panel, *Malik* itself involved a prior *Rowbotham* application that:

> ...had been initiated by Malik and involved the other family members and their finances. The underlying issue in both proceedings was whether the Malik family was playing games with the Province with respect to its financial affairs. Thus, the prior judicial decision involved the "same or related parties or participants".[15]

34. That is very different from an advocate acting in the ordinary course. Advocates do not have the opportunity to lead evidence, their interests are not aligned with those of their client, and their personal activities and relationships are not at issue in the proceeding.

35. There is no basis in law or policy to extend the definition of "participant" in *Malik* to encompass an advocate's role in a proceeding. Where a lawyer has no opportunity to give evidence, is duty-bound to act in her client's interests, and has no right of appeal, it would be grossly unfair and highly prejudicial to admit comments in the reasons into evidence against her in a subsequent disciplinary proceeding on the basis that counsel was a "participant".[16]

36. There may be circumstances, such as when costs are awarded against a lawyer personally under rule 57.07 of the *Rules of Civil Procedure*, where a lawyer crosses the line from advocate to participant. But in these circumstances, the lawyer is afforded all the procedural safeguards

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[15] Appeal Panel Decision at para. 169.

[16] This issue is made clear by the recent case of *Martin v. Martin*, 2015 ONCA 596, in which this Court noted with disapproval comments made by the trial judge during the course of the trial (see paras. 111-115). Were it not for an appeal having been taken, the trial judge's comments might have been used as evidence by the law Society in a disciplinary proceeding.

one would expect – the ability to lead and challenge evidence, the right to make submissions, and the opportunity to appeal. None of this is available to an advocate acting in the ordinary course.

37. As a matter of law, an advocate is not and cannot be considered a "participant" within the meaning of *Malik* when acting in a proceeding in the ordinary course. Reasons from such a proceeding therefore cannot be admitted as evidence against the advocate on matters at issue in a subsequent Law Society prosecution.

(ii) Overriding Policy Considerations

38. Not only is it clear from *Malik* itself that the term "participant" cannot encompass an advocate acting in the ordinary course, but there are also overriding policy considerations unique to the role of lawyers, and courtroom advocates in particular, that would make such an approach unwise and untenable.

39. It is the defining role of an advocate that he or she is not a participant in the proceeding. An advocate's role is to represent and to advocate for the client, but it is the antithesis of the advocate's role to become a participant. The fight is the client's, not the advocate's. Difficult as it may be at times, it is our duty *not* to become one with the client, but instead to maintain professional objectivity.

40. Yet this fundamental distinction between advocate and client is all too often ignored. The public frequently equates the advocate with the client and in so doing undermines one of the most important principles in our justice system. Every time we as a profession blur the line between advocate and participant, we further undermine the justice system we have all sworn to uphold. The consequences of this are nor theoretical. Advocates across the province –

practising criminal law, family law, and ordinary civil litigation – regularly receive threats and hate mail from people who do not understand the difference between advocate and client.

41. But even more than this, the position advanced by the Law Society – that an advocate is a participant in a proceeding when acting in the ordinary course – strikes at the heart of the solicitor-client relationship. The necessary result of the Law Society's position is that any time a judge makes a negative comment about the conduct of counsel in the course of a proceeding, the advocate is placed in an immediate conflict of interest and must withdraw. This is because the advocate has a personal interest in mitigating the potential effect of the judge's comments in subsequent disciplinary proceedings. Such an interest might well influence the presentation of evidence or argument during the proceeding and it would therefore be untenable – and indeed unethical – for the advocate to continue to act. It could also lead to a mistrial.

42. The solicitor-client relationship, and the client's right to counsel of their choosing, is one of the cornerstones of our justice system – on equal footing with the presumption of innocence and the independence of the judiciary. To take an approach, as the Law Society has done, that treats advocates as participants will make us unable to fulfill our primary responsibility to our clients, will deny our clients their right to counsel of their choice, and will render litigation unworkable in practice if advocates are forced to withdraw mid-trial.

43. For their part, the judiciary would have to choose between remaining passive observers of the conduct in their courtrooms and condemning advocates to disciplinary proceedings in which the judge's comments will be used as evidence against them. This result would be bad for judges, bad for advocates, and bad for the justice system in our province.

44. The Advocates' Society considers it of the utmost importance that this Court clearly and unequivocally state that advocates are *not* participants in the proceedings in which they act, and

the reasons from such proceedings are *not* admissible as evidence on matters at issue in Law Society prosecutions.

3. Application to this Case – Mr. Groia Was Not a Participant

45. The Prior Reasons were inadmissible against Mr. Groia in the disciplinary proceeding because the first requirement of the *Malik* test – that Mr. Groia have been a party or participant to the Prior Proceedings – cannot be satisfied in this case.

46. There is no dispute that Mr. Groia was not a party to the Prior Proceedings. Both the Appeal Panel and the Divisional Court explicitly found that he was not a party and found that the Hearing Panel erred when it concluded that Mr. Groia was a party to those proceedings "as a matter of substance."[17] The Law Society does not take issue with these conclusions.

47. The only question, then, is whether Mr. Groia is properly considered a "participant" in the Prior Proceedings for the purposes of the test set out in *Malik*. The Divisional Court found that he was not.[18]

48. There is no question that Mr. Groia acted in the Prior Proceedings as Mr. Felderhof's counsel in the ordinary course. Moreover, as the Appeal Panel found, Mr. Groia did not have the opportunity to lead evidence and his interests were not aligned with those of the actual party, his client.[19] The mere fact that Mr. Groia's own conduct was an issue in Justice Campbell's costs decision is insufficient to make him a "participant" in that proceeding. The conduct of counsel

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[17] Appeal Panel Decision at paras. 196 and 174; Divisional Court Decision at paras. 127-128.

[18] Divisional Court Decision at para. 128.

[19] Appeal Panel Decision at paras. 196-198.

can be and frequently is at issue when a court determines costs, but that does not transform the lawyer's role in the proceeding from that of advocate to participant.[20]

49. As discussed above, an advocate acting in the ordinary course, as was Mr. Groia in the Prior Proceedings, is not a participant. All three of the Prior Reasons were therefore inadmissible as evidence against Mr. Groia and both the Hearing Panel and Appeal Panel erred in concluding otherwise. Similarly, to the extent the Divisional Court found the Prior Reasons admissible as anything more than background and context to the disciplinary proceeding, it erred in so doing.

4. Law Society's Position Fails to Address Admissibility

50. The Law Society's approach to the admissibility of the Prior Reasons is incorrect because it attempts to divorce the question of admissibility from the question of relevance. This cannot be done. The two questions are inextricably linked; it is impossible to determine the admissibility of a piece of evidence without also considering the purpose for which it is sought to be admitted (i.e., its relevance).

51. The Law Society treats admissibility as a threshold requirement that, once satisfied on one basis, need not be considered again. This is incorrect.

52. The admissibility of evidence is not determined 'in the air'. Whether a piece of evidence is admissible is necessarily tied to the *purpose* for which it is sought to be admitted. Evidence

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[20] The one exception may be a motion for costs against a lawyer personally under Rule 57.07 of the *Rules of Civil Procedure*, in which no order can be made unless the lawyer has had an opportunity to make representations to the Court regarding her own conduct.

may be admissible for one purpose but not another,[21] and the question of admissibility therefore cannot be separated from the question of relevance.

53. As the Supreme Court noted in *Malik*:

> Whether or not a prior civil or criminal decision is admissible in trials on the merits - including administrative or disciplinary proceedings - will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. ...[22] [Emphasis added.]

54. In determining the admissibility of a piece of evidence, the Court must first ask: for what purpose is the evidence sought to be admitted, that is, in what way is the evidence said to be relevant? Once that question is answered, the Court must then go on to determine if the evidence is admissible for the stated purpose.

55. As discussed above, the Prior Reasons were admissible as part of the background and context to the disciplinary proceeding. The Prior Reasons were not admissible, however, as evidence of the matters at issue in the disciplinary proceeding. In order to be admissible for this purpose, the test set out in *Malik* must be satisfied. It cannot be in this case. Mr. Groia was neither a party to nor participant in the Prior Proceedings and the Prior Reasons were therefore inadmissible against him.

5. Prior Reasons Do Not Contain Relevant Findings or Conclusions of Fact

56. The Law Society takes the position that the Prior Reasons were relevant to two matters at issue in the disciplinary hearing. Even if the Prior Reasons could pass the first *Malik*

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[21] Alan W. Bryant et al., *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 3d ed. (LexisNexis: 2009) at s. 2.83, p. 74.

[22] *Malik* at para. 46.

requirement (which, for the reasons outlined above, they cannot), those reasons would be inadmissible with respect to the two issues raised by the Law Society. They do not satisfy the second *Malik* requirement, because they do not contain any findings or conclusions relevant to the issues raised by the Law Society.

(iii) Only Findings and Conclusions of Fact Are Admissible

57. In *Malik*, the Court concluded that the prior *Rowbotham* decision was admissible as evidence of the findings and conclusions contained within it.[23] The words "findings and conclusions" are ambiguous, but it is clear from the decision as a whole that the Court was referring to findings and conclusions *of fact*.[24]

58. The same point was made by Justice Conway in *Ontario v. Rothmans*.[25] In that case, the defendant tobacco companies challenged the Ontario courts' jurisdiction to hear claims against them brought against them by the provincial government. A preliminary issue was whether the Crown could introduce as evidence the decisions of courts in other provinces on jurisdiction challenges brought by the same defendants on essentially the same grounds.

59. Justice Conway held that the prior decisions could not be admitted as evidence because they did not contain findings *of fact*. Her Honour reviewed *Malik* and noted:

> In *Malik*, the "findings and conclusions" were factual ones – that Mr. Malik and his family had tried to arrange his financial and business affairs to

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[23] *Malik* at para. 7. The Court in fact uses the word "proof", but it is clear that the prior decision was not conclusive or binding and was therefore only admitted as evidence.

[24] The findings and conclusions referred to included that the Malik family's financial affairs were interconnected and managed as one, that Mr. Malik and his family jointly owned businesses that grossed millions of dollars, and that Mr. Malik's alleged debts to family members were questionable because they were imprecise and there was no legitimate documentation for them (see *Malik* at paras. 15 and 18). All of these findings and conclusions are factual in nature (indeed, the section dealing with the findings from the prior decision is titled "The *Rowbotham* Facts").

[25] 2011 ONSC 5356.

> minimize the value of his estate, render him insolvent and limit the amount that he could contribute to fund his legal defence. Those conclusions were based on specific factual findings made about the Malik family finances.
> ...
> In my view, the Crown's reliance on *Malik* to admit the Decisions into evidence is misplaced.
> The "findings and conclusions" that the Crown seeks to rely on from the Decisions are not factual, as in *Malik*, but consist of legal analysis and conclusions or questions of mixed fact and law.[26]

60. In the case before Justice Conway, the parties were the same, the issues were the same, and the evidence was largely the same. The prior decisions were not admissible, however, because they did not contain findings of fact and only factual findings, not comments or legal conclusions, can be admitted *as evidence*.

61. Turning to the present case, the issue is therefore whether the Prior Reasons contain factual findings that are relevant to the matters in issue in the disciplinary proceeding.

(iv) Issues Raised by the Law Society

62. On this appeal, and for the first time, the Law Society has limited its position to arguing that the Prior Reasons were relevant to two narrow issues that were before the Hearing Panel:[27]

1) First, the question of whether Mr. Groia was incorrect as to the legal positions he took during the *Felderhof* trial concerning the role of the prosecutor and the admissibility of documents; and

2) Second, the question of whether there was a reasonable basis in fact for Mr. Groia's allegations against the prosecutors during the course of the trial.

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[26] *Ontario v. Rothmans*, *supra* note 25, at paras. 11, 13-14.

[27] Responding Factum of the Law Society of Upper Canada at paras. 132-134.

63. Each of these is considered in turn.

First Issue – Correctness of Legal Positions

64. The Law Society argues that all three Prior Reasons were admissible:

> ... as proof that Mr. Groia was, in fact, incorrect as to the legal positions he took ... concerning the role of the prosecutor and the admissibility of documents.[28] [Emphasis added.]

65. This position conflates two distinct questions. The first question is what position Mr. Groia took regarding these issues. This is a question of fact that was not in dispute before the Hearing Panel.

66. The second question is whether the positions Mr. Groia took were wrong in law. That is a question of law not susceptible of "proof" on the basis of evidence. To the extent the Prior Reasons address the role of prosecutors and the admissibility of evidence, as a matter of law, they have the same persuasive/binding authority as does any other judicial precedent. They may well be determinative of the question of whether the positions Mr. Groia took were wrong in law, but they need not be, nor are they, *admissible as evidence* for this purpose.

Second Issue – Reasonable Basis for Allegations

67. The Law Society's second argument is that Justice Campbell's Costs Decision (though neither his nor the Court of Appeal's decisions on the merits) was admissible:

> ... as *prima facie* proof that ... there was no reasonable basis for Mr. Groia's attacks on the prosecutors.[29]

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[28] Responding Factum of the Law Society of Upper Canada at para. 133.

[29] Responding Factum of the Law Society of Upper Canada at para. 134.

68. Two things must be said about this. First, the suggestion that the Costs Decision could be *prima facie* proof of any matter at issue before the Hearing Panel is inconsistent with the Law Society's *Rules of Practice and Procedure*. Rule 24.07 governs the circumstances in which findings in prior reasons for decision can amount to *prima facie* proof of matters at issue, and that Rule requires that the individual to whom the findings relate must have been a *party* to the prior proceeding.[30]

69. There is no dispute that Mr. Groia was not a party to the Prior Proceedings, including the Costs Decision, and the requirements of Rule 24.07 therefore are not met. To the extent any factual findings in the Costs Decision were admissible (which, as discussed above, they are not), those findings cannot amount to *prima facie* proof of the facts so found.

6. Conclusion Regarding Admissibility

70. While prior reasons for decision will always be admissible in disciplinary proceedings to provide background and context, they can only be admitted *as evidence concerning the matters at issue* if the lawyer being prosecuted was a party to or participant in the prior proceeding. An advocate acting in the ordinary course is not and cannot be a "participant" in the proceeding. To conclude otherwise is wrong as a matter of both law and policy. It would be inconsistent with the principles set out in *Malik* and undermine two fundamental principles in our justice system – the independence of the bar and clients' right to counsel of their choosing.

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[30] Rule 24.07 only applies "if the individual is or was a party to the proceeding giving rise to the decision".

71. The Advocates' Society asks that this Court adopt the following clear and unequivocal statements of law and policy:

> *An advocate acting in the ordinary course is not a participant in the proceeding for the purposes of the test set out in Malik.*
>
> *The reasons from a prior proceeding in which an advocate acted in the ordinary course can never be admitted as evidence on matters at issue in a subsequent disciplinary proceeding against that advocate.*

V. ORDER REQUESTED

72. As an intervener, The Advocates' Society takes no position on what order should be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2015.

Terrence J. O'Sullivan

for

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SCHEDULE "A"

LIST OF AUTHORITIES

Authorities

1. *British Columbia (AG) v. Malik,* 2011 SCC 18
2. *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94.
3. *Law Society of Upper Canada v. Groia*, 2013 ONLSAP 41
4. *Law Society of Upper Canada v. Groia*, 2015 ONSC 686
5. *Martin v. Martin*, 2015 ONCA 596
6. Alan W. Bryant et al., *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 3d ed. (LexisNexis: 2009) at s. 2.83, p. 74
7. *Ontario v. Rothmans,* 2011 ONSC 5356

Secondary Sources

1. *Principles of Professionalism for Advocates*, incorporating the *Principles of Civility for Advocates,* published by The Advocates' Society in 2009

SCHEDULE "B"

TEXT OF STATUTES, RULES, AND REGULATIONS

Law Society of Upper Canada, Rules of Practice and Procedure

RULE 24 – EVIDENCE

Proof of prior facts

24.07 (1) Specific findings of fact contained in the reasons for decision of an adjudicative body in Canada are proof, in the absence of evidence to the contrary, of the facts so found if,

(a) no appeal of the decision was taken and the time for an appeal has expired; or

(b) an appeal of the decision was taken but was dismissed or abandoned and no further appeal was taken.

(2) If the findings of fact mentioned in subrule (1) are with respect to an individual, subrule (1) only applies if the individual is or was a party to the proceeding giving rise to the decision.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Rule 57 COSTS OF PROCEEDINGS

LIABILITY OF LAWYER FOR COSTS

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.

(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3); O. Reg. 575/07, s. 1.