Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

Citation: *Law Society of Ontario v. Rothman*, 2021 ONLSTA 13
Date: May 19, 2021
Tribunal File No.: 19A-011

BETWEEN:

Law Society of Ontario

Appellant

- and -

Shayle Frederick Rothman

Respondent in appeal

Before: Linda R. Rothstein (chair), Raj Anand, Geneviève Painchaud, Lubomir Poliacik, Julia Shin Doi

Heard: November 3, 2020, by videoconference

Appearances:
Leslie Maunder, for the appellant
Gavin MacKenzie and Brooke MacKenzie, for the respondent in appeal

REASONS FOR DECISION ON APPEAL

INTRODUCTION AND OVERVIEW

[1] Raj Anand (for the panel):– The respondent, Shayle Rothman, set up a province-wide residential real estate firm called RealEstateLawyers.ca LLP, using a distinctive business model that included an aggressive advertising strategy. The Law Society brought four allegations and several sub-allegations against the respondent, challenging the firm's name and several aspects of its marketing and advertising as misleading. One of the allegations focused on the respondent's advertising of specialization in real estate transactions when he was not certified by the Law Society as a specialist in real estate.

[2] The hearing proceeded on an agreed statement of facts, together with the oral testimony of the respondent. The evidence was largely undisputed, and we will not duplicate the detailed description of the facts that is found in the majority and minority reasons of the hearing panel.

[3] In its decision, the hearing panel found in favour of the Law Society on one relatively minor sub-allegation. Two of the three panel members rejected all the other allegations. The chair issued a partial dissent and found the firm's name misleading. The hearing panel then converted the proceeding to an invitation to attend (ITA), dismissed the application, and awarded costs against the Law Society.

[4] The Law Society appeals against the majority ruling on the misleading firm name allegation, and the full hearing panel's dismissal of the allegation concerning specialist certification and its award of costs. The Law Society is not challenging the ITA conversion, based on the single finding that the hearing panel made, but reserves its rights in this regard if we allow the appeal on either of the first two grounds.

[5] In argument, the Law Society noted that it had not launched this appeal because the respondent was "a particular danger to the public." While he has marketed his firm differently from others, he has also brought innovative approaches to the practice of real estate law. The Law Society's principal position is that the hearing panel's decision deviated sharply from the advertising and marketing jurisprudence of this Tribunal and the Supreme Court of Canada.

[6] For the following reasons, we dismiss the appeal.

STANDARD OF REVIEW

[7] This is one of several cases[1] that have come before the Appeal Division in the year following the Supreme Court's decision in *Vavilov*.[2] The Court focused on judicial reviews and appeals from administrative tribunals, and did not address the standard of review in internal appeals within an administrative body such as the Law Society Tribunal. Nevertheless, the Appeal Division has considered the application of *Vavilov* in appeals from the Hearing Division, and has reached some early and fairly consistent conclusions on *Vavilov*'s impact on the previously well-established jurisprudence on our standard of review.

[8] The parties in this appeal did not focus to any great extent on whether, and if so how, *Vavilov* should influence the standard of review in the appeal before us. Their main point of contention was whether the grounds of appeal raised extricable issues of law, as the Law Society argued, or of fact and mixed law and fact, which was the respondent's submission. That characterization, which we consider in our discussion of each ground of appeal, does not depend on the *Vavilov* analysis.

[9] Therefore, in the circumstances of this appeal, we will adopt the Appeal Division jurisprudence to date on the impact of *Vavilov* on this appeal, and we will apply it to each ground of appeal. In short, that jurisprudence suggests that the standard of review on questions of law is correctness. On questions of fact or mixed fact and law that involve the application of a legal standard to a set of facts, the hearing panel is entitled to deference, and its decision will only be reversed if it meets the *Housen v. Nikolaisen*[3] threshold of "palpable and overriding error."

[10] In our reasons below, we apply a correctness standard to the specialist certification and firm name issues, and a deferential standard to the costs ruling.

ANALYSIS

The Firm Name

[11] The allegation against the respondent in the notice of application regarding the firm name was:

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1 *Law Society of Ontario v. Marusic*, 2020 ONLSTH 18, *Law Society of Ontario v. Chijindu*, 2020 ONLSTA 19, *Law Society of Ontario v. Regan*, 2021 ONLSTA 6, and *Law Society of Ontario v. De Rose*, 2021 ONLSTA 9.

2 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

3 2002 SCC 33.

> 1. That his firm's advertising and marketing was misleading contrary to the Rule 4.2-1 as follows:
>
> > (a) the use of RealEstateLawyers.ca LLP as a firm name, because it suggests a directory rather than a specific firm…

[12] The relevant rules of professional conduct were as follows:

> 4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.
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> 4.2-1 A lawyer may market legal services only if the marketing
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> > (a) is demonstrably true, accurate and verifiable;
> >
> > (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and
> >
> > (c) is in the best interests of the public and is consistent with a high standard of professionalism.

[13] Following his call to the bar in 2007, the respondent began practice in a residential real estate law firm under the name Parnes Rothman LLP. He secured the domain name realestatelawyers.ca, developed a firm website and began setting up province-wide legal services. In late 2013, he received a certificate of registration for a design trademark that incorporated a rooftop design, a slogan, and the domain name Real Estate Lawyers.ca LLP. The next year, he started to use Real Estate Lawyers.ca LLP as his firm name and brand in his advertising.

[14] The Law Society's central allegation was that Real Estate Lawyers.ca LLP is misleading, confusing, deceptive or likely to confuse, mislead or deceive because it is only descriptive of the services provided by the respondent's firm and suggests a directory of real estate in Canada, as opposed to one specific law firm providing real estate law services.[4] The Law Society did not allege that the respondent's advertising was untrue, and therefore it did not need to rely on Rule 4.2-1(a).

[15] In their reasons, the majority and the dissenting panel chair were largely in agreement on the applicable principles. The test for compliance with the advertising and marketing rules is objective, and the Law Society is not required to prove that the licensee intended to breach the requirements. The panel adopted the principles underlying an inquiry into an allegation of misleading

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[4] 2019 ONLSTH 75 at para. 21.

advertising as set out in the Supreme Court of Canada decision in *Richard v. Time Inc.*[5] and adopted in Tribunal jurisprudence.[6]

[16] According to the Supreme Court, the focus is on the "general impression" that is left with the "ordinary hurried purchaser"; that is, a consumer who is "credulous and inexperienced,"[7] and who takes "no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer."[8]

[17] In *Richard,* the Supreme Court spent a good deal of time attempting to articulate the level of sophistication of the "ordinary hurried purchaser". The "average consumer", it said, is not someone with "an average level of intelligence", since the result in a particular case does not depend on the identity of the consumer who is allegedly misled. In addition, the "general impression" does not depend on the "average consumer" with an "average level of curiosity" taking "concrete action to find the 'real message' hidden behind an advertisement."[9]

[18] In our view, although the members of the hearing panel cited and purported to apply *Richard* to the evidence before it, we have concluded, with respect, that some parts of their reasons misstate the applicable principles, and it is important to clarify these points.

[19] In particular, the panel erred in comparing the relative sophistication of the consumers of real estate legal services with "more vulnerable" consumers of legal services such as family law or personal injury clients. We agree with the Law Society that in determining whether or not advertising is " likely to mislead", it is important to protect the vulnerable in the target audience, whatever the practice area.

[20] The hearing panel also erred, in our respectful view, when it reproduced the specific language governing advertising and marketing in the *Rules*. As we explain below, the majority clearly misplaced the word "demonstrably" several times in its application of the Rule as written.

[21] In both cases, however, the intervention of the appeal panel is not justified. In both cases, the conclusion reached by the majority would have resulted from an application of the correct legal principles and a proper quotation of the text of

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5 2012 SCC 265 at paras. 44-78.
6 For example, *LSO v Goldfinger*, 2020 ONLSTA 3 at paras. 60-61 and 90; *LSO v Kamal*, 2019 ONLSTA 20 at para. 29; *LSUC v Zappia*, 2015 ONLSTH 34 at para. 24.
7 *Richard* at paras. 70-72.
8 *Richard* at para. 67.
9 *Richard* at paras. 73-77.

the Rule. In other words, on the evidence before it, the panel's conclusion that Real Estate Lawyers.ca LLP is unlikely to mislead is unassailable.

Comparison of different consumers of legal services

[22] First, in assessing the attributes and sophistication of the legal consumer who would be the target of the respondent's advertising, both the majority and the chair looked at the area of practice, which was residential real estate law. They extrapolated from that context to give the "ordinary hurried purchaser" credit for greater sophistication than other purchasers of legal services, who might be more vulnerable.

[23] For example, the majority stated:

> [33] The ordinary hurried purchaser of legal services for residential real estate transactions, in the present context, will have a level of comprehension or discernment that is not necessarily present in other circumstances involving unsophisticated or vulnerable consumers of legal services. This purchaser would be capable of conducting an internet search for real estate legal services for a contemplated purchase or sale of residential real estate. As is often observed, the purchase or sale of residential real estate is for most consumers the largest single legal transaction that they are likely to make in their lives.

[24] The chair, in her dissenting reasons, made similar statements:

> [51] … The Law Society …. must appreciate the context and to whom the lawyer is directing his or her marketing. Some areas of practice tend to attract more sophisticated clients; others may attract extremely vulnerable clients. The Law Society should not nitpick. The Tribunal should only find misconduct when the public interest demands it.
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> [52] Mr. Rothman was marketing to clients who were buying or selling residential real estate. These clients need legal assistance but they are not vulnerable in a manner that, for instance, might be the case for compromised personal injury clients. They need only see their lawyer on one or two occasions and not repeatedly. Real estate clients have the intelligence and ability to negotiate a real estate transaction, arrange for financing and make the many decisions that homeowners have to make. They can be expected to approach marketing with the same intelligence they need to use for these purposes.

[25] In our respectful view, these generalizations about the group of residential real estate purchasers were unwarranted. The panel did not cite any evidence to support these assumptions. Homeowners – whether first time or repeat buyers – comprise a large proportion of Ontarians, and there was no basis on which

"judicial notice" could be taken of their sophistication. The intelligence of the group is neither measurable nor relevant. There is no easy way to compare homeowners to personal injury clients in terms of their vulnerability to misleading advertising, or the complexity of an agreement to purchase a home versus a settlement of a tort action.

[26] In short, although it is always the case that context is important, the hurried purchaser test is designed to protect the vulnerable within the target audience. At least in the real estate context, identification of the practice area does not assist in that inquiry. There may be some practice areas in which a party can demonstrate to the requisite standard of proof that the target audience is or is not particularly vulnerable to misleading advertising. That was not done in the context of real estate advertising in this application, and we do not need to decide whether such proof is available with reference to any other area of legal practice.

[27] In this case, however, nothing turns on the characterization of the residential real estate law consumer. In its factum, the Law Society argued that the sophistication that the majority attributed to the potential hurried purchaser affected the majority's conclusions with respect to three of the allegations in the notice of application. The panel's conclusions about two of those allegations are not under appeal, and therefore any impact on those findings is not before us in this appeal.

[28] On the particular that the Law Society challenges – the use of the firm name – counsel cites the majority's conclusion that the potential purchaser would have the wherewithal to remove any confusion about the identity and makeup of the firm by making a call to one of the listed lawyers on the website. In line with our earlier reasoning, however, we do not think consumers outside the real estate context are in any different position in making that one follow-up call.

[29] Ultimately, at para. 34, the majority relied on the ability of the "modern consuming public" to distinguish between a listing of real estate lawyers and the name of a private law firm, and on that basis concluded that the name "Real Estate Lawyers.ca LLP" was not misleading. In our view, this conclusion did not depend on any inherent sophistication in the residential real estate market.

[30] For these reasons, while in our respectful view the panel's categorization of consumers was not appropriate, this aspect of its reasons did not affect its conclusion on the firm name issue.

Statement of the test under the Rules

[31] At several points, the reasons of the majority diverge from the wording of the prohibition in the Rules we quoted above. The word "demonstrably" appears in

Rule 4.2-1(a), and not in (b). Rule 4.2-1(a) on its face requires the truth, accuracy and verifiability of the advertising to be “demonstrable”. But as noted earlier, the truth of the firm name advertising was not in issue.

[32] The majority reasons attach the adverb “demonstrably” to the prohibition that was in issue in this case: that the marketing be “neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive”. The majority makes this error in quoting and at times conflating the tests under the two subrules in paras. 26, 27 and 28 of the reasons. Conversely, at paras. 37, 38 and 39, the correct test is cited.

[33] We have read and re-read the majority’s reasons in order to determine whether this section of its reasons would have reached a different result if the correct regulatory language had been used throughout. We have concluded for the following reasons that the result would have been the same.

[34] First, paras. 26 and 27 are principally concerned with a comparison with other Tribunal cases that in fact involved Rule 4.2-1(a) because they related to false representations. Paragraph 28 restates the prohibition in the Rules. All of these paragraphs appear in the majority’s review of general principles, while the correct test is quoted when the Rules are applied at paras. 37 to 39 of its reasons.

[35] Second, the use of the word “demonstrably” in the Rule is confusing in itself, since it is questionable whether its inclusion in Rule 4.2-1(a) adds anything to the prohibition that is already there. But the majority’s actual reasoning does not appear to have relied in any way on the addition of “demonstrably” to what is already a clear prohibition.

[36] Again, therefore, we conclude that while the majority erred in law, the intervention of the appeal panel is not required. In our view, attaching the adverb “demonstrably” at certain points in its reasons did not affect the result that the majority reached on the firm name allegation.

Advertising of Specialization

[37] Rule 4.3-1 states “A lawyer shall not advertise that the lawyer is a specialist in a specific field unless the lawyer has been so certified by the Law Society.”

[38] The commentary to the Rule includes the following:

> [1] Lawyers’ advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

> [2] In accordance with s. 20(1) of the Law Society's By-Law 15 on Certified Specialists, the lawyer who is not a Certified Specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.
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> …
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> [4] A lawyer may advertise areas of practice, including preferred areas of practice or that their practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

[39] It is common ground that the respondent's firm advertised that it "specialized" in real estate, although none of the lawyers at the firm was certified as a specialist by the Law Society. The respondent informed the hearing panel that 90% of the firm's practice involves real estate, and the word "specialized" was used in that context.

[40] The chair, writing on behalf of the hearing panel, dismissed this allegation, reasoning as follows:

> [149] We find that the statement that the firm specialized in real estate is accurate and does not breach the rule. Mr. Rothman did not advertise that he was a "specialist" in real estate, but rather that the firm "specialized" in real estate. The noun "specialist" describes a lawyer or other professional with special expertise or training in a particular skill or area of practice. It is often accompanied by a certification. The verb "specialized" is not typically associated with a designation. It is commonly used to indicate an area in which the firm or business does most of its work. The verbs "focused" or "concentrated" would be alternatives.
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> [150] Members of the public would most likely be unaware of the certified specialist designation and would understand that a firm that specialized in real estate concentrated its practice in that area.

[41] This question raises an extricable, narrow and fairly simple legal issue that has drawn a stark division in the Tribunal's jurisprudence. In our view, it is worthwhile to bring this debate to a close, at least at the Tribunal level, and to provide what we believe to be the correct answer. We will leave Convocation to revisit the issue as a matter of policy if it wishes to achieve a different result.

[42] The hearing panel decision in this case was the second to dismiss this allegation. The other was *Goldfinger*.[10] On the other side of the ledger, there were five hearing panel decisions[11] that adopted the Law Society's position that the use of the word "specialist" or similar derivations of the verb "specialize" is restricted under the Rule to lawyers who have been certified by the Law Society under the Certified Specialist program pursuant to By-Law 15 in a particular field of law. All of these findings were unopposed, and were brought on the basis of joint submissions that could not properly be rejected by the hearing panel under accepted Tribunal jurisprudence.

[43] All of these cases were before the Appeal Division on the appeal of *Goldfinger*.[12] Unfortunately, the respondent licensee did not appear, so the Law Society's argument was unopposed. The hearing panel reasons in the present case, quoted above, were considered. The appeal panel split three to two in favour of allowing the appeal and accepting the Law Society's position.

[44] In light of the number of decisions that have been rendered on this issue, we will first review the arguments that were accepted by the majority and minority in *Goldfinger*.

[45] The majority agreed that members of the public would probably be unaware of the certified specialist designation.[13] They stated, however, that injured clients might be dealing with medical "specialists", whose qualifications and designations are accepted.[14] In our view, there is no basis to restrict the Tribunal's interpretation to one field of practice.

[46] The majority continued along this line of reasoning by focusing on "a traumatized person seeking legal services for serious or catastrophic injuries", and observed that that person "might not be able to review or respond to this advertising with the perspective of a careful and diligent consumer".[15] Indeed, the reasons go on to say that "only relatively sophisticated, careful and diligent readers would understand that someone who specializes is not necessarily a 'specialist'…." In our opinion, this contradicts the initial premise that the certified specialist designation is not well known to the public generally, which means

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10 2018 ONLSTH 103.
11 *Law Society of Ontario v. D'Alimonte*, 2018 ONLSTH 86 ("specialize in representing injured people"); *Law Society of Ontario v. Kapoor*, 2018 ONLSTH 146 ("specializing" in various areas of law); *Law Society of Ontario v. Alexiu*, 2018 ONLSTH 99 ("leading traffic law specialists"); *Law Society of Ontario v. Mazin*, 2019 ONLSTH 35 ("specialist" in personal injury law); *Law Society of Ontario v. Fathi*, 2019 ONLSTH 112 ("specialist" in personal injury and other areas of law).
12 2020 ONLSTA 3.
13 At para. 58.
14 At para. 58.
15 At para. 59.

that the licensee's practice specialization provides the reader with the relevant information on its own.

[47] The majority next described the language of Rule 4.3-1 as "somewhat ambiguous", and therefore attempted to interpret it in keeping with its context, including Rule 4.2-1, which requires advertising to be demonstrably true, accurate and verifiable, and the "ordinary hurried purchaser" jurisprudence.[16] We agree.

[48] As part of this context, the majority of the panel reviewed the *Paralegal Rules of Conduct*, which do not contain any "specialist" prohibition, since there is no certification program for paralegals. The result in the unopposed paralegal cases was an absolute prohibition against using the words "specialization" or "specialize".[17]

[49] With respect, we draw the opposite conclusion. To call oneself a specialist in an area of law, whether as a lawyer or a paralegal, is to relay a simple and useful piece of information that is well understood by the public, most notably the "ordinary hurried purchaser" who has no need to be informed of the existence of specialist certifications for lawyers or the absence of such certifications for paralegals. It is a surprising turn of events for a paralegal to communicate information in the most understandable way for the general public, only to be penalized because a similar word is used in a very specific professional regulatory program that has nothing to do with the paralegal or the services the paralegal wishes to provide.

[50] The majority drew the conclusion that both lawyers and paralegals should be subject to the same advertising prohibition. We agree. The *Goldfinger* majority concluded that this means both should be prohibited from using the words "specialize", "specializing" or "specialization", but not "concentrate", "prefer" or "limit practice". We disagree. The comparison of permitted and prohibited words, when put in the context of the ordinary hurried purchaser and outside the jargon of Law Society regulation, demonstrates the artificiality of the distinction.

[51] Finally, the *Goldfinger* majority indicated that its interpretation would allow the use of the words "specialize" or "specialist" because it denotes lawyers who have obtained "special" training. In fact, training is not a requirement for specialist certification; it is largely based on experience in the specialty area.

[52] The minority panel members in *Goldfinger* held that the licensee was entitled to advertise that he specialized in personal injury law, which was literally true. They made the following points.

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[16] At paras. 60-62 and 69-70.
[17] At paras. 64-67.

[53] There is nothing in Rule 4.3-1 to alert lawyers that they are prohibited from advising the public that they specialized in a particular field.[18] We agree.

[54] The ordinary purchaser of legal services in the personal injury field would not be misled by a law firm saying it specializes in a particular type of personal injury. We agree. It is literally accurate, and most members of the public – not just the credulous and inexperienced – would not associate the word "specialize" with the Law Society's specialist certification program at all.

[55] Rule 4.3-1, targeted at a particular certification designation, lends itself to a specific prohibition, and that has been done: the use of the word "specialist". The word has a familiar meaning, as the majority stated, in the medical context.

[56] What is prohibited, in other words, is the use of a term of art, not the truthful and accurate use of everyday language. Saying "I specialize in this area" is a common representation that is made, for example, across the commercial, professional and educational world. Indeed, in the present appeal, the respondent reproduced many examples of established firms and lawyers who routinely make the same claim in their publications and biographical material.

[57] In sum, we respectfully disagree with the conclusion of the majority in *Goldfinger.* We accept the conclusion of the hearing panel in the present case as legally correct, and we dismiss this ground of appeal.

The Costs Decision

[58] The Law Society challenges the hearing panel's decision to award costs to the respondent in relation to three of the allegations that were dismissed. These allegations related to the size of the firm, its advertising of pricing and discounts, and the "flouting" of the benchers' decision to reject his proposed professional corporation name.

[59] In our view, the panel applied the relevant rules and well-established costs principles in making a highly discretionary ruling. Its application of the established law to the circumstances before it deserves great deference. The panel made no error in principle, and no palpable and overriding error within the meaning of the jurisprudence.

[60] The respondent submitted that he should be awarded the costs of the entire proceeding. The hearing panel enumerated the allegations that it had decided:[19]

> [2] The allegations and their outcomes are as follows:

[18] At para. 106.
[19] 2020 ONLSTH 60 at para. 2.

1. The allegation that the firm name, RealEstateLawyers.ca LLP, was or was likely to be misleading, confusing or deceptive (the firm name allegation) was dismissed by the majority. One panel member dissented.

2. The allegation, comprising three particulars, that advertising of the size and experience of the firm was misleading or untruthful (the firm size allegation) was dismissed entirely.

3. The allegation, comprising three particulars, that advertising of the firm's legal fees, discounts and guarantees was misleading or untruthful (the firm price allegation) was dismissed with the exception of one "minor mistake" in one September 2016 mailer. We found that the September 2016 mailer had advertised flat legal fees plus taxes and courier charges but had not indicated there was a possibility of other disbursements. All other particulars and parts of particulars were dismissed.

4. The allegation that he had breached Rule 4.3-1 by advertising the firm "specialized" in real estate, when none of its lawyers was a certified specialist (the specialization allegation), was dismissed.

5. The allegation that, in using the firm name RealEstateLawyers.ca LLP as his firm's name, Mr. Rothman had flouted a decision of a bencher committee denying the firm approval to use the same name, RealEstateLawyers.ca, as the name of a professional corporation (PC) (the flouting bencher decision allegation) was dismissed.

[61] The respondent made his request for costs under the following provision of the Tribunal's *Rules of Practice and Procedure*:

> 25.01 (1) Costs may only be awarded against the Society, (a) in a licensing, conduct, capacity, competence or non-compliance proceeding, (i) where the proceeding was unwarranted; or (ii) where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default; and (b) in a proceeding not mentioned in clause (a), where the Society caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.

[62] The hearing panel applied Rule 25.01(1)(i) upon finding on all the material before it that allegations 2, 3 and 5 listed above were "launched without reasonable justification" and were therefore "unwarranted from their inception."[20]

[63] The hearing panel concisely summarized the applicable legal principles:

> [4] The interpretation of the Tribunal rule is informed by key values:
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> 1. Protection of the public interest requires that those who make decisions about prosecutions be focused on the public interest, not on fear of an adverse costs award. The public interest also includes considerations of fairness and justice to the licensee.
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> 2. Deference to prosecutorial discretion requires that the Tribunal give wide latitude to the discretion of the Law Society and its Proceedings Authorization Committee (PAC) in deciding to initiate proceedings. Nonetheless, prosecutorial discretion must be exercised reasonably and for proper motives, failing which licensees may be entitled to costs.
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> 3. Proportionality requires that a proceeding advance in a timely, efficient and proportional manner. The Law Society's obligation includes defining the scope of the allegations on which the application will proceed.
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> [5] The standard for awarding costs against the Law Society is extremely high under both parts of the test because the Law Society should not be deterred from bringing an application by fear of an adverse cost award. However, the Tribunal Rule exists to deter the Law Society from commencing or continuing an unjustified proceeding.
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> [6] For a proceeding to be unwarranted under Rule 25.01(1)(a), the licensee must establish that the proceeding was without reasonable justification, patently unreasonable, malicious, taken in bad faith or for a collateral purpose. The analysis must consider the issues as they were at the time when the application was brought and not with the benefit of hindsight. Unless there is evidence of bad faith or improper purpose, the analysis must focus on whether, objectively, there were grounds or reasonable justification to bring the application.
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> [7] In order for there to be a finding that the Law Society caused costs to be wasted or incurred unreasonably, under Tribunal Rule 25.01(1)(a)(ii), the licensee must prove that the Law Society was at fault in making procedural choices, after the proceeding was initiated, that were outside the bound of reasonableness. Advancing the losing argument is not unreasonable on its own but that conclusion changes, if

[20] 2020 ONLSTH 60 at para. 10.

> the Law Society takes legal positions that have no reasonable chance of success or continues a proceeding that is doomed to fail.
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> [8] Reasonableness is assessed against the responsibilities of the Law Society acting as a prosecutor in the public interest. This may require the Law Society to take positions that are unpopular and test evidence and novel interpretations of the law before a hearing panel.

[64] In its reasons, the hearing panel recognized the high threshold that the respondent had to meet. The costs rules governing licensees and the Law Society are asymmetrical. Some proportion of the costs that are indirectly paid by the professions to fund prosecutions will routinely be awarded after findings are made against licensees. On the other hand, it is only in rare circumstances that costs are ordered against the regulator following an unsuccessful prosecution.

[65] None of these costs principles was challenged before us.

[66] The hearing panel proceeded to a lengthy and detailed analysis in order to apply the costs jurisprudence to this case. The respondent did not suggest that the proceeding was malicious or taken in bad faith or for a collateral purpose. His position was that the proceeding was unwarranted in the sense that it was brought without reasonable justification.

[67] The hearing panel found that the firm size and price allegations were unwarranted for four reasons:

- They were minor in nature in the context of advertising that was factually true;
- There was minimal public interest in pursuing the issue;
- No clarification of legal issues could be achieved on these facts; and
- It was unfair to the respondent, given the lack of guidance from the Rules, the Commentary, and the jurisprudence.

[68] The Law Society challenges each of these reasons. It points out with respect to each factor that there are cases before this Tribunal that fit this description, and that the Law Society may be acting quite properly in bringing forward such cases. That much is true, and the hearing panel was frank to acknowledge this point.[21] But the hearing panel's decision was based on the cumulative effect of these four features. The panel did not purport to elevate these principles to a status that would necessitate the awarding of costs against the Law Society if any of these features presented themselves in future cases.

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[21] 2019 ONLSTH 75 paras. 54, 63 and 67.

[69] Moreover, each of these reasons was fact-specific, or at most, a question of mixed fact and law, on which the standard of review was reasonableness before *Vavilov*, or palpable and overriding error, as *Vavilov* has been interpreted by the Appeal Division.

[70] The extricable legal issue – on which the parties and the jurisprudence agreed – was whether the Law Society had reasonable justification to proceed with these allegations in all the circumstances of the case, taking into account the Society's broad prosecutorial discretion. Indeed, the hearing panel's costs ruling was itself an exercise of discretion in the particular circumstances before the panel.

[71] The panel's reasoning is lengthy and replete with references to the evidence it had considered, in addition to its findings about the lack of merit in these two allegations. The panel's summary of its reasoning includes the following:

> [60] We have concluded that the firm size and firm price allegations were unwarranted. Objectively, there were no grounds or reasonable justifications for the Law Society to launch or continue a proceeding to seek a finding of professional misconduct against Mr. Rothman based on these allegations.
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> [61] This was not a case where the allegations were extremely serious….
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> [62] Instead, the Law Society exercised its discretion to proceed with allegations that were on the opposite end of the spectrum of seriousness. The allegations were minimal in nature, were commenced in circumstances where there was no evidence that the public was misled or confused by the advertising, and where the uncontroverted evidence showed it to be demonstrably true.
>
> [63] We accept that the Law Society has significant discretion in commencing proceedings such as these and that it may, and often must, legitimately choose to proceed against misconduct that appears less serious and in the absence of a complaint from the public. Indeed, many cases before the Tribunal may seem to fit into that category.
>
> [64] But in this case, there was no reasonable justification for proceeding with these allegations. ….. The firm size allegations alleged that factually accurate advertising left a misleading impression that the firm was a degree larger and more experienced than the Law Society alleges it was. The firm price allegations were minimal in nature because the website advertising made clear there were additional disbursements and the mailers named the usual disbursements and referred the public to the website. There was no indication of the public being misled although feedback was actively sought by the firm.

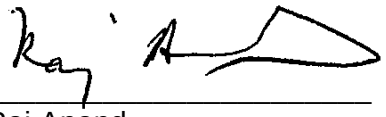
> [65] Although legal or factual uncertainty may reasonably justify the Law Society initiating proceedings, there is no such justification in this case. The firm size and firm price allegations were fact-specific and did not lend themselves to development of the law on misleading advertising. Further, by the time the Law Society launched the application with the firm price allegations, it had clarified the rules on misleading price advertising by adding Rule 4.2-2.1. No useful guidance could be gleaned from our analysis of fixed price advertising under Rule 4.2.2 alone. There were no credibility issues or factual disputes that demanded a hearing. There was an Agreed Statement of Facts including the advertising at issue. Mr. Rothman's oral evidence was largely unchallenged and uncontradicted.
>
> [66] Further, proceeding with the firm size and firm price allegations was simply unfair to a licensee who had actively sought to comply with the Rules, both before and after the investigation commenced, in circumstances where the Rules, Commentary and jurisprudence were not helpful. …
>
> [67] While it cannot be expected to approve advertising for all licensees in the province, the Law Society's decision not to provide guidance in the context of an active investigation to a licensee who was doing everything possible to co-operate, suggests that its own understanding of the expectations for ethical advertising may have also been in flux. If that was not the case, it would have provided the guidance Mr. Rothman sought after the interview instead of after the application was launched when he had to involve counsel. The public interest in fairness and justice to the licensee was not satisfied by proceeding with these allegations in this context.

[72] With respect to the allegation that the respondent had ignored or flouted the benchers' decision to reject RealEstateLawyers.ca LLP as a professional corporation, the hearing panel simply pointed out that the Law Society had not denied him the right to use the same form of words as a firm name. In short, the hearing panel concluded that there was no objective basis on which to pursue the "flouting" allegation.

[73] Again, this was a reasonable conclusion that resulted from the application of established costs principles to the particular facts before the panel, and certainly did not constitute a palpable and overriding error. Indeed, it would have been surprising for the Law Society to have pursued this allegation before the hearing panel if it had been the only particular of alleged misconduct.

CONCLUSION

[74] We dismiss the appeal. If the respondent is seeking costs, we will receive his written submissions of no more than three pages, apart from a bill of costs and any authorities. The respondent's submissions shall be filed within two weeks of the date of these reasons, and the Law Society's responding submissions of at most three pages plus authorities shall be filed within four weeks of the date of these reasons. No further submissions on costs will be received without leave of the panel.



Raj Anand ,
for the panel