Court File No.: DC-19-111

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

IN THE ESTATE OF AINSLEE ELIZABETH BLAKE, deceased

B E T W E E N :

BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES and PATRICIA RUTH GEDDES

Applicants
(Respondents on Appeal)

- and -

KENNETH GEORGE BLAKE and KENNETH GEORGE BLAKE in his capacity as the Estate Trustee of the Estate of AINSLEE ELIZABETH BLAKE

Respondent
(Appellant)

- and -

GREGORY SIDLOFSKY

Intervener

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PART I—OVERVIEW

1. This appeal engages issues of fundamental importance to advocates. In particular, it engages the balance between duty to the court and duty to the client. The lawyer is at all times both an officer of the court and a zealous advocate for the client. These duties are easily articulated, but their application can be challenging.

2. This appeal is about a lawyer's duty to put binding case law before the court, both at a hearing and while a matter is under reserve. The Advocates' Society's submissions will aim to assist the Divisional Court in determining the content and scope of that duty, how to assess whether it has been breached, and the appropriate process for making such a finding.

3. The facts of this appeal do not raise the issue of a lawyer's duty to bring non-binding decisions to the court's attention. The Advocates' Society's only submission on whether a lawyer has a duty to put non-binding cases before the court is that the Divisional Court should not rule on this issue, because it is complex and does not arise on the facts of this case.

4. Lawyers have an obligation to bring cases that are binding and "on point" before the court and an obligation to present the client's case with zeal. The reality is that lawyers must routinely make professional judgments about what cases to put before the court. Lawyers' exercises of professional judgment will be variable.

5. The facts of this case illustrate that variable application of professional judgment. While the court held that the case in question (*Wall* v. *Shaw*) was binding and on point, the lawyer maintains that he does not consider it binding or on point. Notably, it was not raised by the lawyers for the other parties either. Lawyers' professional judgments about the applicability of cases are not always straightforward or obvious.

6. Above all, The Advocates' Society submits that if the court is considering making a finding that a lawyer breached their duty to the court or the rules of professional conduct, there must be clear notice to the lawyer and their client. The lawyer must be given an opportunity to advise their client of the potential implications for them, and both the lawyer and the client (independently represented, if appropriate), must be given a fair opportunity to make submissions. The court should provide notice that a finding may be made that the lawyer

breached their duty to the court or the rules of professional conduct, regardless of whether cost consequences may fall on the lawyer personally, their client, both, or neither.

7. The court's assessment about whether a lawyer breached their duty to the court or the rules of professional conduct should be on a standard of reasonableness and a modified objective test. The more clearly binding a case is, the more the circumstances will weigh in favour of a finding that the lawyer who failed to bring it to the court's attention breached their duty. However, the assessment must always have a subjective element that sets the issue in its context.

8. This appeal also underscores the fundamental principle that the court must only decide matters that are properly put in issue by the parties and subjected to the "crucible of litigation". The opportunity to make submissions is a matter of fairness to the affected parties and assistance to the court.

PART II—SUMMARY OF FACTS

9. The Advocates' Society takes no position on the facts of this case.

10. This is an appeal of a costs endorsement released on July 8, 2019 (the "**Costs Endorsement**").[1] It arose from a summary judgment motion. The court awarded costs on a substantial indemnity basis against the moving party, Kenneth Blake, on the basis that his lawyer, Gregory Sidlofsky, did not bring the case of *Wall v. Shaw,*[2] to the court's attention. The case was not raised by any party on the motion. In finding that Mr. Sidlofsky breached his professional obligations and duty to the court, the court articulated the duty that lawyers owe to the court as follows:

> ***Counsel before the courts have a positive duty to make full disclosure of all the binding authorities relevant to a case, including all authorities on point whether they support or undermine the position being urged upon the court, even if opposing counsel has not cited such authority.***
>
> […]
>
> As to counsel's obligation to inform the court as to relevant authorities, ***two principles emerge***: ***(1) where a lawyer knows of a relevant authority, the***

[1] *Blake v. Blake,* 2019 ONSC 4062.

[2] *Wall v. Shaw,* 2018 ONSC 1735, aff'd 2018 ONCA 929 (Ont. C.A.).

> ***failure of the lawyer to inform the court of that authority could be seen as an attempt to mislead the court; (2) where a lawyer does not know about authority, ignorance may nonetheless be no excuse***. Lawyers have a duty to conduct reasonable research on points of law that are known in advance to be contentious. Thus, while this may not amount to a deliberate misrepresentation, counsel nevertheless may be found to be in breach of their duty to the court for failing to have conducted reasonable research as to relevant authorities.
>
> ***The following factors are also relevant*** to counsel's duty to the court:
>
> > (a) ***binding decisions, in particular, must be raised if relevant***: *Roman Catholic Episcopal Corp. for the Diocese of Sault Ste. Marie v. Axa Insurance (Canada)*, 2015 ONSC 4755, at para 15;
> >
> > (b) ***cases that are not binding but are persuasive need not necessarily be provided to the court, however counsel should nonetheless raise a case if it is on point and from the same jurisdiction.*** Counsel must be mindful of the fact that decisions from courts of the same level may be binding (under the rule of horizontal stare decisis);
> >
> > (c) where it is submitted that the lawyer did not know of the authority, ***in determining whether the lawyer ought to have known (in terms of reasonable research)***, the court may ask whether the authority was easy to find – if for instance, the case is particularly unique and involves a narrow and specialized area of law it may be less likely that the lawyer could have found the case through reasonable research and the duty to provide that authority may therefore not have been breached. However, if the lawyer practices in a specialized area such as estates litigation, that duty would be present in a case such as this;
> >
> > (d) ***counsel cannot decide on their own whether or not a case is distinguishable.*** If it is relevant and on point, they must bring the case to the attention of the court and allow the judge to determine whether or not the case can be distinguished from the facts before the court or from another decision.[3]

11. The Advocates' Society was granted leave to intervene as a friend of the court pursuant to Rule 13.02 of the *Rules of Civil Procedure* on consent, by order dated April 28, 2021.

PART III—ISSUES

12. The issue to be determined on this appeal are:

    (a) Are the findings of the motions judge about Mr. Sidlofsky's professional conduct proper and supported by the evidence?

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[3] *Blake v. Blake,* 2019 ONSC 4062 at paras 30, 32, 33 [*emphasis added*].

(b) What is the extent of a lawyer's duty to the court, including when a matter has been argued and remains under reserve?

(c) Should there be costs consequences for a client if his or her lawyer has breached his or her duty to the court?

13. The Advocates' Society will focus on issue (b). However, in order to provide assistance to this Court with respect to issue (a) without directly addressing the specific facts on this appeal, The Advocates' Society will address the issue of what notice and opportunity ought to be afforded a lawyer and their client when the court contemplates making a finding that the lawyer breached their professional obligations and duty to the court.

A. Lawyers have a duty to disclose binding and "on point" authorities to the court

14. It is clear that lawyers owe a duty to the court to bring binding, controlling or determinative authorities to the court's attention; these are cases from the same or a higher court in the jurisdiction that are "on point".

15. The Advocates' Society submits that when the court is determining whether a lawyer breached their duty to the court by not bringing a binding authority to the court's attention, the court ought to determine whether the duty has been breached by applying a reasonableness standard and a modified objective test.

i. A binding, controlling or determinative authority is one that is from the same or a higher court and is "on point."

16. The doctrine of *stare decisis* ("to stand by decisions") is strongest and most readily accepted in its vertical formulation: authorities from higher courts are binding and must be followed. This principle is so ingrained that even *obiter dicta* of the Supreme Court of Canada is often treated by lower courts as essentially binding.[4] The principle of *stare decisis* also has a horizontal formulation based on the principle of uniformity, namely that for cases decided at the same level of court, that court ought to decide cases the same way when their material facts are the same.[5]

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[4] *Sellars v. The Queen,* [1980] 1 SCR 527 (SCC) at para 10; *Ottawa v. Nepean,* 1943 CanLII 350 (Ont. C.A.) at para 5; *Re McKibbon and R* (1981), 1981 CanLII 1722 (Ont. S.C.J.), aff'd 1981 CanLII 83 (Ont. C.A.) aff'd on other grounds *R v McKibbon,* [1984] 1 SCR 131 (SCC).

[5] *Holmes v. Jarrett*, [1993] O.J. No. 679 (Ont. Gen. Div.) at para 13.

17. An authority ought to be considered binding, controlling or determinative (terms that are used interchangeably in the case law on this topic) such that the lawyer has an obligation to put it before the court if: (1) the case is from the same or a higher court; and (2) the case is "on point" in the sense that it is potentially determinative because it decided a point of law based on the same or similar facts.[6]

18. In the Costs Endorsement, the court refers to counsel's duty to inform the court about "relevant authorities".[7] In *Lougheed Enterprises Ltd. v. Armbruster,* the British Columbia Court of Appeal defined a "relevant" decision as one in which a point of law is decided and "on which the case might turn"[8], meaning a potentially binding authority.

19. In an article entitled "A Lawyer's Duty to the Court", authored by members of The Advocates' Society's 2009 Principles of Professionalism Committee (which was also cited in the Costs Endorsement), the authors recognize this principle:

> Lawyers are under a positive duty to make ***full disclosure of all the binding authorities relevant to a case.*** This means that all such authorities on point must be brought before the court, whether they support or undermine the position being argued by that party, even if opposing counsel has not cited such authority. This element of the duty includes drawing a judge's attention to any legal errors which have been made so that they can be corrected. ***This duty, however, should not be misconstrued as requiring the lawyer to present a disinterested account of the law. In fact, lawyers are obliged to distinguish those authorities which do not support their client's position.*** Thus, while a lawyer does not need to assist an adversary and is permitted to be silent on certain matters, they are not permitted to actively mislead the court.[9]

20. Cases from other jurisdictions, even those "on point", are not binding. Cases from the same jurisdiction which fall short of being "on point" are also not binding. Such non-binding cases may be relevant and persuasive, but they are not binding, controlling or determinative.

21. The Divisional Court ought not to rule on the existence or scope of a lawyer's duty to bring non-binding authorities to the court's attention. The circumstance of a lawyer failing to

[6] *Lougheed Enterprises Ltd. v. Armbruster,* [1992] B.C.J. No. 712 (BCCA) at paras 30-32; *Holmes v. Jarrett*, [1993] O.J. No. 679 (Ont. Gen. Div.) at para 13; *R. v. Osmar*, 2007 ONCA 50 at paras 44-45, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 157.

[7] *Blake v. Blake,* 2019 ONSC 4062 at paras 30, 32, 33 & 34.

[8] *Lougheed Enterprises Ltd. v. Armbruster,* [1992] B.C.J. No. 712 (BCCA) at paras 30-32.

[9] Robert Bell and Caroline Abela, "A Lawyer's Duty to the Court" (undated), at p. 7 [*emphasis added*].

bring a non-binding case to the attention of the court does not arise on the facts of this appeal because the court held that the decision in *Wall* was binding.

ii. Whether an authority is considered binding, controlling or determinative is a question of professional judgment

22. Whether a case is sufficiently similar to the case at bar to be potentially binding and require putting it forth and distinguishing it is a question of professional judgment. This is particularly challenging when the decision is from the same level of court. In some cases, the answer will be obvious, but often the answer will be less clear.

23. All legal determinations exist on the spectrum from pure questions of law, to questions of mixed fact and law, to pure questions of fact. Questions of mixed fact and law themselves lie along a spectrum.[10] At one end of that spectrum, namely where an extricable legal principle can be distilled from a case, The Advocates' Society submits that this will more readily give rise to a need to ensure uniformity and application of *stare decisis* in either its vertical or horizontal formulation. In these scenarios, the lawyer's obligation to bring cases to the court's attention is engaged.

24. On the other end of the spectrum, there are cases that truly involve questions of fact and law which cannot be decoupled. In these scenarios, the need to bring such a case before the court is more of a professional judgment call by the lawyer. In these scenarios, the lawyer will need to consider how similar the facts are, and whether the legal principles engaged by the case are set forth in other cases. In so doing, the lawyer balances the obligation to the court to make full disclosure and the obligation to the client to be a zealous advocate in presenting the case.

25. Where there is a volume of potentially relevant case law to choose from, the decision is more complicated. For example, the search in an electronic database for "security for costs" decisions in Ontario yields thousands of results. The law on security for costs is dictated firstly by the language of Rule 56 of the *Rules of Civil Procedure* and secondly by the common law. Which cases the lawyer chooses to rely on out of the thousands of available options in which the court applies that test to the facts is a classic example of professional judgment. The

[10] *Housen v. Nikolaisen,* [2002] 2 SCR 235 (SCC) at para 36.

Advocates' Society submits that in these circumstances, the court should be cautious about criticizing lawyers for these exercises of professional judgment.

iii. Whether a lawyer has breached the duty should be evaluated against a reasonableness standard with a modified objective test.

26. In articulating the test applicable to a consideration of whether a lawyer breached their duty to the court, The Advocates' Society submits that the court ought to have regard to the fact that lawyers must balance their duty to the court with their duty to the client. Further, the practice of law is a complex endeavour that inevitably involves the application of professional judgment. Finally, the context in which lawyers exercise their professional judgment is not uniform.

27. Lawyers provide legal services to their clients and exercise their professional judgment with varying degrees of seniority, experience, expertise, and resources. Furthermore, proportionality should play a role in the assessment of whether a lawyer breached their duty to the Court. Some matters are higher stakes than others and within a matter, some issues are of more importance than others. The context is important. Lawyers face different time and resource constraints depending on the circumstances in which they operate. This must always be taken into account.

28. These factors dictate two relevant considerations: (1) the standard must be one of reasonableness, and (2) the test should be a modified objective test.

29. When considering whether the lawyer breached their duty, the court must first determine whether the lawyer, subjectively, knew about the case. If so, the question is whether the lawyer acted reasonably in not bringing it forward, including whether the lawyer reasonably believed the case to be binding or not. If not, the question is whether the lawyer acted reasonably in not becoming aware of the case. In both instances, the test should be a modified objective one of whether the lawyer acted reasonably, in light of the particular circumstances in which they operated, including seniority, experience, expertise, available time and resources, the dollar value of the retainer, and what is at stake in the litigation.

30. As stated above, the questions of whether an authority is "on point" and binding are subjective professional judgments by the lawyer. In some cases, the answers are obvious, but

in many cases they will be more difficult to determine. In recognition of this difficulty, the Ontario *Rules of Professional Conduct* express the lawyer's duty of candour on a subjective basis:

> 5.1-2 When acting as an advocate, a lawyer shall not:
>
> . . . . .
>
> (i) ***deliberately*** refrain from informing the tribunal of any binding authority ***that the lawyer considers to be directly on point*** and that has not been mentioned by an opponent ...[11]

31. In *Adler Firestopping Ltd. v. Rea,* the Alberta Court of Queen's Bench recognized that the lawyer's duty to bring relevant adverse authorities to the court's attention involves professional judgment calls, and is subjective:

> ***Counsel are not expected to be familiar with every case that may be relevant, helpful or not.*** If counsel is aware of favourable cases, they will undoubtedly put those cases forward. ***If counsel is aware of unfavourable cases, from relevant jurisdictions, the Court should be made aware of the existence of such cases, and counsel should be ready to distinguish them. Where the case is of binding authority, and counsel is aware of it, the failure to disclose its existence is tantamount to misrepresentation.*** The courts rely on counsel to argue their cases on the basis of relevant and binding authorities.
>
> […]
>
> I am not suggesting here that the Alberta Rule was breached. ***What is and is not a "relevant adverse authority" leaves room for judgment calls. But where counsel is aware of an Alberta Queen's Bench decision that has similarities to the case at bar, and where counsel is of the subjective view that the case is unhelpful to his or her client's position, there are very few if any circumstances where the case should not be brought to the court's attention***.[12]

32. The facts of this case illustrate why a reasonableness standard and a modified objective test should apply. Mr. Sidlofsky himself deposed that even if he had been aware of the decision in *Wall,* he would not have considered it to be relevant to the argument he was making.[13]

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[11] The Law Society of Ontario, *Rules of Professional Conduct,* Toronto: Law Society of Ontario, 2000.

[12] *Adler Firestopping Ltd. v. Rea*, 2008 ABQB 95 at paras 95-101 [*emphasis added*].

[13] Motion Record of the Intervener re: Fresh Evidence, Tab 2, Affidavit of Gregory Sidlofsky, sworn January 24, 2021, at paras 16-17.

Different lawyers may reach different conclusions regarding the applicability of case law to the same set of facts, and those views may be different from the views of judges.

33. The Advocates' Society submits that the assessment of whether a lawyer discharged their duty to the court begins with a subjective inquiry into the lawyer's knowledge. The reasonableness standard then focusses on objective factors such as the degree of relevance of the case, how easy it would be to find, and other cases relied on by the party. The modified objective test puts those objective factors into the context facing the lawyer to assess whether there has been a breach.

34. In the professional negligence case of *Central & Eastern Trust Co. v. Rafuse,* the Supreme Court of Canada described the professional standards applicable to lawyers in a contextual way:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. ***The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.*** Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, ***stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist.*** […]
>
> The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. ***A solicitor is not required to know all the law applicable to the performance of a particular legal service***, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, ***but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.*** The duty in respect of knowledge is stated in 7 Am. Jur. 2d, "Attorneys at Law" §200, in a passage that was quoted by Jones J.A. in the Appeal Division, as follows [[at p. 269-70]: p. 269, 147 D.L.R.]:
>
> > An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, ***and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.***
>
> […]

> The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, Professional Negligence (1982), at pp. 145-46 as follows:
>
> > ***Although a solicitor is not 'bound to know all the law', he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice.*** However, before the solicitor is held liable for failing to look a point up, ***circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched.***[14]

35. A reasonableness standard and modified objective test ought also to apply to cases, as here, in which a lawyer was unaware of the case. In that case, the question will be whether the lawyer ought to have known about the case. This was the circumstance in *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*[15] The plaintiff's application for an interim injunction was dismissed and the defendants applied for an order requiring the plaintiff's former solicitors to personally pay solicitor-and-client costs. The court granted the application because it was clear that counsel was not aware of the leading case law, which caused the defendants to have to defend an application that was doomed to fail. The court stated:

> In my opinion the conduct of the plaintiff's solicitors in this case fell far short of the reasonable care, skill and knowledge which the plaintiff was entitled to expect. ***The*** **Amer. Cyanamid** ***principles ought by now to be part of the working knowledge of a competent counsel in this jurisdiction. If they are not, then any counsel contemplating an injunction application ought to be able to perceive the need to research the law before preparing the material to be filed. It may be that the*** **Aetna Fin.** ***case is not as well known, however, a moderate amount of research would quickly have brought it to light,*** and that research should have been undertaken as part of the preparation for a bid for what are known to competent counsel to be extraordinary remedies not lightly granted by the court. It is for these reasons, and in accordance with the principles I have read from the *Rafuse* case that ***I conclude that the plaintiff's solicitors were negligent in the performance of their duty to him. That negligence led to the award of solicitor-client costs***.[16]

36. In *Maranello Autobody Inc. v. Fridman*, the lawyer herself did not subjectively believe the authority in question was on point because she thought it was distinguishable. The Ontario

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[14] *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 SCR 147 (SCC) at para 58-59 [*citations omitted*; *emphasis added*].

[15] *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*, [1987] B.C.J. No. 2619 (BCSC).

[16] *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*, [1987] B.C.J. No. 2619 (BCSC) at paras 13-24.

Small Claims Court nonetheless held that it was *unreasonable* for her not to bring the case to its attention because it was a binding authority. The court stated:

> In her written submissions, the Defendant's lawyer argued that *Parkway* was distinguishable from this case. I concluded that it was not. ***However, I am not prepared to conclude that the Defendant's lawyer deliberately refrained from informing the Court of any binding authority that she knew to be directly on point.*** In fact, from her submissions, it is clear that the Defendant's lawyer did not believe that *Parkway* was 'on point', unlike the Plaintiff's lawyer in *Adler*. ***I am not prepared to conclude that she engaged in conduct that was "tantamount to misrepresentation".***
>
> ***That does not mean that the failure of the Defendant's lawyer to raise Parkway was reasonable. The Divisional Court's decision in*** **Parkway** ***is binding on this Court. What was debatable was its application to this case.*** The Court in *Adler* outlined the reasonable course of conduct in such circumstances: "If counsel is aware of unfavourable cases, from relevant jurisdictions, the Court should be made aware of the existence of such cases, and counsel should be ready to distinguish them." ***The failure by the Defendant's lawyer to do so amounted to "unreasonable behaviour in the proceeding".***[17]

37. There is a pattern in the case law of applying closer scrutiny to lawyers who were personally involved in a prior case and failed to bring it to the attention of the court in a subsequent case. For example, in *R. v. Hume,* counsel for the accused failed to bring two cases forward which were factually similar to the case at bar and in which defence counsel also acted for the accused. The court stated:

> It was disappointing that Mr. Lent failed to draw the court's attention to either of *Sirelpuu* or *Bhullar*. ***Each was a reported case in which he was counsel. Each was a case with facts much closer to the case at bar than to*** **Keast.** It would have been of greater assistance to the court, and more consistent with the court's expectation of candour from all counsel, that relevant decisions from both trial and appellate levels be brought forward. It is hoped that in the future Mr. Lent will bring all relevant cases on point to the court's attention.[18]

38. Similarly, in *R v. Waddington,* counsel failed to bring to the court's attention two recent cases applicable to the fact situation in the case at bar. Counsel also acted for the accused in those cases. The court commented:

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[17] *Maranello Autobody Inc. v. Fridman*, 2012 CarswellOnt 17009 (Ont. S.C.J.) at paras 5-10, Unreported Book of Authorities of The Advocates' Society, Tab 1 [*emphasis added*].

[18] *R. v. Hume*, 2013 ONCJ 380 at para 37 [*emphasis added*].

> On a separate issue regarding this matter, I found that defence counsel's approach to this particular issue of some concern. In his notice of *Charter* issues on the question of right to counsel, defence counsel cited 36 cases in support of his position. He did not refer to either *Rice* or *Edgington*.
>
> It is not incumbent upon defence counsel to do a brief of law that will assist Crown counsel's position. ***If however defence counsel is aware of cases that are on point, albeit opposite the argument he is making, he should bring them to the court's attention. Mr. Waddington's counsel in this case was counsel in both the Edgington and Rice decisions. It was inappropriate for him not to advise the court of the existence of these decisions in his written or oral argument***.[19]

39. In another case, *McGregor v. Crossland,* counsel for the defendant failed to draw the court's attention to binding appellate authority (the Court of Appeal for Ontario case in *Adderly v. Bremner*) even though he was counsel in that case and therefore knew that his strategy at trial was contrary to appellate jurisprudence. This ultimately led to a new trial being ordered. The court found the lawyer's conduct to be unreasonable and ordered costs against the lawyer's client as a result.[20]

40. In *General Motors Acceptance Corp. of Canada v. Isaac,*[21] neither party brought a "remarkably similar case" that had recently been decided by the Alberta Court of Appeal to the court's attention. The lawyer whose side it did not favour was counsel in that case, and only disclosed his awareness of the case after the judge raised it at the end of the hearing. The court stated:

> It would not be an answer to say that *Sherwood* is distinguishable so it need not be disclosed. That also does not work that way. The fallacy in that argument should be obvious. That would leave it to counsel to decide if a case is distinguishable. Counsel do not make that decision. The Court does.
>
> ***It is proper for counsel to bring forward a relevant case and then submit that it is distinguishable for whatever reason. That is fair play. It is improper to not bring forward a relevant case on the ground that it is distinguishable. That is not fair play***.[22]

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[19] *R. v. Waddington*, [2014 SKQB 392] at paras 14-16 [*emphasis added*].

[20] *McGregor v. Crossland,* [1997] O.J. No. 2513 (Gen. Div.) at paras 61-64, Book of Authorities of Amicus Curiae ("**Amicus BOA**"), Tab 3.

[21] *General Motors Acceptance Corp. of Canada v. Isaac*, [1992] A.J. No. 1083 (ABQB).

[22] *General Motors Acceptance Corp. of Canada v. Isaac*, [1992] A.J. No. 1083 (ABQB) at paras 85-88 [*emphasis added*].

41. Similarly, The Advocates' Society recognizes that the court may apply closer scrutiny when a lawyer fails to disclose a decision that is vertically binding and "on point". In such cases, it may be more difficult for the lawyer to establish that it was reasonable not to bring the authority to the court's attention than if the decision were potentially binding on the basis of horizontal *stare decisis*. Put another way, when the authority in question is vertically binding, objective factors suggesting that the lawyer breached their duty to the court may be difficult to overcome with contextual factors explaining why that occurred.

iv. The duty extends to binding authorities that come to the lawyer's attention while a matter is under reserve.

42. The Advocates' Society submits that a lawyer *does* have an obligation to bring to the court's attention a binding case that is newly decided while a matter is under reserve, if the lawyer becomes aware of the case. However, this duty ought *not* to extend to imposing a positive obligation on a lawyer to continue conducting research to identify new cases while a matter is under reserve. *Amicus Curiae* has also submitted that the lawyer's duty ought not to extend this far.[23] This would impose too onerous a standard on counsel and would be practically unfeasible for many lawyers in many circumstances.

43. The Advocates' Society identified just one case in which a lawyer's failure to bring a decision to the court's attention while a matter was under reserve was considered. In *Powell v. Pal,* the Divisional Court considered an appeal of a representation order. After the motion was heard and while it was under reserve, the Court of Appeal for Ontario released two new decisions that were determinative. Neither party brought the Court of Appeal decisions to the motion judge's attention during the reserve and the motion judge's decision was contrary to the new cases. On appeal, the Divisional Court allowed the appeal on the basis of the two new cases. The Court declined to award costs to the appellant on the basis that the appeal was only required because the two new cases were not put before the motion judge:

> …Counsel were unable to bring the two Ontario Court of Appeal decisions to the attention of the motions judge in the almost two months that elapsed between the date when the Ontario Court of Appeal delivered its decisions in the two cases upon which the outcome of this matter turned and when the motions judge released her decision.

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[23] Factum of *Amicus Curiae,* para 83.

> In our view, ***the appellant, who has succeeded solely because of these two decisions, must bear the greater responsibility for not having advised the motions judge of them. Had she been made aware of these decisions, she undoubtedly would have called for further submissions which may have obviated the necessity of the appearance before Carnwath J. and the appearance before us today.***[24]

44. The court exercised its discretion to not award costs to the appellant in *Powell* despite its success because the appellant failed to bring the two new decisions to the attention of the court. The decision falls short of articulating a positive obligation on counsel to continue conducting research while a matter is under reserve or suggesting that the appellant's lawyer breached their duty to the court. *Powell* underscores that the obligation to bring relevant authorities to the attention of the court applies to counsel for all parties, whether the authorities are supportive or adverse to the party's position.

45. Reserves can be long; often in the order of many months. Surveying newly released case law would not just be a matter of monitoring for the release of new cases, but reading and considering them in connection with all matters the lawyer has under reserve. While achievable for some lawyers, this would be unachievable for others and would tend to disproportionately impact lawyers with high-volume practices, sole practitioners and lawyers with clients on tighter budgets. Requiring lawyers to continue conducting research after their matters have been heard, and until the reasons for decision are released, would place an undue burden on some lawyers.

46. Lawyers should be encouraged to <u>jointly</u> contact the court regarding the delivery of additional submissions on newly released cases that actually come to their attention and which they consider potentially binding. The responsibility is joint. The lawyers should seek this opportunity whether they intend to urge the court to apply or distinguish the case.

47. It is common practice for courts to invite the parties to make submissions on the applicability of decisions released while a matter is under reserve when they come to the attention of the court.[25]

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[24] *Powell v. Pal*, 2009 CanLII 6630 (Ont. Div. Ct.) at paras 19-20 [*emphasis added*].

[25] See: *R. v. Haas*, 2005 CanLII 26440 (Ont. C.A.) at para 39; *Ontario Home Builders' Association v. York Region Board of Education*, 1994 CanLII 8710 (Ont. C.A.); *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272 at para 13.

48. At paragraph 69 of the *Amicus Curiae* factum, it is asserted that the motions judge was "entitled to do his own research" and "not required to seek further submissions from the parties". Two cases are cited.[26] What these cases underscore is that while seeking submissions is discretionary, it is the more prudent course, particularly if the new case changes the applicable law. The cited passage from *Canada (Attorney General) v. Levac* is:

> "There is a short answer to the applicant's submission. I do not think that a tribunal or a court can ever be on a strict duty to entertain new submissions from the parties to a litigation because a decision of a higher court handed down after the hearing could influence its deliberation. It may be useful and more prudent to do so but it is, I believe, particularly in the absence of any request by the parties, a purely discretionary matter."

49. The passage from *McCunn Estate v. Canadian Imperial Bank of Commerce* cited by *Amicus Curiae*, the Court focused on whether the matter raised by the case that was not cited by the parties had nonetheless been put in issue:

> "It is the obligation of the parties to bring the relevant authorities to the attention of the court. If the court finds further authorities which support or contradict the positions of the parties on the issues, it is the duty of the court to apply the law as it exists. In some circumstances, the court may wish to have the submissions of the parties on some case law which was not brought to the court's attention, for example, where the law has undergone a significant change and the court intends to base its decision on that change. That was not the case here. ***It was open to the application judge to consider all authorities which pertain to the matter as framed by the parties.***"

50. The Advocates' Society submits that the court does have discretion to consider authorities that were not raised by the parties. However, it is only in certain circumstances (i.e., where the case is in line with other cases raised by the parties or otherwise has a benign impact on the outcome) that the court should do so without inviting submissions from the parties. The court ought not to decide a matter based on cases, issues and arguments that were not raised by the parties without putting the parties on notice and accepting submissions. To do so is antithetical to the adversarial process.

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[26] Factum of *Amicus Curiae,* para 69, citing *McCunn Estate v. Canadian Imperial Bank of Commerce,* 2001 CanLII 24162 (Ont. C.A.) at paras 42-43, *Canada (Attorney General) v. Levac,* 1992 CanLII 8518 (FCA) at para 13 [*emphasis added*]. The paragraphs cited by *Amicus Curiae* from the *McCunn* decision are quoted from the dissent. See also: *Theiventhiran v. Canada (Minister of Citizenship & Immigration),* 1994 CarswellNat 1888 at para 4, cited at para 80 of the Factum of *Amicus Curiae*, Amicus BOA, Tab 1.

B. Clear notice is required if a finding of a breach of duty by a lawyer is at issue

51. The Advocates' Society submits that the Divisional Court ought to reinforce that when a court is considering making a finding that a lawyer breached their duty to the court or breached the rules of professional conduct, the lawyer whose conduct is impugned, and through them their client, must *always* be on notice and be given an opportunity to make submissions.

52. *Amicus Curiae* correctly points out that the court's authority to control its own process is crucial to judicial independence.[27] That does not, however, derogate from the requirement for notice. In considering this requirement, the distinction must be drawn between a statement by the court about the conduct of proceedings before it (e.g., "It is both unfortunate and troubling that counsel did not refer to this decision during their submissions")[28] and a finding of a breach by a lawyer (e.g., "I have concluded that counsel did breach his duty to this court").[29] The Advocates' Society submits that any finding of breach requires notice.

53. *Amicus Curiae* notes that Mr. Sidlofsky was aware of the motion judge's view that the failure to cite the *Wall* case was "troubling and unfortunate".[30] However, neither party addressed this issue in their costs submissions[31] and the statement did not impugn the conduct of Mr. Sidlofsky any more than the other lawyers involved. The Advocates' Society respectfully disagrees with *Amicus Curiae* that the duty to the court lies most squarely on the lawyer for the moving party. The onus to bring binding and "on point" authorities to the attention of the court lies with all lawyers. The impact of the onus is properly conceived of as part of the context to be considered in assessing whether a lawyer breached their duty to the court.

54. Rule 57.07 of the *Rules of Civil Procedure* provides that if a party seeks costs against a lawyer personally, the lawyer must be given "a reasonable opportunity to make representations to the court" before such an order is made.[32] The rationale for this rule was explained in *Donmor Industries Ltd. v. Kremlin Canada Inc.*:

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[27] Factum of *Amicus Curiae,* para 71, citing *Groia v Law Society of Upper Canada*, 2018 SCC 27, at paras 54-55.

[28] *Blake v. Blake*, 2019 ONSC 1464 at para 39.

[29] *Blake v. Blake,* 2019 ONSC 4062 at para 36.

[30] Factum of *Amicus Curiae,* para 75; *Blake v. Blake*, 2019 ONSC 1464 at para 39.

[31] Appeal Book and Compendium of the Intervener, Tabs 5-6 and 8.

[32] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 57.07.

> This is a motion by the defendants to have their costs incurred on a motion to strike out the statement of claim and dismiss this action paid personally by the solicitor for the plaintiffs.
>
> The jurisdiction of the court to make such an order springs from s. 141 of the *Courts of Justice Act* and Rule 57.07. ***Such an order is unusual and one pregnant with serious consequences for not only the solicitor but for the profession in general. For that reason the rule requires that the solicitor be given a reasonable opportunity to make representations to the court and to retain counsel for that purpose.***[33]

55. The rule that a lawyer must be given notice and an opportunity to make submissions if costs may be awarded against them personally ought also to apply more generally, including when a lawyer's breach is being considered as a basis for awarding costs against their client on an elevated scale. Notice should be required whenever a court is considering making a finding of a breach of duty to the court or rules of professional conduct, even absent cost consequences.

56. One of the rationales for providing notice is that a finding that the lawyer breached their duty to the court may fracture the lawyer-client relationship and/or put the lawyer and client in a conflict of interest. The client deserves an opportunity to understand the implications of the alleged breach, and consider independent legal advice; none of that is possible without notice.

57. The Court of Appeal for Ontario alluded to a broad requirement for notice in the recent case of *R. v. Ibrahim,* on an appeal from a manslaughter conviction.[34] During the trial, the defence moved for a mistrial. In the reasons for dismissing the application for a mistrial, the trial judge was critical of defence counsel and "*implicitly*" accused the lawyer of professional misconduct. Although not determinative of the appeal, the Court of Appeal noted that the trial judge had conducted the mistrial application in an injudicious manner in part because defence counsel was not given an opportunity to respond to the allegations of misconduct:

> *…**[T]he trial judge raised none of these concerns with counsel at the time. Defence counsel was not afforded the opportunity to respond to the serious concerns raised by the trial judge in his written reasons, including the allegations of professional misconduct.***
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> […]

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[33] *Donmor Industries Ltd. v. Kremlin Canada Inc.,* [1992] O.J. No. 4055 (Ont. Sup. Ct.) at paras 1-2 [*emphasis added*].

[34] *R. v. Ibrahim,* 2019 ONCA 631 at paras 87-95.

> ***To conclude, we are of the view that the trial judge conducted the mistrial application in an injudicious manner***. However, given that this portion of the proceedings occurred entirely in the absence of the jury, we are not persuaded that this aspect of the trial judge's conduct had any impact on the overall fairness of the proceedings: see Murray, at para. 97; John, at para. 51.[35]

58. The Court of Appeal for Ontario also considered notice in *R. v. Leduc*.[36] The Crown appealed a stay of criminal proceedings made on the ground of willful non-disclosure by a senior Crown prosecutor. Ultimately, the court overturned the finding of willful misconduct, allowed the appeal, and set aside the stay. In so doing, the court considered whether the Crown whose conduct had been impugned had received reasonable notice of the allegation of misconduct against her. The defendant had originally alleged non-disclosure by the police and although there was "*an inkling*" of the position in opening, it was not until closing submissions that misconduct of the Crown was clearly alleged.[37]

59. The Ontario Crown Attorney's Association ("**OCAA**") and the Criminal Lawyers' Association ("**CLA**") both intervened on the appeal. The OCAA argued for a firm rule that the Crown ought to be given timely written notice of allegations of wilful misconduct, with particulars, and a fair opportunity to respond.[38] The OCAA argued that it was a matter of natural justice and urged analogy to disciplinary proceedings by the Law Society of Ontario.[39] The Court of Appeal rejected the analogy, finding that procedural fairness only arises if there is a possibility of costs awarded personally against the Crown.[40]

60. The Court of Appeal rejected the firm rule urged by the OCAA, in favour of a more flexible approach to notice for the Crown of allegations of wilful non-disclosure, and cited the inherent jurisdiction of the court as a means of ensuring fairness to the Crown.[41] In so doing, the Court of Appeal also emphasized the importance of notice, though not in the firm formulation urged by the OCAA:

> ***Where an accused intends to rely on an allegation of prosecutorial misconduct, I think it highly desirable that Crown counsel receive the kind of***

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[35] *R. v. Ibrahim,* 2019 ONCA 631 at paras 91-95 [*emphasis added*].
[36] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.).
[37] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at para 75.
[38] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at para 82.
[39] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at paras 83-84.
[40] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at paras 87-88.
[41] *R v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at para 95.

> ***notice argued for by the OCAA***. If the accused is represented by a lawyer, where at all possible, ***this kind of notice is called for as a matter of simple professional decency and courtesy***.[42]

61. The Court of Appeal held in *R. v. Leduc* that while the notice provided was "not ideal", it was "adequate."[43] Two facts appear to have driven that result in *R. v. Leduc*: (i) the Crown did appear to be aware her conduct was at issue; and (ii) she did not complain about a lack of notice, even during closing submissions. This case was not about whether the Crown was on notice; she was. Rather, it was about whether the notice was *adequate*.

62. Taken together, the decisions of *R. v. Ibrahim* and *R. v. Leduc* underscore the need for a lawyer to be on notice and given an opportunity to respond if a finding with respect to their conduct is to be made. The Advocates' Society submits that it is crucial that the court never make findings that a lawyer breached their duty to the court or breached rules of professional conduct without giving the lawyer and the client a fair opportunity to be heard.

63. It is a fundamental principle of the adversarial system that the parties put forth the matters to be decided by the court. This is done by pleadings in an action, by notice of application on an application, and by notice of motion on a motion. Decisions get overturned on appeal when the court strays from the matters put before the court by the parties and decides matters on grounds not advanced and argued by the parties. [44] There are important reasons for this. The faith we place in the adversarial system is grounded in the notion that when matters are tested in the crucible of litigation, there is justice and fairness in the outcome. When matters are decided without having been put before the court, they have not been appropriately tested, and accordingly there can be no faith in the justice and fairness of that outcome.[45] As such, the court should seek submissions from the parties on issues raised on the court's own motion.

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[42] *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at para 86 [*emphasis added*].

[43] *R v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.) at para 77.

[44] *Rodaro v. Royal Bank,* [2002] O.J. No. 1365 (Ont. C.A.) at paras 60-63; *Grass (Litigation Guardian of) v. Women's College Hospital*, [2005] O.J. No. 1403 (Ont. C.A.) at paras 76-78; *Labatt Brewing Company Ltd. v. NHL Enterprises Canada, L.P.,* 2011 ONCA 511 at paras 4-5, 21; *Nemchin v. Green,* 2021 ONCA 238 at paras 15-16; *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC,* 2012 FCA 103 at paras 23, 27; *Canada (Commissioner of Competition) v. CCS Corp.,* 2013 FCA 28 at paras 71-73, rev'd on other grounds, 2015 SCC 3.

[45] *Labatt Brewing Company Ltd. v. NHL Enterprises Canada, L.P.,* 2011 ONCA 511 at para 6.

64. Mr. Sidlofsky's Intervener Factum asserts that the Costs Endorsement contains factual errors; this was also recognized in *Amicus Curiae*'s Factum.[46] Submissions and arguments of counsel are crucial to the administration of justice. Hearing from both sides is not only a matter of fundamental justice, it also reduces the chances of error by permitting the court to review tested evidence and arguments and benefit from the discourse between lawyers and the court.

65. The principle that the parties put the matters before the court applies to costs decisions. In the usual course of costs decisions, the successful party delivers submissions and the unsuccessful party responds. In this way, the unsuccessful party who faces costs consequences knows what arguments to respond to. If the successful party raises the lawyer's conduct as a reason for costs on an elevated scale – the lawyer and their client are on notice and can respond.

66. Costs awards also serve the function of sending messages to litigants and lawyers about conduct in the course of litigation. The court may occasionally wish to raise issues not raised by the parties under the authority of its inherent jurisdiction to control its own process. The Advocates' Society submits that in such circumstances, the court ought to take special care to put the parties on notice and get the benefit of submissions before making findings on that basis.

67. The Advocates' Society respectfully disagrees with *Amicus Curiae* that a finding of a breach based on actual knowledge requires notice whereas a finding of a breach based on what the lawyer ought to have known does not.[47] The rationales for providing notice apply to both circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2021.

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Sarit Batner, Moya Graham and Adriana Forest
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Lawyers' for The Advocates' Society

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[46] Factum of the Intervener, paras 42-43; Factum of *Amicus Curiae,* para 45.
[47] Factum of *Amicus Curiae,* at paras. 76-77.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Adler Firestopping Ltd. v. Rea*, 2008 ABQB 95
2. *Blake v. Blake,* 2019 ONSC 1464
3. *Blake v. Blake,* 2019 ONSC 4062
4. *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272
5. *Canada (Attorney General v. Levac,* 1992 CanLII 8518 (FCA)
6. *Canada (Commissioner of Competition) v. CCS Corp.,* 2013 FCA 28, rev'd on other grounds, 2015 SCC 3
7. *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 SCR 147 (SCC)
8. *Donmor Industries Ltd. v. Kremlin Canada Inc.,* [1992] O.J. No. 4055 (Ont. Sup. Ct.)
9. *General Motors Acceptance Corp. of Canada v. Isaac*, [1992] A.J. No. 1083 (ABQB)
10. *Grass (Litigation Guardian of) v. Women's College Hospital*, [2005] O.J. No. 1403 (Ont. C.A.)
11. *Groia v. Law Society of Upper Canada*, 2018 SCC 27
12. *Holmes v. Jarrett*, [1993] O.J. No. 679 (Ont. Gen. Div.)
13. *Housen v. Nikolaisen,* [2002] 2 SCR 235 (SCC)
14. *Labatt Brewing Company Ltd. v. NHL Enterprises Canada, L.P.,* 2011 ONCA 511
15. *Lougheed Enterprises Ltd. v. Armbruster,* [1992] B.C.J. No. 712 (BCCA)
16. *Maranello Autobody Inc. v. Fridman*, 2012 CarswellOnt 17009 (Ont. S.C.J.)
17. *McCunn Estate v. Canadian Imperial Bank of Commerce,* 2001 CanLII 24162 (Ont. C.A.)
18. *McGregor v. Crossland,* [1997] O.J. No. 2513 (Gen. Div.)
19. *Nemchin v. Green,* 2021 ONCA 238
20. *Ontario Home Builders' Association v. York Region Board of Education*, 1994 CanLII 8710 (Ont. C.A.)
21. *Ottawa v. Nepean,* 1943 CanLII 350 (Ont. C.A.)

22. *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC,* 2012 FCA 103

23. *Powell v. Pal*, 2009 CanLII 6630 (Ont. Div. Ct.)

24. *R. v Waddington*, 2014 SKQB 392

25. *R. v. Haas*, 2005 CanLII 26440 (Ont. C.A.)

26. *R. v. Hume*, 2013 ONCJ 380

27. *R. v. Ibrahim,* 2019 ONCA 631

28. *R. v. Leduc,* [2003] O.J. No. 2974 (Ont. C.A.).

29. *R. v. Osmar*, 2007 ONCA 50, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 157.

30. *Re McKibbon and R* (1981), 1981 CanLII 1722 (Ont. S.C.J.), aff'd 1981 CanLII 83 (Ont. C.A.) aff'd on other grounds *R v McKibbon,* [1984] 1 SCR 131 (SCC)

31. *Rodaro v. Royal Bank,* [2002] O.J. No. 1365 (Ont. C.A.)

32. *Sellars v. The Queen,* [1980] 1 SCR 527 (SCC)

33. *Theiventhiran v. Canada (Minister of Citizenship & Immigration),* 1994 CarswellNat 1888

34. *Wall v. Shaw,* 2018 ONSC 1735, aff'd 2018 ONCA 929 (Ont. C.A.).

35. *World Wide Treasure Adventures Inc. v. Trivia Games Inc.,* [1987] B.C.J. No. 2619 (BCSC)

SCHEDULE "B"
RELEVANT STATUTES

The Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2000.

5.1-2 When acting as an advocate, a lawyer shall not

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

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

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

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

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

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent,

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(m) needlessly abuse, hector, or harass a witness,

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 57.07.**

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.

BRUCE HOWARD BLAKE et al Plaintiffs	and	KENNETH GEORGE BLAKE et al Defendant	and	GREGORY SIDLOFSKY Intervenor	Court File No.: DC-19-111

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding commenced at Brampton

FACTUM OF THE INTERVENER,
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(Returnable June 18, 2021)

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