COURT OF APPEAL FOR ONTARIO

CITATION: The Law Society of Upper Canada v. Watson, 2026 ONCA 372
DATE: 20260527
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Tulloch C.J.O., Sossin J.A. and O'Marra J. (*ad hoc*)

BETWEEN

The Law Society of Upper Canada

Applicant/Respondent in Appeal
(Appellant)

and

Richard Keith Watson

Respondent/Appellant
(Respondent)

Stephen Aylward and Alexandra Heine, for the appellant

David Moore, Ken Jones and Christopher Stienburg, for the respondent

Heard: March 18, 2026

On appeal from the order of the Divisional Court (Associate Chief Justice Faye E. McWatt, Justices Anne M. Molloy and William S. Chalmers), dated March 2, 2023, with reasons reported at 2023 ONSC 1154, allowing an appeal in part from an order of the Law Society Tribunal Appeal Division, dated February 22, 2018, with reasons reported at 2018 ONLSTA 3, affirming an order of the Law Society Tribunal Hearing Division, dated August 5, 2016, with reasons reported at 2016 ONLSTH 135.

Sossin J.A.:

I. OVERVIEW

[1] This appeal is about the threshold requirement for an award of wasted costs against the appellant, the Law Society of Ontario (the "LSO" or the "Law Society")[1] in a conduct application. The respondent, Richard Keith Watson, was subject to a lengthy investigation and disciplinary hearing. At the end of the hearing, counsel for the LSO sought to withdraw the application, and, ultimately, the application was dismissed in its entirety. The Hearing Division of the Law Society Tribunal (the "Tribunal") held that, applying the Tribunal's rule governing costs against the LSO, costs were not warranted. This finding was upheld by the Tribunal's Appeal Division. The Divisional Court allowed the appeal from the Appeal Division in part, concluding that the Law Society's process was procedurally unfair and one-sided, and remitted the matter back to the Hearing Division for a fresh determination of the costs issue.

[2] For the reasons that follow, I would dismiss the appeal from the Divisional Court's decision to remit the matter back, but I reach that conclusion by a somewhat different route than the Divisional Court.

[1] At the time the proceedings against Mr. Watson commenced, the LSO was known as the Law Society of Upper Canada. For clarity, I use the current Law Society of Ontario designation throughout.

II. FACTS

[3] On October 27, 2008, the LSO received a complaint by Sylvia Sweeney alleging that Mr. Watson, while acting as her lawyer, did not follow her instructions regarding the disbursement of trust funds, misappropriated some of the funds, and improperly altered corporate records. The complaint arose out of a project operated by Ms. Sweeney's production company to stage a concert series for the Beijing Olympic and Paralympic Games in 2008. Mr. Watson denied wrongdoing and maintained that he was not acting as a lawyer, but rather as a business executive for Ms. Sweeney's company.

[4] Following an investigation, the Proceedings Authorization Committee ("PAC") authorized a conduct application on August 25, 2009. A Notice of Application was issued on September 11, 2009, alleging four instances of professional misconduct, including improperly withdrawing funds, misappropriation of funds, and failing to act with integrity by, among other things, fabricating certain corporate documents.

III. PROCEDURAL HISTORY

a. Conduct Proceeding

[5] The conduct hearing proceeded before a three-member panel of the Tribunal's Hearing Division over 56 hearing days between 2011 and 2013, including a lengthy cross-examination of Ms. Sweeney. After the close of Ms. Sweeney's cross-examination, the LSO sought to withdraw the application. On

April 1, 2013, the panel declined to permit withdrawal and instead dismissed all charges against Mr. Watson: *Law Society of Upper Canada v. Richard Keith Watson,* 2013 ONLSHP 60. The dismissal of the conduct allegations was not appealed.

b. First Costs Hearing

[6] Mr. Watson then sought costs against the LSO. Under r. 25.01 of the *Ontario Law Society Tribunal Hearing Division Rules of Practice and Procedure* (the "Rules"), costs could be ordered against the LSO under certain specified circumstances. The costs proceeding unfolded in two stages before the same panel.

[7] First, Mr. Watson challenged the validity of r. 25.01. By majority reasons, the panel dismissed that challenge: *Law Society of Upper Canada v. Watson*, 2014 ONLSTH 75. That ruling is not an issue in this appeal.

[8] The second stage was about entitlement to costs. Before the panel heard submissions on the second stage, one panel member was appointed to the bench. The remaining two members proceeded to hear the matter but were unable to agree. They issued brief explanations of their respective positions but made no final order: *Law Society of Upper Canada v. Watson*, 2015 ONLSTH 119. They concluded that, in the absence of agreement, no decision had been rendered and

the second stage of the costs motion had to be reheard before a newly constituted panel: *Law Society of Upper Canada v. Watson*, 2015 ONLSTH 189.

c. Second Costs Hearing

[9] A newly constituted three-member panel (the "Hearing Panel" or the "Hearing Division") reheard the second stage of the costs motion. In that motion, Mr. Watson sought: (i) production of the memorandum provided to the PAC ("PAC Memorandum"); (ii) costs of the conduct proceeding; and (iii) costs of the abortive first costs hearing.

[10] The Hearing Panel dismissed Mr. Watson's motion for production of the PAC Memorandum, holding that the memorandum was privileged and not relevant to the determination of costs: *Law Society of Upper Canada v. Watson,* 2016 ONLSTH 136.

[11] The Hearing Panel denied Mr. Watson's motion for costs of both the conduct proceeding and the first costs hearing: *Law Society of Upper Canada v. Watson,* 2016 ONLSTH 135. It concluded that the proceeding was not unwarranted at the outset or at any point during the hearing, and that the LSO had not caused wasted costs within the meaning of r. 25.01. Given that conclusion, there was no basis to award costs of the first costs motion. The Hearing Division's decision is discussed in more detail below; it is the decision of first instance in this appeal.

[12] In separate reasons, the Hearing Panel awarded the LSO $52,000 in costs, comprising $12,000 relating to the PAC Memorandum disclosure motion and $40,000 relating to the costs hearing: *Law Society of Upper Canada v. Watson,* 2016 ONLSTH 186.

d. Appeal Division

[13] Mr. Watson appealed all aspects of the Hearing Panel's decisions to the Appeal Division of the Tribunal, which sat as a five-member panel: *Watson v. Law Society of Upper Canada*, 2018 ONLSTA 3. The Appeal Division dismissed the appeal of the costs decision in its entirety. It upheld the refusal to order production of the PAC Memorandum, the denial of costs against the LSO pursuant to r. 25.01, and the award of $52,000 in costs to the LSO.

[14] In a separate decision, the Appeal Division awarded the LSO costs of the appeal in the amount of $31,500: *Watson v. Law Society of Ontario*, 2018 ONLSTA 14.

e. Divisional Court

[15] Mr. Watson appealed to the Divisional Court under s. 49.38(b) of the *Law Society Act*, R.S.O. 1990, c. L.8. The Divisional Court partially allowed the appeal.

[16] The Divisional Court upheld the Tribunal's refusal to order production of the PAC Memorandum and its refusal to award costs under r. 25.01(1)(a)(i) dealing with whether the proceedings were unwarranted at the outset.

[17] However, the court concluded that the Tribunal had erred in finding Mr. Watson was not eligible for costs under r. 25.01(1)(a)(ii) dealing with "wasted costs." Specifically, the court found that the investigation and prosecution by the LSO was undermined by procedural fairness concerns, particularly in the LSO's approach to obtaining and disclosing documentary material.

[18] The Divisional Court set aside the Appeal Division's decision and remitted the matter to a newly constituted panel for a further hearing limited to "wasted costs." It directed that if costs are awarded to Mr. Watson by the new panel, the Hearing Panel's conclusion that Mr. Watson was not entitled to costs of the first costs hearing should also be re-examined.

[19] The Divisional Court upheld the $12,000 costs award to the LSO for the PAC motion but set aside the LSO's $40,000 costs award for the second costs hearing. It further directed that Mr. Watson receive costs before the Appeal Division, to be fixed there if not agreed and awarded Mr. Watson $17,500 all-inclusive costs of the Divisional Court appeal.

IV. ISSUES

[20] The Law Society raises the following issues on this appeal:

(1) Does the framework from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 apply to questions of procedural fairness?

(2) When may costs be ordered against the LSO for “wasted costs”?

(3) What level of procedural fairness is owed at the investigative stage?

(4) What level of procedural fairness is owed during the disclosure process?

(5) Did any of the alleged errors affect the outcome?

V. ANALYSIS

[21] For the reasons that follow, I conclude the only issues to be addressed are (2) and (5), namely whether the threshold for “wasted costs” under r. 25.01 was properly considered in this case. As I will explain below, this was not a judicial review of an alleged breach of procedural fairness, and therefore, I will not address issues (1), (3), and (4). With respect to issues (2) and (5), I conclude that, under r. 25.01(1)(a)(ii), the Hearing Division should have conducted a holistic, rather than a piecemeal, analysis of the LSO’s conduct, and the Hearing Division applied a higher standard of fault than required. Had the Hearing Division applied the correct test, it may have come to a different conclusion.

a. The Law Governing Costs Awards Against the LSO

1. The Rule 25.01 Framework

[22] As discussed above, the underlying proceeding was a costs decision made under r. 25.01(1)(a) of the Rules.[2] This subrule provided:

> 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.

[23] Accordingly, the subrule contemplates costs being awarded against the Law Society under two branches: the first branch, in r. 25.01(1)(a)(i), in which the licensee can establish that the proceeding was unwarranted at the outset, and the second branch, in r. 25.01(1)(a)(ii), in which (1) the Law Society, in the conduct of the hearing, caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, or other fault, or (2) the proceeding becomes unwarranted at some point after commencement.

[24] The burden of establishing that a proceeding was unwarranted or that costs were wasted, rests with the party making that allegation, and the Law Society's conduct must be analyzed at the time decisions were made without overly relying

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[2] Subrule 25.01(1) has since been succeeded by r. 15.1(1) in the current *Ontario Law Society Tribunal Rules of Practice and Procedure*, effect January 1, 2020. The guidance provided in this decision with respect to the former r. 25.01(1)(a) would also apply going forward to r. 15.1(1)(a). The text is almost identical, and cases decided under the former r. 25.01(1) rule have been applied under the new r. 15.1(1): see e.g., *Law Society of Ontario v. Moudgil, Lacaria, and Guadagnoli*, 2026 ONLSTH 34, at paras. 20-26.

on hindsight: *Law Society of Upper Canada v. Speciale*, [1994] L.S.D.D. No. 222, at paras. 81-82.

[25] Finally, even if the tribunal concludes that proceedings were unwarranted, there is a residual discretion not to award costs based on the circumstances of the case: *Speciale*, at para. 85.

[26] I would note at the outset that Mr. Watson did not file a cross-appeal of the Divisional Court's decision under the first branch. However, I touch briefly on the first branch to provide context for the Divisional Court's reasoning.

2. The Divisional Court's Treatment of Procedural Fairness

[27] The Divisional Court analyzed the question of costs under r. 25.01(1)(a) through the lens of the duty of procedural fairness. Before proceeding to an analysis of r. 25.01(1)(a), it concluded that "the investigation stage, right up to the time of the hearing, was tainted by procedural unfairness". As mentioned, although the Divisional Court did not interfere with the Hearing Panel's conclusion on the first branch, it directed that a newly constituted panel should reconsider the decision on the second branch in light of its findings with respect to the procedural fairness issues.

[28] On appeal, the LSO argues that the Divisional Court improperly transformed a discretionary costs analysis into a generalized procedural fairness inquiry and thereby circumvented the deference owed to discretionary costs determinations.

The respondent argues that procedural unfairness in the investigation and disclosure process may constitute “negligence or other default” under the second branch and therefore justifies reconsideration of costs. I agree with the LSO that the duty of procedural fairness is not relevant in this case. This was a statutory appeal of a costs decision. No party challenged the validity of the decision on procedural fairness grounds. The Divisional Court, while analyzing the LSO’s conduct through the lens of procedural fairness, did not undertake a full analysis of the duty of procedural fairness. For example, there was no consideration of the five factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, for determining the extent of the duty of procedural fairness owed in the circumstances. In my view, adopting the lens of the duty of procedural fairness was not necessary for the costs analysis under r. 25.01 and caused confusion.

[29] Further, as the LSO argues, the Divisional Court does not appear to acknowledge the well-settled distinction between the lower degree of fairness required at the investigative stage and the degree of fairness required at the adjudicative stage of disciplinary proceedings: see e.g. *Kuny v. College of Registered Nurses of Manitoba*, 2017 MBCA 111, [2018] 3 W.W.R. 101, at para. 22.

[30] Additionally, some of the allegations that the Divisional Court accepted, such as the one-sided nature of the investigation, do not appear to be rooted in the

fairness of the investigation in the sense of Mr. Watson's right to participate in the process. The allegations instead seem to be concerned with impartiality and a reasonable apprehension of bias, as was at issue in the *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814, relied on by the Divisional Court. Indeed, the Hearing Division noted that Mr. Watson's key concern was that the investigation was biased against him.

[31] Therefore, the *Baker* procedural fairness framework is not the operative legal framework on this costs appeal. This is not an appeal seeking to quash the Tribunal's decision for breach of procedural fairness. However, the requirement that disciplinary bodies deal fairly with members whose livelihood and reputation are at stake, as I explain further below in addressing the LSO's role, remains relevant context in assessing whether the Law Society's conduct caused costs to be incurred or wasted by undue delay, negligence, or other default under r. 25.01. In that sense, concerns about one-sidedness, procedural flaws, or unfair treatment may inform the costs analysis without converting this appeal into a free-standing *Baker* procedural fairness review.

[32] A *Baker* complaint goes to the validity of the process and the resulting decision. The present appeal does not seek that form of relief. The relevance of fairness here is different: it bears on whether the Law Society's conduct, viewed in context, amounted to fault causing costs to be incurred or wasted under r. 25.01.

[33] Accordingly, there is nothing improper in the Divisional Court's consideration of whether the investigation had procedural flaws, nor whether the investigation was one-sided. This is clearly relevant to whether the threshold of r. 25.01(1)(a) was met in the circumstances.

[34] The conflation of the duty of procedural fairness with the eligibility of Mr. Watson for costs also caused confusion with respect to the standard of review.

3. Standard of Review on Statutory Appeal

[35] The Divisional Court held that following *Vavilov*, appellate standards apply on a statutory appeal: correctness for questions of law; palpable and overriding error for findings of fact and mixed fact and law where the legal principle is not readily extricable: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[36] The Divisional Court then considered the standard of review for procedural fairness. In my view, the standard of review for procedural fairness does not arise in this case. That standard relates to findings that a decision-maker breached the duty of procedural fairness, leading to a decision being quashed. As addressed above, that is not the scenario here. Fairness in this context, by contrast, relates to the threshold for "wasted costs" under the second branch of r. 25.01(1)(a). The finding with respect to that threshold is under review. Since this is a statutory appeal of that finding, the proper standard of review is as set out in *Housen*.

[37] Therefore, the Divisional Court's analysis at para. 67 of the standard of review based on *Vavilov* and *Baker* in my view, is not relevant.

[38] A more relevant consideration is the appellate standard of review for discretionary costs awards generally, where it is well-settled that an appellate court will not interfere unless the costs award reflects an error in principle or is plainly wrong: see *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; and *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 19-20.

4. The History of Rule 25.01

[39] Below, I consider the conclusions reached by the Divisional Court with respect to the threshold for r. 25.01. First, however, it is important to consider that threshold itself.

[40] The Hearing Division provided a detailed account of the evolution of the availability of costs in Law Society disciplinary proceedings. The analysis of costs in the civil context is distinct from costs in a professional regulatory setting. In the LSO context, costs do not follow the event but instead must be considered in the context of the LSO's public interest mandate. In particular, relying on *Speciale*, the Hearing Division emphasized that the LSO must not be deterred by the risk of costs from "vigilantly fulfilling its mandate to protect the public interest".

[41] The Hearing Division noted that the availability of costs to those subject to disciplinary proceedings was first recognized through the former s. 41 of the *Law Society Act,* which granted Convocation the discretion to award costs where disciplinary proceedings were unwarranted:

> Where it appears that disciplinary proceedings against a member or student member were unwarranted, Convocation may order that such costs as it considers just be paid by the Society to the member or student member whose conduct was the subject of the proceedings.

[42] In *Speciale*, decided under the s. 41 standard, the Tribunal confirmed that the onus for establishing that a proceeding was unwarranted lies with the person seeking costs, on a balance of probabilities: at para. 81. The Tribunal in *Speciale* also cautioned against relying "slavishly" on hindsight reasoning: at para. 82. It further clarified that the LSO has an obligation to continue to exercise a reasonable degree of care, skill, judgment, and vigilance as the discipline process unfolds, and that a proceeding that initially was justified could become unwarranted if such reasonable care was not demonstrated: *Speciale*, at para. 83.

[43] The s. 41 standard was replaced by amendments to the *Law Society Act* that came into effect on February 1, 1999. The amendments removed any test for awarding costs against the Law Society from the *Law Society Act* itself and replaced it with s. 49.28(1) which provides for a general discretion on the part of the Hearing Division to award costs:

> Subject to the rules of practice and procedure, the costs of and incidental to a proceeding or a step in a proceeding before the Hearing Panel are in the discretion of the Panel, and the Panel may determine by whom and to what extent the costs shall be paid.

[44] To accompany the reform, Convocation also approved new *Rules of Practice and Procedure* (the "1999 Rules") governing the conduct of hearings. The 1999 Rules contained two provisions dealing with costs. The first, at r. 14.03, largely incorporated the "unwarranted" test of the old s. 41:

> In admission, conduct, capacity, professional competence or non-compliance proceedings, where it appears that the proceedings were unwarranted, the tribunal may order such costs as it considers just be paid to the person subject to the proceeding by the Society and any other party to the proceeding.

[45] A new rule, r. 14.05, added a separate basis for awarding costs against any party, including the LSO. In addition to cases found to have been unwarranted, costs also could be awarded against the LSO where it caused costs to be wasted or incurred without reasonable cause in the new r. 14.05:

> (1) Where a party or non-party participant has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the tribunal may make an order awarding such costs as are just.
>
> (2) An order under subrule (1) may be made by the tribunal on its own motion or on the motion of any party in the proceeding.

[46] Rule 25.01 came into effect on July 1, 2009 and incorporated the substance of the former rr. 14.03 and 14.05 as rr. 25.01(1)(a)(i) and (ii), respectively. While rr. 14.03 and 14.05 dealt with costs against any party, r. 25.01(1) referred to costs

awards against the LSO only. Costs against other parties were addressed in rr. 25.01(2) and (3).

[47] Thus, r. 25.01 established two branches under which costs may be awarded against the Law Society: the first branch ("unwarranted" costs) and second branch ("wasted" costs). The Hearing Division confirmed that r. 25.01 contemplated the scenario that a proceeding was warranted at the outset but became unwarranted due to unreasonable actions by the LSO. In *Speciale*, this had been captured by the test under the first branch since, at that time, there was no second branch.

[48] The Hearing Division clarified that, based on the language of r. 25.01, the first branch applies to pre-hearing conduct, while the second branch focuses on in-hearing conduct which includes the concept discussed in *Speciale* of proceedings which "become unwarranted" at some point after commencement. While, as a general matter, I agree that the first and second branches address pre-hearing and in-hearing conduct respectively, the two branches are not silos. The LSO's conduct during the investigation can and should be considered as a contextual factor in determining whether costs were wasted under the second branch, as I discuss in more detail below.

5. The Interpretation of the Second Branch

i. A holistic approach

[49] When considering the second branch of r. 25.01(1)(a), it is important to focus on the text itself as the anchor for any interpretation: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, 498 D.L.R. (4th) 316, at para. 24, citing Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59 Alta. L. Rev. 919, at p. 927.

[50] It is noteworthy that the text of r. 25.01(1)(a)(ii) mirrors the language of r. 57.07(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which allows for costs to be imposed personally against a party's lawyer, and provides, in part:

> (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…

[51] The LSO argues, and I agree generally, that the matching language suggests an intention to interpret the provision similarly. As this court stated in *Galganov v. Russell (Township),* 2012 ONCA 410, 350 D.L.R. (4th) 679, at para. 16, "Rule 57.07(1) is therefore not concerned with the discipline or punishment of a lawyer, but only with compensation for conduct which has caused unreasonable costs to be incurred."

[52] Courts have held that mere negligence can attract costs consequences in addition to actions or omissions which fall short of negligence: see *Galganov* at

para. 18, citing *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1998), 16 C.P.C. (4th) 201 (Ont. Gen. Div.). Any assessment of negligence must be based on a breach of the objective standard of care of a reasonably competent lawyer in the same position: *Galganov*, at para. 43.

[53] The inclusion of “other default” suggests an open-ended set of actions or inactions by the LSO that could be the basis for a determination of “wasted costs.”

[54] As the court put it in *Rand Estate v. Lenton*, 2009 ONCA 251, 46 E.T.R. (3d) 183, at para. 5, the application of r. 57.07(1) requires an examination of “the entire course of litigation that went on before the application judge so that the application judge can put in proper context the specific actions and conduct of counsel.” While hindsight is not to be used, hindsight is distinguished from conducting a “holistic after-the fact examination”: *Rand Estate*, at para. 5. A similar holistic approach is required in the context of r. 25.01.

[55] The language chosen to indicate when a party will have an entitlement for costs against the LSO suggests that two inquiries should be made: (1) What was the impact of the LSO’s conduct; and (2) Was that conduct reasonable. That is, where the LSO’s actions or inactions are negligent or lead to undue delay, regardless of the LSO’s actual intent, wasted costs may result. Additionally, where the LSO acts unreasonably, then it may be liable for costs, irrespective of the outcome of the proceedings. In applying r. 25.01, the task is not to consider each

step in the investigation or prosecution in isolation and deal with whether that step resulted in wasted costs. Rather, it is intended to be a holistic analysis of the specific steps taken both individually, and viewed as a whole, in the context of the case.

ii. The LSO's role and the extreme caution principle

[56] The LSO argues that the analogy to r. 57.07(1) should include importing the "extreme caution" principle. This principle requires that awards must only be made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in rule 57.07(1): *Galganov*, at para. 22.

[57] While it is true that the text of r. 57.07(1) is similar, that is not the sole consideration: its context and purpose differs. The role of a lawyer in a civil proceeding and the role of the LSO in a disciplinary proceeding are not the same. The two costs schemes reflect this distinction.

[58] In interpreting and applying r. 25.01, it is important to bear in mind the distinct nature and mandate of disciplinary bodies such as the LSO. In *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, Rowe J., writing for the majority, discussed the role of disciplinary bodies. He explained, "The purposes of disciplinary bodies are to protect the public, to regulate the profession and to preserve public confidence in the profession": *Abrametz*, at para. 53.

However, Rowe J. also noted that "[d]isciplinary proceedings are neither civil nor criminal, but rather *sui generis*": *Abrametz*, at para. 54. In addition to protecting the public, "[d]isciplinary bodies have a duty to deal fairly with members whose livelihood and reputation are affected by such proceedings": *Abrametz*, at para. 55, citing Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (loose-leaf), at § 26:1.

[59] It is clear from this discussion that the LSO has a dual mandate to both protect the public but also to deal fairly with members whose livelihood and reputation are affected. This court has emphasized that nothing is to be gained by giving one of these functions priority over the other: MacKenzie, at § 26:1 (loose-leaf updated March 2026, release 1), citing *W.D. Latimer Co. v. Bray* (1974), 6 O.R. (2d) 129 (C.A.). I note that while the court in *Abrametz*, unlike in this case, ultimately addressed the LSO's specific duty of procedural fairness during a disciplinary hearing, the passages referenced above address a disciplinary body's public interest mandate in the broader sense.

[60] The LSO argues that the Divisional Court's decision sets an onerous and impractical burden on professional regulators, which will have the effect of deterring regulators like the LSO from vigorously investigating and prosecuting serious issues of professional misconduct.

[61] I would reject this characterization of the Divisional Court's approach. In my view, the Divisional Court merely restated and reiterated the LSO's public interest mandate to deal fairly with its members, which requires it to be neutral and rigorous in the investigation and prosecution of disciplinary cases.

[62] Similarly, I would reject the LSO's call to import the extreme caution principle into the costs analysis. In the civil context, the extreme caution principle is part of a scheme in which the winning party, as a matter of course, will typically be awarded costs of the proceedings.

[63] The extreme caution principle was set out by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 135-136:

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister… [C]ourts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [Emphasis omitted.]

[64] While it is of course true that the LSO should not be deterred from bringing misconduct proceedings, the LSO has a dual mandate, to both protect the public and to deal fairly with its members. The default presumption of no costs against the LSO serves to protect its public interest mandate. To import the "extreme caution" principle into the text would be to downplay the LSO's responsibilities to

its members. The LSO does not have a “duty of commitment to the client’s cause” as do lawyers: *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at para. 8; Law Society of Ontario, *Rules of Professional Conduct* (Toronto: LSO, 2000), r. 3.4-1, commentary 2.

[65] The extreme caution principle is a reflection of this duty, which has been deemed to have constitutional status as a principle of fundamental justice. This is not to say that costs should be awarded against the LSO as a matter of course. To the contrary. The scheme is clear that costs do not follow the event. However, the balancing of the objectives of r. 25.01(1)(a) differs from that balancing under r. 57.07(1) of the *Rules of Civil Procedure*.

b. The Application of Rule 25.01

1. The Standard of Review

[66] As discussed above, generally speaking, a hearing panel’s assessment of the reasonableness of the LSO’s positions is owed deference. However, the two key errors made by the Hearing Division, that it conducted the analysis in a piecemeal fashion and that it applied a higher standard of fault than what was required, are errors in principle, and the decision in this case is therefore not owed deference.

2. The One-Sided Approach

[67] The Divisional Court assessed whether the LSO took a one-sided approach to its role.[3] While I agree, as discussed above, that the lens of procedural fairness was not the appropriate one, the Hearing Panel's failure to consider whether the LSO took a one-sided approach is an aspect of its failure to consider the analysis at the second branch holistically. Whether the LSO took a one-sided approach to the investigation is part of the broader context in which its positions on disclosure, addressed later in these reasons, must be viewed. The Divisional Court's analysis reflects this holistic approach. It did not conclude that any single instance of conduct constituted the basis for this conclusion. Rather, this conclusion flowed from a series of investigatory actions (and inactions) on the part of the LSO.

i. The statements by LSO counsel

[68] In its analysis of whether the LSO's approach was one-sided the Divisional Court highlighted statements made by counsel for the LSO. In submissions to the Hearing Division, counsel stated:

> The other principle that is important to note is that the Law Society does not have an obligation to unearth every possible piece of evidence. Our obligation is to hand over the fruits of the investigation, and we have to be reasonably diligent to obtain all of the evidence we seek to rely on in support of the particulars we are alleging.

[3] The Divisional Court analyzed the one-sided nature of the investigation in its procedural fairness analysis before proceeding to the individual branches under r. 25.01. I have structured these reasons similarly in order the properly review the Divisional Court's analysis. However, whether the investigation was one-sided is specifically relevant in the analysis in the second branch, as I indicate.

> Otherwise, when we go to Proceedings Authorization Committee, they are not going to be satisfied there is sufficient evidence to authorize a conduct allegation, and that is at our peril if we don't do that.
>
> But it is not the Law Society's obligation to conduct every possible inquiry. I would suggest to you that our duty to inquire is to make reasonable efforts to obtain evidence that supports the allegations that we are advancing in the Notice of Application. [Emphasis added.]

[69] The Hearing Division referred to these comments as "troubling". It specifically acknowledged that such comments "could be indicative of an approach to the investigation that was one-sided." However, it rejected that conclusion "in the absence of further evidence".

[70] The Divisional Court viewed these statements as part and parcel of the concern for fairness in the investigation. The Divisional Court noted that counsel for the LSO expressed this position multiple times in its submissions. I agree that these statements strongly suggest that the LSO took a one-sided approach in which it sought to confirm the allegations made. It appears not to have looked for both evidence that confirms and refutes the positions taken by each side.

[71] The Hearing Division appeared to view the "troubling" comments in isolation, concluding that absent more, those comments did not undermine the investigation. The Divisional Court, by contrast, viewed those comments together with other aspects of the investigation. In fact, the Hearing Division did have more evidence of one-sidedness (for example, the timing of Mr. Watson's interview).

ii. The timing of the interview with Mr. Watson

[72] According to the Divisional Court, the “most glaring” example of a one-sided approach concerned the timing of the LSO investigator’s, Joseph DiPietro’s, final report. This report was completed on March 6, 2009, almost a month before Mr. DiPietro’s final interview with Mr. Watson on April 1, 2009.

[73] The Hearing Division observed, at para. 92, “We agree that it is unfortunate that DiPietro finalized his investigative report before he interviewed [Mr. Watson] for the last time. However, nothing appears to turn on this for purposes of this motion.”

[74] The LSO argues that the Hearing Division’s conclusion on the marginal importance of the timing of Mr. DiPietro’s report is entitled to deference. The LSO also notes that the record reveals attempts by Mr. DiPietro to conduct this final interview prior to finalizing his report, but that Mr. Watson cancelled and postponed the interview. According to the LSO, rather than identifying any palpable or overriding error with the Hearing Division’s conclusion, the Divisional Court simply substituted its own finding on this question.

[75] The Divisional Court’s concern with the timing of the final interview with Mr. Watson, however, was substantive and not simply a concern with process. The Divisional Court highlighted that many of the negative conclusions made in the report about Mr. Watson’s conduct were not even put to him in that interview in order to obtain his explanation. By the same token, other information and

documents Mr. Watson provided were never put to the complainant. In other words, it was not simply that the interview with Mr. Watson should have occurred before Mr. DiPietro's report was finalized, but that the timing of the interview and report reinforced the flawed and one-sided nature of the LSO's investigation. Important avenues of investigation appear to have been left unexplored.

[76] As the Divisional Court put it, "While it is clear that the other investigation was still ongoing, the fact that a final report would be filed without interviewing the member about many of the allegations says a lot about the general approach to the investigation."

[77] The Hearing Division did not defend the timing of Mr. DiPietro's final interview with Mr. Watson. Indeed, the Hearing Division acknowledged that it was "unfortunate" that Mr. DiPietro finalized his investigative report before this interview. The Hearing Division added, "However, nothing appears to turn on this for purposes of this motion." This observation is not a finding of fact – rather, it reflects the Hearing Division's understanding of the test it had to apply under r. 25.01. Here again, the Hearing Division took a piecemeal approach to the analysis. It looked at the issues complained of by Mr. Watson in isolation, rather than in concert with the other issues, to reveal patterns to the LSO's approach.

iii. Relevance of credibility

[78] Additionally, the Divisional Court took issue with the Hearing Division's approach to the issue of credibility involved in its case against Mr. Watson. Mr. Watson alleged that the investigation failed to properly challenge many of Ms. Sweeney's claims or obtain the evidence necessary to substantiate them.

[79] In its costs decision, the Hearing Division characterized the case against Mr. Watson as a contest of credibility, and that the decision to dismiss the case ultimately was the result of the effectiveness of counsel for Mr. Watson in eroding the credibility of Ms. Sweeney, in what it referred to as "death by a thousand cuts."

[80] The LSO argued, and the Hearing Division accepted, that it was not incumbent on the LSO, nor would it have been appropriate for the investigator, to make an assessment of credibility of the complainant or Mr. Watson as part of its investigation. Indeed, the LSO cited its *Standards for the Authorization of Sexual Impropriety Complaints*, which sets out that it is inappropriate for the LSO investigators to assess credibility.

[81] In my view, these elements of the case were not mutually exclusive. The case against Mr. Watson clearly included elements of credibility, particularly where alleged arrangements were not documented. However, a misconduct case involving corporate and financial records will generally rise or fall on the documentary record, and this context is a far cry from the he said/she said archetype of a sexual assault in which there tends to be little or no other evidence

to corroborate the accounts. While Ms. Sweeney's credibility may have been a necessary component of the LSO's case, counsel for Mr. Watson used the voluminous documentary record to impugn Ms. Sweeney's credibility in cross-examination.

[82] The presence of credibility issues also does not relieve the LSO of its responsibility to conduct a proper investigation. As the Divisional Court highlighted, at para. 104, "Even in complaints of sexual assault, there is a duty to investigate both sides of the story. That is not the same thing as making findings of credibility. It is merely gathering evidence." The LSO was required to pursue documentary evidence and lines of questioning raised by Mr. Watson that contradicted Ms. Sweeny's assertions. Evidence that is both inculpatory and exculpatory should have been explored. This does not appear to be how the LSO approached its task, as evidenced by the LSO's failure, for example, to conduct a corporate search at the investigative stage.

iv. The Corporate Search Issue

[83] In her complaint, Ms. Sweeney alleged that Mr. Watson had "erased the shareholders" from her company's certificate of registration. She produced and attached to her complaint a version of the articles of incorporation that appeared to have been doctored. She alleged that Mr. Watson had done this. Ms. Sweeney made similar allegations to the police. In fact, a search of the Ministry of Consumer and Commercial Affairs records later revealed that the amended articles had been

filed with the Ministry in January 2007 in exactly the form Ms. Sweeney claimed had been falsified, long before she ever met Mr. Watson.

[84] Mr. DiPietro reviewed Ms. Sweeney's complaint as the starting point for his investigation. The Hearing Division noted that he must have reviewed the attachments, including the articles of amendment. He testified that the Law Society never conducted any corporate search to determine whether this allegation was legitimate. The Hearing Division found that this was "surprising" and "inexplicable" given that one of the particulars of the allegations was that Mr. Watson had fabricated corporate documents, and the Divisional Court agreed with this sentiment. The Hearing Division found that had Mr. DiPietro done the corporate search, it would have become clear that Ms. Sweeney's allegation was false.

[85] As I discuss below, in the Hearing Division's analysis of the first branch, it concluded that the various "red flags" which Mr. Watson pointed to, such as the corporate search, were not sufficient for finding the proceeding to have been unwarranted. However, in my view, this was one of the constellation of incidents that the Hearing Division also should have considered in assessing the LSO's general approach to its role under the second branch.

3. The First Branch

[86] The Hearing Division acknowledged that with the benefit of hindsight, the investigation should have been conducted differently, with more scrutiny on the

allegations of Ms. Sweeney. However, viewed at the time the investigation was conducted, the Hearing Division concluded, at para. 116:

> In summary, we do not believe that the red flags raised by [Mr. Watson], had they been pursued, would have led the Law Society to conclude that Sweeney's evidence was so fundamentally flawed as to prevent it from being accepted by a hearing panel. To the contrary, this appears to have been one of those classic cases where the public interest demanded a hearing so that the serious allegations she made against [Mr. Watson], which appeared to have been corroborated in a number of respects, could be publicly aired and determined on their merits.

[87] The question of whether the proceedings were unwarranted at the outset within the first branch of r. 25.01, is a question of mixed fact and law. The Hearing Division's conclusion that the proceedings against Mr. Watson were not unwarranted, is therefore entitled to deference, as acknowledged by the Divisional Court. The Divisional Court expressed reservations with this conclusion, but held it was a rational conclusion, rooted in an assessment of the whole of the evidence, and revealing no palpable and overriding error.

[88] While deciding not to interfere with the Hearing Division's conclusion that the proceedings against Mr. Watson were not unwarranted, the Divisional Court characterized the Hearing Division as having made an extricable legal error in its findings on the fairness of the investigation, at para. 119:

> The fundamental underlying error is the failure of the Second Costs Hearing Panel to recognize the inherently flawed nature of the investigation. As I have previously noted, this is a separate issue from whether the proceedings would have been warranted even if a full and fair investigation had been conducted. The Second Costs Hearing Panel committed a legal error in finding that there was no breach of the duty of fairness in the investigatory stage of the proceeding, and this infected the whole of its reasoning on the issue of costs caused by delay or other default. [Emphasis added.]

[89] As set out above, I would reject the framing of the Hearing Division's error as relating to a breach of the duty of procedural fairness. This characterization introduced unnecessary confusion to the key question before the Divisional Court, which was whether the Tribunal erred in its interpretation and application of r. 25.01. That said, I agree with the Divisional Court's conclusion that the Tribunal's decision on the second branch of r. 25.01 cannot stand.

4. The Second Branch

[90] How the LSO conducted the investigation provides context for the LSO's approach to disclosure throughout the hearing, and whether that approach was reasonable. While the Hearing Division was concerned with avoiding hindsight reasoning, it failed to distinguish this concern for hindsight from a holistic consideration of the LSO's conduct, as set out in *Rand Estate*. The LSO appears to have acted as if it was only required to seek out inculpatory evidence in its case against Mr. Watson. This approach reflected a pattern that began at the

investigation stage, as discussed above, and continued through to the LSO's approach to disclosure during the hearing, as I discuss further below.

i. Disclosure decisions

[91] The Hearing Division concluded that while the LSO was less than responsive to Mr. Watson's requests, it could not find that the LSO had no defensible legal basis for the positions it took, or that it wasted identifiable costs by an unreasonable tactic. It observed that there is no 'wasting' of costs or 'other default' in simply advancing the losing argument. For these propositions, the Hearing Division relied on *Law Society of Upper Canada v. Feldman*, 2013 ONLSHP 51, at para. 33, where the Tribunal held:

> Rule 25.01(1) imports a higher standard for entitlement to costs against the Society than success on the part of the moving party. In our view, the requirement to show that the Society has caused costs to be "wasted" by "other defaults" requires costs caused by some fault on the part of the Society. Such fault could include procedural misconduct or taking legal positions that, based on existing law, were without any chance of success. There is no "wasting" of costs or "other default" in simply advancing the losing argument.

[92] In my view, the Hearing Division's interpretation of *Feldman* was overly rigid. The hearing panel in *Feldman* lists indefensible legal positions as merely one example of fault rather than an ironclad requirement. The analysis in *Feldman* must be read together with the text of the second branch of r. 25.01, which refers to wasted costs through "undue delay, negligence, or other default". Defensible

legal positions can result in undue delay or negligence, particularly if the conduct of the prosecution reveals a pattern of resisting disclosure where the documents sought are relevant and potentially exculpatory. There is no requirement that legal positions taken must be “without any chance of success” or that “procedural misconduct” is necessary.

[93] To understand what appears to be a pattern of resistance at the hearing stage, it is helpful to review the timeline of the conduct application in more detail. I summarize the events set out by the Hearing Division at paras. 27-39:

- October 28, 2009: The LSO made its initial disclosure but failed to disclose the complete investigation file until July 2010, just before the hearing was scheduled to begin. This led the hearing to be adjourned until November 2010.
- August 2010: Mr. Watson’s counsel wrote two letters to LSO counsel regarding disclosure. He pointed out that Ms. Sweeney appeared to have provided the Law Society with certain records supportive of her allegations but had not produced all documents and communications relevant to her allegations. He noted that, given the fundamental issues of credibility between Ms. Sweeney and Mr. Watson, it was essential for Mr. Watson to have access to these files. He also

requested that searches be conducted within certain e-mail addresses used by Ms. Sweeney.

- August 17, 2010: LSO counsel responded that she could not compel third parties to produce documents at the prehearing stage. She indicated that she would have the investigator meet with Ms. Sweeney to ask for certain categories of materials but raised concerns about the relevance of other categories and asked for evidence to establish the relevance of these materials.
- October 2010: A large number of e-mails and attachments responsive to certain of Mr. Watson's requests were made available to him in four banker's boxes, although the LSO took the position that none of these materials were "pertinent". Many of these documents were in fact helpful to Mr. Watson's position that he had been a senior executive and had extensive authority with respect to financial affairs.
- November 2010: The hearing was adjourned again and rescheduled to April 2011, as a result of the late production.
- April 15, 2011: Shortly before the hearing was to commence, Mr. Watson requested production from Ms. Sweeney of QuickBooks accounting records. No explanation of the relevance of these records was provided. The LSO initially took the position that they were

irrelevant and that Mr. Watson had not met his obligation to request further disclosure with due diligence.

- April 27, 2011: The hearing commenced. Mr. Watson renewed his request for these records. The chair made comments on the record about the obvious relevance of these records to the issues in the case. Ms. Sweeney was the first witness. Her cross-examination was adjourned pending the production of the accounting records and the Law Society proceeded to call other witnesses in the interim.
- May 18, 2011: A consent order was issued requiring Ms. Sweeney to produce the QuickBook records. These records ultimately assisted Mr. Watson in demonstrating that Ms. Sweeney had budgeted to pay him a salary.
- Summer 2011: During the continued cross-examination of Ms. Sweeney, she referenced a contract. Counsel for Mr. Watson requested the signed version as Ms. Sweeney had only provided Mr. DiPietro with a draft. The following day, Ms. Sweeney produced the signed contract, which was significantly different than the draft.
- November and December of 2011: Cross-examination of Ms. Sweeney continued.

- December 2011: Mr. Watson's counsel advised LSO counsel that, based on information he had received from an accounting expert, certain information in the corporate accounting records had been altered in a manner so as to effectively conceal debts owed to Mr. Watson.
- March 2012: Mr. Watson brought a motion for production of additional records from Sweeney. It was during this motion that the LSO's counsel characterized the LSO's obligations during the investigative phase of the proceedings as not to conduct every possible inquiry but "to make reasonable efforts to obtain evidence that supports the allegations that we are advancing in the Notice of Application."
- April 2012: The panel granted the motion.
- September 2012 to February 2013: Ms. Sweeney's cross-examination continued.
- April 1, 2013: the LSO sought leave to discontinue the conduct application.
- Ultimately, the merits hearing consumed 56 days, 27 of which were spent cross-examining Ms. Sweeney.

[94] Based on the above, it is not difficult to establish that the Hearing Panel may well have come to a different conclusion on costs had it applied the test as described in these reasons. There were at least five disclosure-related incidents highlighted in the Hearing Division's own findings: (1) in the summer of 2010 due to the failure to disclose the entire investigative file; (2) in fall of 2010 due to the four banker's boxes of undisclosed emails; (3) in spring of 2011 due to the QuickBooks issue; (4) during the summer of 2011 due to the missing contract issue; and (5) in the spring of 2012 for more production from Ms. Sweeney. The question was not whether the LSO took "defensible positions" in each of these specific incidents. I agree that something more than taking a single losing position is needed to meet the threshold for wasted costs. However, a pattern of taking defensible but unsuccessful positions on disclosure issues, based on a misunderstanding of the LSO's role, or reflecting a one-sided investigation, could well meet this threshold.

[95] The Divisional Court's analysis highlights the first three of the disclosure-related incidents:

- Although the hearing was scheduled to commence in July 2010, the discovery of an inadvertent error in failing to disclose a significant quantity of Mr. DiPietro's file resulted in a one-month adjournment.

- With respect to the four banker's boxes produced in October 2010, the LSO took the position that they had nothing "pertinent" in them. The boxes contained documents authored by Ms. Sweeney herself, corroborating Mr. Watson's position that he held a senior executive position with significant authority in financial matters.
- The LSO resisted Mr. Watson's request for disclosure of the company's QuickBooks, which recorded payables and receivables, at least partly on the basis that those documents were "irrelevant". Counsel for the LSO took the view that the financial records of the company showing a debt to Mr. Watson for $40,000 was not relevant to the charge that Mr. Watson misappropriated funds. Mr. Watson was required to bring a motion to get the production he sought. He was successful in obtaining an order for production.

[96] The LSO's positions with respect to the QuickBooks and the banker's boxes are particularly puzzling. Taking the position that these sets of documents were not relevant strongly suggests that the LSO viewed its role through the one-sided lens of what supports the prosecution. This was part of a broader pattern of conduct throughout the investigation and the hearing. It was reinforced by LSO counsel's statements during the spring 2012 disclosure motion.

[97] The LSO argued on appeal that the QuickBooks were irrelevant because, even if Mr. Watson was contractually owed the money, that does not mean he was entitled to engage in “self-help” by taking the company’s funds for himself. This argument elides the fact that evidence can be relevant even if it is not conclusive of the charge. There is no doubt that the QuickBooks provided at least some support for Mr. Watson’s case. Even if they were not sufficient to prove his case, it was obvious from the outset, as the Chair noted, that they would at least support Mr. Watson’s own assertions of what occurred since they were more reliable evidence than the cashflow projections that Ms. Sweeny had provided.

[98] Additionally, the Hearing Panel expressed sympathy for the LSO’s position that Mr. Watson could compel Ms. Sweeney to produce documents at the hearing. In a similar vein, the LSO argues that the positions taken by its counsel with respect to the QuickBooks flowed from the distinction, acknowledged by the Supreme Court, that the records sought by Mr. Watson were largely in the hands of third parties (i.e. Ms. Sweeney) rather than in the LSO’s possession. It was therefore not the LSO’s responsibility to produce them, absent a proper third party production motion. I would not accept this reasoning. Even if it is true that the LSO was not strictly required to procure the documents, the LSO may still have acted unreasonably in response to Mr. Watson’s requests in the context of a r. 25.01 analysis. This is particularly true when viewed in the broader context of the LSO’s positions from the beginning of the investigation.

[99] The Hearing Division also concluded that costs were not wasted because some of the failures in the investigation and prosecution were “inadvertent,” such as the initial one-month delay in providing disclosure of the investigative file. Again, there is nothing inconsistent with inadvertent errors in disclosure nonetheless leading to undue delay or negligence, particularly when viewed together with other disclosure delays and other indications of the one-sided nature of the investigation from the outset.

ii. Costs wasted in fact and the “all or nothing” approach

[100] Under the second branch of r. 25.01, the Divisional Court found that costs are not an “all or nothing” proposition. It may well be, as the Divisional Court reasoned, that Mr. Watson was not entitled to recover costs of the hearing itself. However, he could be entitled to costs wasted on fighting about disclosure that should have been provided, or that should, at least, not have been resisted. He may also be entitled to costs caused by delays from the failure to make timely disclosure.

[101] I reject the LSO’s argument that the Hearing Division’s reasons should be upheld on an independent line of reasoning that, even if the LSO took unreasonable positions, no costs were, in fact, wasted. I would not characterize this as an independent line of reasoning. Whether costs were wasted must be assessed in relation to the conduct that is determined to be unreasonable. In light of my conclusion that the Hearing Division did not apply the correct test for

reasonableness, the determination of whether costs were in fact wasted must also be reassessed.

[102] For example, the Hearing Division made a finding that, with respect to the QuickBooks, the LSO "eventually consented to an order providing for their production, without significant hearing time being lost": at para. 127. While it may be true that little hearing time was lost, this does not take into consideration whether other losses accrued because of the delay in producing them or the resulting adjournment. It also does not consider that this was part of a broader pattern of resisting disclosure: a number of small incidents could add up to wasted costs when viewed in context.

c. Conclusion and New Directions

[103] In light of the Hearing Division's error in its interpretation of r. 25.01, the Divisional Court was correct to conclude that the Tribunal's decision that no costs were wasted in Mr. Watson's case should be set aside.

[104] Given the disagreement with the Divisional Court's use of procedural fairness and the additional guidance provided in these reasons on the interpretation of r. 25.01, it is appropriate to substitute the directions to the new hearing panel in place of the Divisional Court's directions.

[105] The test under second branch of r. 25.01(1)(a) involves both a consideration of reasonableness, and a consideration of whether costs were in fact wasted. A

holistic analysis of reasonableness should be conducted, and this requires an assessment of the LSO's conduct and its approach to its role from the beginning of the investigation. The hearing panel should consider whether the LSO correctly understood its public interest mandate to treat its members fairly. This should inform the analysis of whether the LSO's positions on disclosure were unreasonable. The question is not whether each individual position taken by the LSO was defensible in a vacuum. As well, inadvertent conduct should be considered in assessing reasonableness. If the new hearing panel does not grant the costs award in its entirety, it must consider whether a partial costs award is appropriate.

[106] If the new hearing panel awards any costs of the conduct proceedings, it also should revisit the finding of the original hearing panel that Mr. Watson should receive no costs in relation to the abortive first costs hearing.

[107] Additionally, I note that the new hearing panel retains its residual discretion not to award costs.

[108] Finally, I would not disturb the Divisional Court's order that Mr. Watson is entitled to costs before the Appeal Division Panel.

VI. DISPOSITION

[109] For the reasons set out above, I would dismiss the appeal. Costs are awarded to the respondent in accordance with the parties' agreement in the

amount of $17,500, all inclusive, for both the appeal and the motion for leave to appeal.

Released: May 27, 2026 “M. T.”

“L. Sossin J.A.”
“I agree. M. Tulloch C.J.O.”
“I agree. A. O’Marra J. (*ad hoc*)”