S.C.C. Court File No.: 37112

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

JOSEPH PETER PAUL GROIA

APPELLANT
(Appellant)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

-and-

ATTORNEY GENERAL OF SASKATCHEWAN and DIRECTOR OF PUBLIC PROSECUTIONS

INTERVENERS

FACTUM OF THE APPELLANT, JOSEPH PETER PAUL GROIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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"Part of the duty of the presiding judge is to maintain order in this arena of potential chaos. As a result, the trial judge is the person best placed to determine whether a barrister's conduct is approaching or has crossed over the all-too-grey line that separates zealous advocacy from impermissible courtroom conduct. No person stands in a better position than the presiding judge to assess what a barrister says or does, the manner or tone in which it is said or done, its relevance to the dispute under adjudication, and the impact such conduct will have on the fairness of the trial, including the fairness of the process to its other participants. Counsel look to the presiding judge to draw the lines of fair conduct and to police their observance."[1]

It has been ever thus.

A. INTRODUCTION

1. This case concerns the foundational duties of lawyers to their clients when pleading their causes in Canadian courts. This Court's decision will have a significant effect on all Canadians who need to retain a lawyer or paralegal to represent them in a court of law. Clients deserve and are constitutionally entitled to a fearless advocate who will mount a zealous defence or prosecution of their case, using broad freedom of expression rights, in a fair hearing, before an independent judge. That is how Joseph Peter Paul Groia ("**Mr. Groia**") represented John Bernard Felderhof ("**Mr. Felderhof**"). For doing so he has been convicted of professional misconduct. If the conviction is allowed to stand, the public's confidence in lawyers and the legal system will be severely damaged.

2. The four critical issues on this appeal are:

   (a) First, do the values expressed by Lord Brougham in his defence of Queen Caroline[2] and cited with approval by Chief Justice McLachlin in *Canadian National Railway Co. v. McKercher LLP*[3] and by Justice Binnie in *R. v. Neil*[4] still apply in a Canadian courtroom?

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[1] Justice D.M. Brown, *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 ["*ONCA Reasons*"] para 418, Appellant's Record, ["AR"], Vol. III, Tab 15, p. 159.

[2] Lord Brougham stated: "*An advocate in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he*

(b) Second, are Canadians, through their lawyers' advocacy, entitled to broad freedom of speech rights when defending themselves from the powers of the state in a criminal prosecution? In this case, there was no allegation of uncivil behaviour outside the courtroom, and no suggestion of extraneous conduct inside the courtroom. Mr. Groia was found guilty for his advocacy in certain of his submissions about prosecutorial misconduct to an experienced trial judge. If the risk of a finding of professional misconduct is the cost a defence lawyer must pay to challenge a prosecutor, will many lawyers be willing to pay that price?

(c) Third, do judges in Canadian courtrooms enjoy a full measure of independence? There will be serious harm to the public interest if this independence is not protected. If the decisions below stand, Canadians may regrettably conclude that it is the state—in this case, through its statutory agent the Law Society of Upper Canada (the "**LSUC**")—and not the trial judge who has the final say on how a criminal or civil trial is conducted.

(d) Fourth, what is the appropriate standard of review to be applied to findings of an inferior tribunal such as a panel of the LSUC on these critical issues of public importance? There was stark disagreement among the judges of the Ontario Court of Appeal (the "**ONCA**"). Who determines the boundaries of acceptable courtroom behaviour—judges or a panel of the LSUC? When, if ever, can a statutory regulator be permitted to infringe on the constitutional independence of Canadian judges by second-guessing how they run a criminal or civil trial through the prosecution of the lawyer in the case? Where the issue before a LSUC panel involves the conduct of a trial, the presumption of reasonableness that applies to the interpretation of its home statute is rebutted. The standard of review should be correctness.

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may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion", Lord Henry Brougham, *The Trial of Queen Caroline*, Ed. J. Nightingale (London: J. Robins & Co., Albion Press 1820-1821) vol. 2, p. 8.

[3] 2013 SCC 39, para 25.

[4] 2002 SCC 70, para 12**.**

B. OVERVIEW

3. Mr. Groia appeals from a split decision of the ONCA dated June 14, 2016.[5] The ONCA majority decision (the "**majority decision**") affirmed (on materially different grounds) the decision of the Ontario Divisional Court dated February 2, 2015.[6] These two decisions affirmed the decisions of a LSUC Appeal Panel (the "**Appeal Panel**") dated November 28, 2013 and March 21, 2014, in which Mr. Groia was found guilty of professional misconduct and received a one month suspension and an order to pay $200,000 in costs.[7] The Appeal Panel disregarded the findings of professional misconduct made against Mr. Groia by a LSUC Hearing Panel (the "**Hearing Panel**") and conducted a *de novo* review of the record because the Hearing Panel had reached the conclusion that it was an abuse of process for him even to try to mount a defence at his hearing.[8] Mr. Groia was convicted for the words used in certain of the submissions he made concerning prosecutorial misconduct to an experienced trial judge, Justice Peter Hryn (the "**trial judge"** or "**Justice Hryn**") of the Ontario Court of Justice. Those submissions were made in the course of his successful defence of Mr. Felderhof, who faced a lengthy period of incarceration and financial and reputational ruin as a result of quasi-criminal charges brought by the Ontario Securities Commission (the "**OSC**") arising out of the collapse of Bre-X Minerals Ltd. At all times, Mr. Groia acted in accordance with the rulings and under the direction of Justice Hryn, who never criticized Mr. Groia for his conduct during the Felderhof trial. Critically, no one complained to the LSUC about Mr. Groia's conduct, not the trial judge, the prosecutors, the OSC or the reviewing courts.

4. A major issue on this appeal is the protection of the unquestionable independence of Canadian judges and Canadian courts as mandated by the *Constitution Act, 1867*.[9] The majority decision, and the decisions below which it affirmed, failed to pay due heed to the issue of

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[5] *ONCA Reasons*, AR, Vol. III, Tab 15, pp. 1-172.
[6] *Joseph Groia v. The Law Society of Upper Canada*, 2015 ONSC 686 ["*Divisional Court Reasons*"], AR, Vol. II, Tab 11, pp. 100-142.
[7] *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2013 ONLSAP 41 ["*LSUC Appeal Panel Reasons*"] AR, Vol. II, Tab 7, pp. 3-91; *Law Society of Upper Canada v. Groia*, 2014 ONLSTA 11, AR, Vol. II, Tab 9, pp. 94-97.
[8] *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2012 ONLSHP 94 ["*LSUC Hearing Panel Reasons*"] AR, Vol. I, Tab 4, pp. 131-183; *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2013 ONLSHP 59, AR, Vol. I, Tab 5, pp. 184-202.
[9] *The Constitution Act, 1867*(UK), 30 & 31 Victoria, c 3 [the "*Constitution Act*"].

judicial independence. As a result, judicial independence was compromised by allowing a statutory regulator to "second-guess" the actions of Justice Hryn who ran the Felderhof trial as he thought fit. It was not constitutionally permissible for the ONCA majority to defer to the regulator's decision regarding professional misconduct for conduct in the courtroom, when the trial judge before whom the conduct occurred found no fault with it. This Court should reaffirm the primacy of trial judges to supervise and control the conduct of lawyers who plead in their court, as officers of the court, in a manner consistent with the proper regulation of the legal profession as a whole. The standard of review of law society panel decisions in such cases, to protect the public interest and the independence of courts and trial judges, should be correctness.

5. Clients require confidence and assurance that their lawyers can mount a zealous defence to charges by the state, with broad freedom of expression in the courtroom, to protect their interests. Most importantly, accused persons must be free to challenge the conduct of prosecutors when necessary. Clients have the right to demand the duties of loyalty and zealous advocacy from their lawyers. These duties are essential to the proper functioning of Canadian justice. The majority decision and the decisions below fall well short of protecting the rights of clients to the benefit of zealous advocacy on their behalf. Advocacy in court must not suffer from the chilling effects of after-the-fact interference by a law society. The boundaries on advocacy in a courtroom should come directly or indirectly from the trial judge hearing the case live, not years later by a regulator trying to fathom what really happened from a paper record. If the majority decision stands, there is a real risk that defence lawyers will be reluctant to raise issues of prosecutorial misconduct on behalf of their clients, through fear of being required to defend themselves from a prosecution by a law society regulator and risk becoming the "next Joe Groia".

6. The legislative mandate of the LSUC is found in its enabling statute, the *Law Society Act* (the "***Act***").[10] That mandate requires the LSUC to act in the best interests of the public who rely on the legal profession to protect their fundamental legal rights. In its prosecution of Mr. Groia, the LSUC did not act in accordance with its mandate. The mandate states, in part, as follows:

[10] R.S.O. 1990, c. L. 8 [the "***Act***"].

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

3. The Society has a duty to protect the public interest.

4. The Society has a duty to act in a timely, open and efficient manner…[11]

7. The public understands that a lawyer will often be all that stands between an accused and a jail sentence or reputational and financial ruin. Litigants need and deserve fearless advocacy. The LSUC's concern with regulating "civility" in a courtroom is misplaced. That is especially true when, as here, an allegation of incivility is used to convict a defence lawyer of professional misconduct because it was said he was too aggressive in the defence of his client. The public expects appropriate zeal in an advocate. As Professor Adam Dodek has noted, this is an important case, as much for what it says about the nature of professional regulation as it says about the dynamic of a Canadian criminal trial:

> The Groia case is emblematic of much that is wrong with our justice system and with the regulation of lawyers: too much time and money spent on cases that do not warrant it at the expense of addressing other issues. The Groia discipline hearing also raises questions of what forum is best suited to address particular conduct issues of lawyers. Much of the concerns regarding civility relate to litigation. Indeed, many of the organisations that have led on this issue are barristers' organisations. In Groia's case, the uncivil conduct of which he stands accused relates solely to his in-court activities. In vigorously defending Felderhof, Groia was not chastised let alone sanctioned by the trial judge for his alleged uncivil conduct. The prosecution complained about the trial judge's failure to control Groia and attempted to have the judge removed on grounds of reasonable apprehension of bias. This too was unsuccessful. As the court famously quipped about Groia's defence of Felderhof and about litigation generally, 'a hard fought trial is not a tea party'.[12]

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[11] *Act*, at s. 4.2.

[12] Adam Dodek, "Ethics in Practice, An Education and Apprenticeship in Civility: Correspondent's Report from Canada" (2012) 14:2 Legal Ethics 239 at 242-243.

C. FACTUAL BACKGROUND

(a) The Collapse of Bre-X Minerals Ltd.

8. The Bre-X Minerals Ltd. collapse was the result of one of the largest frauds ever in Canadian capital markets. Investors lost over $6 billion. Mr. Felderhof and Mr. Groia were the only persons ever to be charged in connection with this fraud.[13] The entire resources of the OSC were arrayed against Mr. Felderhof. He entrusted Mr. Groia with his defence.

9. Mr. Felderhof faced a lengthy period of incarceration if convicted. He retained Mr. Groia because he wanted an aggressive lawyer and someone who could understand geological data.[14] As he testified, he wanted someone to be his "friend" in the courtroom.[15] Mr. Groia continued to represent him long after Mr. Felderhof ran out money during Phase II of the trial. After a 160 day "hard fought"[16] trial before Justice Hryn on charges of insider trading and the release of misleading press releases, Mr. Felderhof was acquitted on July 31, 2007, on the merits, on all counts.[17] Mr. Groia continues to represent him *pro bono* to this day. However, Mr. Groia's successful defence of Mr. Felderhof directly led to the LSUC's prosecution of him, a prosecution which began as a watching brief in 2002 and led to charges in 2009. Its interest stemmed from reading a newspaper account of the result of the judicial review proceeding.

(b) Phase I of the Felderhof Trial

10. The use and admissibility of documents were contentious issues throughout Phase I of the trial. Mr. Groia had a real concern that counsel for the OSC were not meeting their *Stinchcombe* disclosure obligations.[18] As the Felderhof trial involved a massive fraud, there were significant concerns about the authenticity and continuity of the documents. Mr. Groia would not agree to mark every document in the OSC Court Binders as an exhibit, as the OSC had asked and then

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[13] *Divisional Court Reasons*, para 5, AR, Vol. II, Tab 11, p. 101.
[14] *LSUC Hearing Panel Reasons*, para 31, AR, Vol. I, Tab 4, p. 136; *Evidence of Mr. Felderhof*, Aug. 8, 2011, p. 180, ll. 17-20, Transcripts, Law Society Hearing, 05.
[15] *Evidence of Mr. Felderhof*, Aug. 9, 2011, p. 34, ll. 22-25, Transcripts, Law Society Hearing, 06.
[16] *LSUC Appeal Panel Reasons*, para 15, AR, Vol. II, Tab 7, p. 10.
[17] Exh. 6 (6-1), Tab 4, *Judgment of Hryn J. dated July 31, 2007*, pp. 2-38 *(PDF pp. 39-76)*; *LSUC Appeal Panel Reasons*, paras 15-16, AR, Vol. II, Tab 7, p. 10.
[18] *Evidence of Mr. Richter*, Aug. 9, 2011, pp. 63, l. 7 – p. 68, l. 24, Transcripts, Law Society Hearing, 06; *Evidence of Mr. Groia*, Aug. 11, 2011, p. 58, l. 14 – p.77, l. 4, Transcripts, Law Society Hearing, 08.

demanded he do, but he was prepared to agree to admit a large number of them on consent. He also argued that as the documents were relevant or authentic, based on the OSC's admissions and submissions to the court, he had a right to ask that some (but not all) of the documents in the OSC's Court Binders be marked with his consent. Surprisingly, the OSC's counsel refused to accept Mr. Groia's concession. The OSC said this would result in a "skewed record" and that Mr. Groia was trying to "shaft [them] big time".[19] The OSC's position was that Mr. Groia had to agree that all of the OSC's Court Binders documents would go into evidence in their entirety or no documents would be consented to, notwithstanding that, for over a year, the OSC had referred to the documents in their OSC Court Binders as the "wheat" of its case and that it had repeatedly asked that all of those documents be tendered and marked as exhibits at trial. Mr. Groia testified that he had prepared Mr. Felderhof's defence based on those representations.[20]

11. To deal with the early *Stinchcombe* production failures by the OSC, Mr. Felderhof brought a motion at the outset of the trial for further disclosure, vigorously defended by the OSC, who called it a "waste of time" and accused Mr. Groia of professional misconduct for filing a misleading affidavit. Justice Hryn disagreed and found that the OSC had not met its disclosure obligations and made an additional disclosure order. There were key exculpatory documents that the OSC only gave to the defence because Mr. Groia had resolutely pushed for disclosure. In addition, at the outset of trial, an OSC representative stood on the courthouse steps and announced publicly that the OSC was "simply here to seek a conviction".[21] Justice Hryn censured the OSC for this statement, which was not only not withdrawn, but was reiterated by OSC counsel and never resiled from.[22] Justice Hryn said the comments "offend[ed] what the courts have repeatedly said is the role of the prosecution", and found it was "no excuse to say it happened in a media scrum".[23]

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[19] Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 55, pp. 94-100 *(PDF pp. 80-86)*; *LSUC Appeal Panel Reasons*, para 301, AR, Vol. II, Tab 7, p. 74.
[20] *Evidence of Mr. Groia*, Aug. 11, 2011, p. 112, ll. 4-21, Transcripts, Law Society Hearing, 08.
[21] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 4, pp. 93-95 *(PDF pp. 17-19)*; Exh. 7 (7-1), Day 16, pp. 6-7 *(PDF pp. 6-7)*; *LSUC Appeal Panel Reasons*, para 55, AR, Vol. II, Tab 7, p. 18.
[22] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 3, pp. 100-103 *(PDF pp. 34-37)*; Day 4, p. 113, *(PDF p. 29)*; Day 16, pp. 6-7, *(PDF pp. 6-7)*; Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 54, p. 29, *(PDF p. 28)*.
[23] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 16, pp. 6-7 *(PDF pp. 6-7)*.

12. The defence concerns about prosecutorial misconduct continued to grow as the trial moved ahead. The defence team concluded that the OSC had a "win at all costs" approach to their prosecution of Mr. Felderhof.[24] In order to give the prosecutor fair notice, Mr. Groia raised his concerns to Justice Hryn throughout Phase I of the trial. Mr. Groia also raised the possibility that he might move for a stay or that he might seek a s. 24(1) *Charter* remedy to allow some of the OSC's Court Binder documents to be marked as exhibits. After raising his concerns, he followed Justice Hryn's direction that rather than repeating them, he should make a "standard objection" on which Justice Hryn would later rule.[25] Nicholas Richter, who was part of the defence trial team, testified that in his view, Mr. Groia's submissions about prosecutorial misconduct had both substance and foundation.[26] Brian Greenspan, who was retained by Mr. Felderhof to assist in defending the OSC's Judicial Review Application (the "**Application**"), agreed.[27] That was also Mr. Groia's evidence.[28] There was no evidence to the contrary.

13. During Phase I, Justice Hryn made several key rulings in favour of Mr. Felderhof: first, as noted above, that the OSC had not met its disclosure obligations; second, that an OSC "omnibus" motion regarding the admission of documents should be deferred until later in the trial; third, that the parties should exchange lists of the documents they intended to introduce through each witness in advance to determine what could go in on consent. The OSC challenged the second and third rulings in open court, for which it was censured by Justice Hryn.[29] These important and critical rulings against the prosecution are found in their entirety in Exhibit 7 (7-

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[24] *Evidence of Mr. Richter*, Aug. 10, 2011, p. 179, l. 12 - p. 180, l. 10, Transcripts, Law Society Hearing, 07.
[25] *ONCA Reasons*, para 382, AR, Vol. III, Tab 15, p. 144; *LSUC Appeal Panel Reasons*, para 77, AR, Vol. II, Tab 7, p. 22; Exh. 3 (1-70), *Transcript of the Proceedings in R v. JBF*, Day 57, p. 133 *(PDF p. 137)*.
[26] *Evidence of Mr. Richter,* Aug. 10, 2011, p. 178, l. 16 - p. 179, l. 7 and p. 187, l. 20 - p. 188, l. 19, Transcripts, Law Society Hearing, 07.
[27] *Evidence of Mr. Greenspan*, Aug. 18, 2011, p. 30, l. 21 – p. 32, l. 6 and p. 105, 1. 5 – p.107, l. 4, Transcripts, Law Society Hearing, 10.
[28] *Evidence of Mr. Groia*, Aug. 11, 2011, p. 142, l. 13 – p. 144, l. 23, Transcripts, Law Society Hearing, 08; *Evidence of Mr. Groia*, Aug. 19, 2011, p. 110, l. 14 – p. 113, l. 8, p. 122, l. 8 – p. 132, l. 7, Transcripts, Law Society Hearing, 11; *Evidence of Mr. Groia*, Feb. 1, 2012, p. 192, ll. 17-25, Transcripts, Law Society Hearing, 14.
[29] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 16, pp. 24-25, *(PDF pp. 24-25)*; pp. 29-30 *(PDF pp. 29-30)*; Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 67, pp. 115-118 *(PDF pp. 107-110)*; Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 68, pp. 2-7 *(PDF pp. 2-7)*, pp. 15-22 *(PDF 15-22)*.

2), Transcript Brief of the Respondent, *R v. JBF*, Day 67 and Exhibit 7 (7-2), Transcript Brief of the Respondent, *R v. JBF*, Day 68.

(c) The OSC's Extraordinary Application

14. Following the last two rulings, the OSC launched an extraordinary and unsuccessful attack on Justice Hryn, challenging his jurisdiction, accusing him of "lacking basic human sensitivity" and alleging that he was unable to comprehend the issues he had to deal with. In the Application, the OSC sought an almost unprecedented order removing Justice Hryn, on the grounds that (i) he wrongly postponed the OSC's omnibus document application; (ii) he wrongly directed the OSC as to the order in which evidence and witnesses should be presented; (iii) he wrongly attempted to force the parties to reach agreement on the admission or exclusion of certain documents; and (iv) he had lost jurisdiction because he appeared to be siding with the defence.[30] The OSC retained Michael Code (now Justice Code) to lead the argument.

15. The Application was first heard by Mr. Justice Archie Campbell. He noted that the Application was described by Mr. Code as being 80% about evidentiary rulings and 20% about Justice Hryn's failure to restrain Mr. Groia's conduct.[31] Nothing in the Application addressed whether Mr. Groia's conduct amounted to a violation of the Rules of Professional Conduct.

16. The Felderhof defence team believed that the Application had been brought because the OSC believed it was losing the trial.[32] Mr. Felderhof's only goal was to retain Justice Hryn as the trial judge and finish the trial. Mr. Greenspan's uncontroverted evidence before the Hearing Panel was that in the service of Mr. Felderhof's interests, the decision was made "not to join issue on a lot of the suggestions of misconduct" made by the OSC, but to focus on Justice Hryn's retention of jurisdiction. He also testified that had he been retained to defend Mr. Groia, the record on the Application would also have looked very different, but such a record would have

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[30] *R. v. Felderhof*, 2002 CanLII 41888 (ON SC) *(*"*Decision of Campbell J.*"), para 5, AR. Vol. I, Tab 1, p. 3; *Evidence of Mr. Groia*, Aug. 10, 2011, p. 172 , l. 11 - p. 174, l. 13, Transcripts, Law Society Hearing, 07.

[31] *Decision of Campbell J.*, paras 6 and 259, AR, Vol. I, Tab 1, pp. 4 and 74.

[32] *Evidence of Mr. Greenspan*, Aug. 18, 2011, p. 15, l. 2 – p. 16, l. 16, p. 34, l. 16 – p. 35, l. 19 and p. 220, l. 8 – p. 221, l. 2, Transcripts, Law Society Hearing, 10; *Evidence of Mr. Groia*, Jan. 31, 2012, p. 34, ll. 12-22, Transcripts, Law Society Hearing, 13.

been contrary to Mr. Felderhof's interests.[33] He said that as matters turned out "[i]t was better for Felderhof and, quite frankly, worse for Joe Groia."[34]

17. Justice Campbell dismissed the Application, finding that Justice Hryn had shown a "patient and even-handed" resolve to proceed with a difficult trial. About Mr. Groia's conduct, Justice Campbell found that a trial judge does not lose jurisdiction unless that conduct prevented a fair trial. He rightly placed the focus on the trial judge's jurisdiction, not on Mr. Groia's conduct, and found that nothing the OSC alleged could reasonably have prevented the prosecutors from discharging their duties in a professional manner. In other words, trial fairness was unaffected, and Justice Hryn had the right to control the trial in the manner that he saw fit.[35] Justice Campbell also concluded that Mr. Groia had the right to make allegations of prosecutorial misconduct and Justice Hryn was obliged to listen and rule on them at the appropriate time.[36]

18. Justice Campbell was critical of Mr. Groia's (undefended) conduct, but not only his conduct. Illustrating his observation that there was no "monopoly over incivility or rhetorical excess", he noted that there was a "real basis for the defence concern about [senior OSC counsel] Mr. Naster's failure to appreciate his duty to follow adverse rulings,"[37] He also noted that in his court Mr. Code had characterized a submission of Mr. Groia's as a "bald-faced lie." Mr. Code also stated (shortly after 9/11): "He's like someone who drops a bomb and runs."[38] Mr. Greenspan testified that he recalled Justice Campbell characterizing Mr. Code's "bald-faced lie" comment as "the most uncivil attack on counsel uttered in any aspect of the proceeding."[39]

(d) Ontario Court of Appeal on the Application

19. The ONCA (Carthy, Doherty and Rosenberg JJ.A.) dismissed the OSC's appeal. They were also critical of Mr. Groia's (still undefended) conduct. They agreed that Mr. Groia's

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[33] *Evidence of Mr. Greenspan,* Aug 18, 2011, p. 29, l. 6 - p. 32, l. 23 and p. 35, l. 1 - p. 36, l. 18, Transcripts, Law Society Hearing, 10.
[34] *Evidence of Mr. Greenspan*, Aug. 18, 2011, p. 182, l. 23 - p. 183, l. 11, Transcripts, Law Society Hearing, 10.
[35] *Decision of Campbell J.*, paras 10, 236, 254, 276, 285, AR, Vol. I, Tab 1, pp. 4, 68, 72, 81, 84.
[36] *Decision of Campbell J.*, para 278, AR, Vol. I, Tab 1, p. 81.
[37] *Decision of Campbell J.*, paras 263-264, AR, Vol. I, Tab 1, p. 75.
[38] *Decision of Campbell J.*, para 264, AR, Vol., I, Tab 1, p. 75; Exh. 5, Tab 2, *Globe and Mail - "OSC alleges lawyer lied in Bre-X trial" dated November 22, 2001*.
[39] *Evidence of Mr. Greenspan*, Aug. 18, 2011, p. 39, l. 17 – p. 40, l. 5, Transcripts, Law Society Hearing, 10.

"rhetorical excess" did not cause the trial judge to lose jurisdiction and did not deprive the prosecution of the right to a fair trial.[40] In *obiter,* the ONCA said that there was an obligation on counsel to conduct themselves in a way that does not delay or deny justice. However, the ONCA also recognized the importance of zealous advocacy on behalf of a client.[41]

20. As to the process and language for making allegations of prosecutorial misconduct, the ONCA agreed in part with Justice Campbell, but found that the allegations should be made only where there is some possibility that they would lead to a remedy and at the appropriate time in the proceedings.[42] In this way, the ONCA diverged from Justices Campbell and Hryn. It stated that there was no theoretical or legal impediment to a trial judge's permitting a defence counsel to tender certain evidence that might be otherwise inadmissible, as a s. 24(1) remedy.[43]

21. Mr. Groia now stands convicted for professional misconduct for the manner in which he dealt with the defence concerns about prosecutorial misconduct, but the differing opinions of Justices Campbell and Hryn on the one hand, and the ONCA on the other, demonstrate that Mr. Groia's approach to these concerns was not wrong at the time Phase I of the trial was unfolding. Acting in accordance with the jurisprudence of the day and the direction of the trial judge cannot amount to professional misconduct.

(e) Phase II of the Felderhof Trial

22. After two years, the Felderhof trial ("**Phase II**") resumed with new counsel for the OSC, Frank Marrocco (now Marrocco, A.C.J.S.C.) and Ms. Emily Cole. The trial proceeded in an orderly manner, with the document issues being resolved using a process similar to the one Mr. Groia had proposed in Phase I, which Mr. Naster had rejected. At the close of the trial, Justice Hryn thanked all counsel, noting that their work was "above the industry standard".[44]

23. As Justice D. M. Brown noted in dissent, this remarkable change in how the trial proceeded during Phase II was almost completely ignored by the LSUC and the ONCA majority:

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[40] *R. v. Felderhof,* 2003 CanLII 37346 (ON CA) ["*ONCA Felderhof Decision*"], paras 13, 82, 97, AR, Vol. I, Tab 3, pp. 95, 123, 128.
[41] *ONCA Felderhof Decision*, paras 81-84, AR, Vol. I, Tab 3, pp. 122-124.
[42] *ONCA Felderhof Decision*, para 88, AR, Vol. I, Tab 3, p. 125.
[43] *ONCA Felderhof Decision*, para 74, AR, Vol. I, Tab 3, p. 120.
[44] Exh. 6 (6-1), Tab 4, *Judgment of Hryn J. dated July 31, 2007*, p. 2, ll. 13-24, *(PDF p. 40)*.

> What emerges, as well, is the picture of a defence counsel who listened to and abided by the trial judge's rulings…
>
> Not satisfied with that state of affairs, the prosecution sought a remedy from the senior courts. What the prosecution obtained from the senior courts were forceful rulings and directions to both the trial judge and Mr. Groia: Felderhof, at paras. 73, 76-77 and 93. Mr. Groia complied with those directions. Yet, as part of its assessment, the Appeal Panel did not take into account how Mr. Groia reacted to those directions. Instead, the Appeal Panel held, at para. 120, that "[g]iven our findings below, we have not considered it necessary to rely in any way on the conduct of the parties in Phase Two or to draw any inferences adverse to Mr. Groia from his alleged change in position from his conduct of Phase One."[45]

D. THE LSUC "INVESTIGATION" AND HEARINGS

(a) The "Investigation"

24. In 2009, based solely on media reports and the *Felderhof* decisions and, as noted above, in the absence of a complaint by anyone, the LSUC chose to pursue Mr. Groia, and only Mr. Groia. The LSUC made no attempt to independently review and assess his conduct. At $6,000, the trial transcripts were too expensive to buy and read as part of its "investigation".[46] The LSUC interviewed only one person involved in the *Felderhof* trial, Ms. Cole, who was not present during Phase I. It then charged Mr. Groia with six counts of professional misconduct, without particularizing exactly what he had done wrong over the course of those 70 days. The LSUC report that recommended laying charges was based solely on the LSUC's belief that although Mr. Groia was not a party to the *Felderhof* proceedings, the judicial review courts on the Application had made "findings" of professional misconduct against him which the LSUC was determined to enforce, on the basis that it was "*res judicata*". In the view of the LSUC, Mr. Groia had no right to challenge them or defend himself.[47]

(b) The Hearing Panel Decision

25. The LSUC called no witnesses at the hearing. The Hearing Panel largely ignored Mr. Groia's evidence and the testimony of the seven other witnesses he called, relying instead on

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[45] *ONCA Reasons*, paras 425-426, AR, Vol. III, Tab 15, pp. 161-162.
[46] Exh. 6 (6-6), Tab 19, *LSUC Investigation Report*, p. 10 *(PDF p. 40)*; Exh. 6 (6-6), Tab 18, *Email thread between J. Cross and M. Murphy dated October 29, 2008 (PDF pp. 28-29)*.
[47] Exh. 6 (6-6), Tab 20, *LSUC Letter, dated November 28, 2008*, pp. 347-349 *(PDF pp. 156-158)*; Exh. 6 (6-6), Tab 20, *Groia & Company Letter, December 17, 2008*, pp. 359-361 *(PDF pp. 152-154)*; Exh. 6 (6-6), Tab 19, *LSUC Investigation Report*, pp. 31-142 *(PDF pp. 31-142)*.

what it called the "findings" of the reviewing courts. Rather than assessing the charges individually, it lumped all the charges together and found him guilty of misconduct.[48] Mr. Groia's conviction by the Hearing Panel was based upon its conclusions that he (i) repeatedly quoted a phrase from Justice Sopinka's decision in *Stinchcombe*; (ii) in a case styled *Regina v. Felderhof* repeatedly referred to the OSC as the "government"; (iii) was sarcastic; (iv) following a process approved by the trial judge, made allegations of prosecutorial misconduct in order to lay the foundation for a motion for a stay or other relief based on prosecutorial misconduct; and (v) took positions that the Hearing Panel said he knew or ought to have known were wrong in law.

26. Remarkably, the Hearing Panel also found that there was an "overriding duty" of "efficiency" and "calmness" that trumps a lawyer's duty of loyalty to his or her client.[49] Then, even more remarkably, the Hearing Panel accepted the LSUC's argument and decided that it was an abuse of process for Mr. Groia even to try to defend himself because of the criticisms of his conduct made in *obiter* by the reviewing courts.[50] To come to this erroneous conclusion, the Hearing Panel had to ignore the fact that Mr. Groia was never criticized by the trial judge, was not a party to the Application, had no counsel on it, and had no right of appeal from the decisions. The Hearing Panel rejected the uncontradicted evidence before it from Mr. Greenspan who, as senior appellate counsel, made the tactical decision not to defend Mr. Groia's conduct because to do so would not have been in Mr. Felderhof's best interest. The Hearing Panel needed to invent a new legal doctrine, describing Mr. Groia as a "party in substance" -whatever that means- so that it could then say that it was abusive for Mr. Groia, a non-party to the Application, to even defend the allegations before it.[51] The Hearing Panel relied on the comments of the reviewing courts as "evidence" of Mr. Groia's misconduct to boot strap its conclusions, all in contravention of the LSUC Rules of Practice and Procedure.[52] These rulings infected the entire decision, as it was clear that the Hearing Panel ignored or rejected the uncontroverted evidence of all of Mr. Groia's witnesses. Even if it had considered that evidence, the standard which it applied to the issues before it and the rulings that it made were fatal errors in law.

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[48] *LSUC Hearing Panel Reasons*, paras 99-100, AR, Vol. I, Tab 4, p. 155.
[49] *LSUC Hearing Panel Reasons*, para 70, AR, Vol. I, Tab 4, p. 148.
[50] *LSUC Hearing Panel Reasons*, para 96, AR, Vol. I, Tab 4, p. 154.
[51] *LSUC Hearing Panel Reasons*, para 92, AR, Vol. I, Tab 4, p. 153.
[52] *Law Society Tribunal, Hearing Division, Rules of Practice and Procedure*, Rule 24.07.

(c) The LSUC Appeal Panel

27. The Appeal Panel corrected some of the Hearing Panel's most egregious errors—particularly its finding that Mr. Groia's efforts to defend himself were an abuse of process—and it struck down the Hearing Panel's conclusion that all lawyers have "an overriding duty to ensure" that trials are "conducted fairly and efficiently, and in an atmosphere of calm".[53] The reasons of the Appeal Panel, unlike the Hearing Panel, are filled with its views about the importance of civility and how, properly understood, civility does not impair zealous advocacy or the ability of defence lawyers to defend their clients fearlessly. Unfortunately, its decision to convict Mr. Groia on the paper record before it belies those views.

28. The Appeal Panel found Mr. Groia guilty of four counts of professional misconduct over the course of ten days of the Felderhof trial, in that:

> (a) he did not have a reasonable basis to raise concerns about prosecutorial misconduct (even though the record amply supported his doing so and the Appeal Panel found that he honestly believed in his submissions);[54]
>
> (b) he did not have a reasonable basis to attack the integrity of the OSC prosecutors, or their motives, (notwithstanding the matters raised above and even though the trial judge harshly criticized the OSC on several occasions);[55] and
>
> (c) he was guilty of professional misconduct because his alleged misconduct had a serious adverse impact on the trial (even though Justice Hryn made no such finding and Justices Campbell and Rosenberg had held that it did not).[56]

29. The Appeal Panel ignored important evidence, including the uncontradicted evidence of Mr. Groia and Mr. Richter about the reasonable basis upon which they made submissions on prosecutorial misconduct, that they had an honestly held belief in those submissions, and that the OSC had maintained its unfathomable position on the admissibility of documents until the end of

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[53] *LSUC Appeal Panel Reasons*, paras 201 and 233, AR, Vol. II, Tab 7, pp. 46, 54.
[54] *LSUC Appeal Panel Reasons*, para 323, AR, Vol. II, Tab 7, p. 77.
[55] *LSUC Appeal Panel Reasons*, para 324, AR, Vol. II, Tab 7, p. 77.
[56] *LSUC Appeal Panel Reasons*, para 332, AR, Vol. II, Tab 7, p. 79.

Phase I.[57] In so doing, the Appeal Panel departed from the contextual analysis it had directed itself to adopt. Perhaps most importantly, the Appeal Panel concluded, incorrectly, that there was no reasonable basis for Mr. Groia's concerns about prosecutorial misconduct. It stated:

> In our review of the record, we could find **no evidentiary foundation** for the allegations of **deliberate** prosecutorial misconduct **at this point in the trial**. As will have been clear from the foregoing, **the disclosure issues had long since been resolved**…His submissions regarding the 'conviction filter' not only were wrong in law but **did not have a reasonable basis**. And again, these submissions amplified and repeated comments made earlier in the trial, to the effect that the prosecutors were acting deliberately to make it impossible for Mr. Felderhof to get a fair trial.[58] [emphasis added.]

30. This conclusion completely ignores, among other things, Justice Hryn's harsh criticisms of the OSC prosecutors on Days 67 and 68 of the trial.[59] It also flies in the face of the uncontradicted evidence in the record of the repeated disclosure failings; the never resiled-from "simply seek to convict" statement; the inaccurate assurances by the prosecutors; the abuse of a defence lawyer in cross-examination on the *Stinchcombe* motion;[60] the accusations of misconduct against Mr. Groia; the testimony from the OSC lead investigator that the OSC expert had been instructed to look only for inculpatory evidence;[61] the OSC's ever-changing positions on documents; Justice Hryn's rulings against the OSC; the OSC's challenges to those rulings; the

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[57] *Evidence of Mr. Richter,* Aug. 9, 2011, p. 160, l. 11 - p. 167, l. 10; p. 178, l. 16 - p. 179, l. 7; p. 185, l. 12 - p. 188, l. 19, Transcripts, Law Society Hearing, 06; *Evidence of Mr. Groia*, Aug. 11, 2011, p. 142, l. 13 – p. 144, l. 23, Transcripts, Law Society Hearing, 08; Aug. 19, 2011, p. 110, l. 14 – p. 113, l. 8, p. 122, l. 8 – p. 132, l. 7, Transcripts, Law Society Hearing, 11; Feb. 1, 2012, p. 192, ll. 17-25, Transcripts, Law Society Hearing, 14.

[58] *LSUC Appeal Panel Reasons*, para 295, AR, Vol. II, Tab 7, pp. 71-72.

[59] Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 67, pp. 115-118 *(PDF pp. 107-110)*; Day 68, pp. 15-22 *(PDF pp. 15-22)*.

[60] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 4, pp. 25-26 *(PDF pp. 10-11)*; *Evidence of Mr. Richter*, Aug. 9, 2011, p. 148, l. 16 – p. 149, l. 19, Transcripts, Law Society Hearing, 06; *Evidence of Mr. Groia*, Aug. 11, 2011, p. 220, l. 2 – p. 221, l. 7, Transcripts, Law Society Hearing, 08.

[61] Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 7, pp. 42-46 *(PDF pp. 13-17)*; *Evidence of Mr. Groia*, Aug. 12, 2011, p. 181, l.1 - p. 196, l. 9 and p. 240, l. 9 - p. 242, l. 2, Transcripts, Law Society Hearing, 09.

For example, he expressly instructed one of its experts not to seek out any "green flags" or positive indicators of the Busang gold reserves. See Exh. 7 (7-1), *Transcript Brief of the Respondent, R v. JBF*, Day 9, pp. 18-19 *(PDF pp. 12-13)*.

testimony of Mr. Richard, Mr. Richter, Mr. Greenspan; and the nine days of evidence from Mr. Groia. As Mr. Groia testified before the Hearing Panel, comparing Phase I to Phase II of the trial:

> [In Phase I] I felt like I was, on many occasions, coming to court without my sea legs under me because I had never before been in a position where…well, they promised me hard copy and then they say, "I am not giving it to you." They say everything is in the documents, then they say it is not. This evidentiary argument that I heard there was just extraordinary; I put in one document and the Crown says, "Well, now, I can put in the whole file."
>
> [In Phase II] Mr. Marrocco was a very experienced trial lawyer and I was a very experienced trial lawyer, and he never took positions like that and I never had to deal with it. I think there was a consistency and a fairness and a willingness to work with a defence that we just never saw in the first part of the trial.[62]

(i) The Appeal Panel's New Test for Incivility

31. The Appeal Panel's test for when lawyers submissions to a court become professional misconduct was too general. It fails to take into account that the context of each individual case will differ:

> In our view, it is professional misconduct to make allegations of prosecutorial misconduct or that impugn the integrity of opposing counsel unless they are both made in good faith and have a reasonable basis. A *bona fide* belief is insufficient; it gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions of opposing counsel. In *R. v. Felderhof,* Justice Rosenberg made reference to the well-known passage from *Rondel v. Worsley* where Lord Reid said, in part that, "[c]ounsel must not mislead the court, [and] he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession." Justice Rosenberg applied that principle to casting aspersions on opposing counsel for which there was no reasonable foundation.
>
> In addition, even when a lawyer honestly and reasonably believes that opposing counsel is engaging in prosecutorial misconduct or professional misconduct more generally, she must avoid use of invective to raise the issue. That is, it is unprofessional to make submissions about opposing counsel's improper conduct, to paraphrase Justice Campbell, in a 'repetitive stream of invective' that attacks that counsel's professional integrity.[63]

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[62] *Evidence of Mr. Groia*, Feb. 8, 2012, p. 78, l.1 – p. 80, l. 20, Transcripts, Law Society Hearing, 18.

[63] *LSUC Appeal Panel Reasons*, paras 235-236, AR, Vol. II, Tab 7, pp. 54-55.

(ii) Applying the Appeal Panel's New Test in this case

32. The problems with applying such a test for incivility in a courtroom were noted by Justice D. M. Brown:

> The challenges in articulating a test are matched by the challenges in applying any test to alleged misconduct. By its nature, a professional discipline proceeding is an exercise in the retrospective examination of counsel's conduct by those who were not present when the conduct occurred and who lack the ability to re-create, with precision and certainty, exactly what took place. A discipline review is largely transcript-based, restricting the reviewer's ability to understand the sense and nuance of the moment. Retrospective transcript-based reviews contain inherent limitations which can produce an artificial understanding of what took place in the courtroom, and which risk turning the review into an exercise in Monday-morning quarterbacking.[64]

(iii)The Acts of Misconduct

33. The Appeal Panel found that Mr. Groia's conduct first "crossed the line" on Day 52 during his cross-examination of Mr. Francisco and his attempt to use a letter from Placer Dome. Instead of considering the context (especially the OSC's ever-shifting position on the authenticity, reliability and admissibility of documents in the OSC Court Binders) it chose to focus on what it thought to be the "tenor" and "tone" of Mr. Groia's submissions.[65] The Appeal Panel gave examples of what it considered were Mr. Groia's uncivil comments during the course of the arguments on Day 52.[66] The Appeal Panel concluded that Mr. Groia's submissions directly attacked the integrity of the prosecutors "by alleging that they cannot be relied upon to keep their 'word' and are lazy and incompetent."[67] It also held that it was clear that when "all of the transcripts are carefully examined", Mr. Groia used the word "government" to refer to the OSC prosecutors in a sarcastic manner and as a way of casting aspersions.[68] It ignored Mr. Groia's evidence that, as the OSC prosecutors were not Crown Attorneys (though the prosecution was in the name of the crown), he from time to time used the American expression of "government" to describe them.[69] It gave no explanation why it disregarded, in its entirety, Mr. Groia's testimony

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[64] *ONCA Reasons*, para 318, AR, Vol. III, Tab 15, p. 121.
[65] *LSUC Appeal Panel Reasons*, paras 276-280, AR, Vol. II, Tab 7, pp. 65-67.
[66] *LSUC Appeal Panel Reasons*, para 278, AR, Vol. II, Tab 7, pp. 65-66.
[67] *LSUC Appeal Panel Reasons*, para 285, AR, Vol. II, Tab 7, p. 68.
[68] *LSUC Appeal Panel Reasons*, para 286, AR, Vol. II, Tab 7, pp. 68-69.
[69] *Evidence of Mr. Groia*, Feb. 1, 2012, p. 28, l. 10 - p. 29, l. 25, Transcripts, Law Society Hearing, 14.

about the mistrust that had been created by the OSC's conduct or why he believed these comments were fair and supported by the record. When a lawyer believes that a prosecutor is misconducting himself or herself, it cannot be professional misconduct to call the prosecutor out on it to the trial judge. The Appeal Panel ignored that on these days Mr. Groia was also laying the foundation for the s. 24(1) arguments, in the face of shifting positions being taken by the prosecution. He employed the strong language that is needed to describe the basis for a claim for this relief. To argue for a s. 24(1) remedy based on prosecutorial misconduct, Mr. Groia would need to meet the test established by this Court in *R. v. Power*.[70] As stated about this case by Donald Bayne (the 2016 recipient of the Catzman Award for Professionalism and Civility):

> The standards set for abuse and *Charter* stay relief involve an "exceedingly" "high threshold" of "egregious" prosecutorial misconduct usually involving "flagrant and intentional" Crown misconduct, "bad faith" and/or "improper motives" that shock the conscience, "overwhelmingly" offensive prosecutorial conduct that offends standards of "fair play and decency." This is the stirring language used by the courts. It is the language taken directly from these judgments and used by criminal defence counsel in advancing (fearlessly and however distastefully) the openly partisan case for the client in *Charter* and/or abuse stay litigation. It is language that makes relevant and important bad faith, motives, intent and conduct of Crown counsel (and other prosecutorial authorities). It is language that invites, if not requires, like language in submissions.[71]

34. The Appeal Panel reduced Mr. Groia's penalty to a one-month suspension and arbitrarily decreased the costs award to $200,000, without providing meaningful reasons as to how it reached those conclusions (those sanctions have been stayed pending this appeal). In convicting Mr. Groia, it ignored the findings of Justice Campbell and Justice Rosenberg that Mr. Groia's conduct did not interfere with the fairness of the trial or the administration of justice.[72] Most importantly, as noted by Justice D. M. Brown, it ignored the critical role of Justice Hryn:

> [T]he analysis actually conducted by the Appeal Panel failed to take into account, in any meaningful way, how the trial judge ruled on the complaints by the OSC about Mr. Groia's conduct and how Mr. Groia responded to the trial judge's rulings on those

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[70] [1994] 1 S.C.R. 601 ["*R. v. Power*"], paras 16-17.

[71] Bayne, Donald "*Problems with the Prevailing Approach to the Tension Between Zealous Advocacy and Incivility*", 4 C.R. (7th) 301 at p. 5 (citing language from the decisions in *R. v. O'Connor*, [1995] 4 S.C.R. 411, *R. v. Tran*, 2010 ONCA 471 and *R. v. Power*)

[72] *LSUC Appeal Panel Reasons*, paras 352, AR, Vol. II, Tab 7, p. 83; *ONCA Felderhof Decision*, paras 13, 77, 81-82, AR, Vol. I, Tab 3, pp. 95, 121-123; *Decision of Campbell J.*, paras 253-254, 276, AR, Vol. I, Tab 1, pp. 72-73.

> complaints. In brief, the Appeal Panel examined Mr. Groia's conduct as if only two people were present in the courtroom – Mr. Groia and the prosecutor. The Appeal Panel ignored the third person – the trial judge – and failed to give any meaningful consideration to his rulings about Mr. Groia's conduct in its assessment of whether that conduct amounted to professional misconduct. That, in my view, rendered the Conduct Decision both incorrect and unreasonable.[73]

E. THE COURTS

(a) The Divisional Court

35. Mr. Groia appealed to the Divisional Court. The LSUC cross-appealed, arguing that the reasons of the reviewing courts were admissible as evidence of Mr. Groia's professional misconduct and that the Appeal Panel erred in reducing Mr. Groia's penalty to a one-month suspension and costs of $200,000. On February 2, 2015, the Divisional Court (reasons by Justice Nordheimer) upheld the decision of the Appeal Panel, despite its finding that the test applied by the Appeal Panel was wrong and did not go far enough to protect zealous advocacy.[74] The Divisional Court dismissed the cross-appeal.[75]

36. The Divisional Court noted the importance of context when assessing a lawyer's potentially uncivil conduct in open court. It said that Mr. Groia's conduct "occurred in the course of a criminal prosecution where the appellant was responsible for the defence of the accused who faced the potential loss of his liberty" and that "there were serious issues raised by the defence regarding the degree of disclosure that had been made by the prosecutor and the manner in which that disclosure had been made".[76] The Divisional Court correctly held that when the interests of zealous advocacy and civility conflict, "it is better that zealous advocacy be favoured over the desire for civility. Our justice system can tolerate uncomfortable and unpleasant exchanges in the courtroom much better than we can ever tolerate a wrongful result".[77]

37. The Divisional Court then established a new test for when uncivil conduct amounts to professional misconduct. Its test requires that it is "necessary for a finding of professional misconduct for the uncivil conduct to have undermined, or to have had the realistic prospect of

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[73] *ONCA Reasons*, para 257, AR, Vol. III, Tab 15, pp. 97-98.
[74] *Divisional Court Reasons*, para 72, AR, Vol. II, Tab 11, p. 121.
[75] *Divisional Court Reasons*, paras 120-141, AR, Vol. II, Tab 11, pp. 134-141.
[76] *Divisional Court Reasons*, para 20, AR, Vol. II, Tab 11, p. 106.
[77] *Divisional Court Reasons*, para 71, AR, Vol. II, Tab 11, p. 120.

undermining, the proper administration of justice."[78] Justice Nordheimer wrote that "[o]f special concern is any such conduct that could ultimately result in a decision that would amount to a miscarriage of justice".[79] He then concluded, however, that even if this had been the test used by the Appeal Panel, the result would have been the same.[80]

38. The Divisional Court deferred to the Appeal Panel's decision on penalty and costs, even though it had given no meaningful and intelligible reasons for a significant suspension and a punitive costs award against Mr. Groia. It also ordered Mr. Groia to pay another $30,000 in costs.

(b) The ONCA

39. The ONCA released a split decision on June 14, 2016. Justice Cronk, joined by Justice MacPherson, dismissed the appeal and awarded no additional costs. Justice D. M. Brown wrote a lengthy dissent in which he would have allowed the appeal, dismissed the complaints against Mr. Groia, and awarded him $230,000 in costs.

(i) The Majority Decision

40. The majority decision made several findings critical to its conclusion:

(a) It disagreed with the new test formulated by the Divisional Court and restored the more problematic test of the Appeal Panel. It upheld Mr. Groia's one month suspension and the $200,000 + $30,000 in costs that he was ordered to pay.[81]

(b) It found that the limits placed by the Appeal Panel on a client's freedom of expression for the submissions made by his or her lawyer in a courtroom were "reasonable and proportionate".[82]

(c) It found that the presumption of a deferential standard of reasonableness applies to a review of a decision by a law society panel about courtroom professional misconduct. It said that there is no "principled reason for drawing a distinction between a lawyer's in-

[78] *Divisional Court Reasons*, para 76, AR, Vol. II, Tab 11, p. 122.
[79] *Divisional Court Reasons*, para 76, AR, Vol. II, Tab 11, p. 122.
[80] *Divisional Court Reasons*, paras 96-97, AR, Vol. II, Tab 11, pp. 127-128.
[81] *ONCA Reasons*, paras 178-179 and 229-240, AR, Vol. III, Tab 15, pp. 69-70.
[82] *ONCA Reasons*, paras 152-161, AR, Vol. III, Tab 15, pp. 60-63.

court and out-of-court conduct for the purpose of determining the appropriate standard of review".[83]

(d) It found that the Appeal Panel's decision was "reasonable".

(e) It did not consider the implications of how its decision would affect the constitutionally protected rights of clients or the independence of the judiciary.

41. Most importantly, the majority found that the LSUC's authority to determine what constitutes professional misconduct in a courtroom was "unqualified" and that any attempts to balance or measure the separation of powers between regulators and the courts constituted a "constraint on the Law Society's oversight powers [in]defensible as a matter of principle".[84]

(ii) Justice D. M. Brown's Dissent

42. Justice D. M. Brown held that a correctness standard of review should apply in cases where a LSUC panel deals with allegations of professional misconduct in a courtroom. Unlike the majority, he noted that the context of the issues raised "engages the contours of the constitutional relationship between the courts and government regulators".[85] He found that the Appeal Panel's decision could not survive review on either a correctness or reasonableness standard because it failed to give any meaningful consideration to the rulings of the trial judge and to Mr. Groia's response to those rulings.[86]

43. Justice D. M. Brown then formulated a three-part test to be applied to an allegation of professional misconduct before a court:

> [A]ny inquiry into whether a barrister's in-court conduct amounts to professional misconduct takes into account three main factors:
>
> (a) What the barrister did;
>
> (b) What the presiding judge did about the barrister's conduct and how the barrister responded to the directions of the presiding judge; and

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[83] *ONCA Reasons*, paras 54-80, AR, Vol. III, Tab 15, pp. 22-32.
[84] *ONCA Reasons*, paras 87-92, AR, Vol. III, Tab 15, pp. 35-37.
[85] *ONCA Reasons*, para 312, AR, Vol. III, Tab 15, p. 118.
[86] *ONCA Reasons*, para 440, AR, Vol. III, Tab 15, pp. 167-168.

(c) What effect the conduct complained of had on the fairness of the in-court proceeding, including the ability of the opposing side to present its case.[87]

44. Justice D.M. Brown rightly focused on the barrister's conduct, how it was received by the presiding judge and whether it had any impact on the fairness of the trial.

45. When Justice D. M. Brown applied this test to Mr. Groia's conduct, he found that it could not amount to professional misconduct as Justice Hryn did not complain about his conduct, he acted in accordance with Justice Hryn's directions during the trial, and his conduct had no adverse impact on the fairness of the trial. Justice D.M. Brown would have allowed the appeal.[88]

PART II - QUESTIONS IN ISSUE

46. This appeal raises the following questions in issue:

A. What is the standard of review to be applied when reviewing a decision of a law society regarding whether or not the conduct of a lawyer in open court constitutes professional misconduct?

B. In what circumstances can a law society discipline a lawyer for professional misconduct arising out of a lawyer's submissions to a judge in open court while acting for a client? This issue encompasses three critical questions: the limits of zealous advocacy, freedom of expression and the constitutional independence of courts and judges.

C. Was there professional misconduct in this case?

PART III - STATEMENT OF ARGUMENT

A. What is the standard of review to be applied when reviewing a decision of a law society regarding whether or not the conduct of a lawyer in open court constitutes professional misconduct?

47. This issue is about the boundary line between regulators and courts – and about shared regulation. Who has the "final say" regarding the regulation of the conduct of lawyers in a courtroom also engages the constitutional powers of judges under the *Constitution Act*. Deciding

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[87] *ONCA Reasons*, para 319, AR, Vol. III, Tab 15, pp. 121-122.
[88] *ONCA Reasons*, paras 435-445, AR, Vol. III, Tab 15, pp. 166-169.

whether the correctness or reasonableness standard of review applies will determine which branch of the government (a statutory body or the judiciary) has the final say on this important issue. If a correctness standard applies, then the courts, including this Court, have the last word in answering the question because the reviewing court will "decide whether it agrees with the determination of the decision maker; if not, the reviewing court will substitute its own view and provide the correct answer".[89] However, if the majority decision is correct and only a reasonableness standard applies, it will be exceedingly difficult for a court to interfere with the administrative decision of a regulator, notwithstanding that the issue is the conduct of an officer of the court in a trial presided over by a constitutionally independent judge, where that judge directly or indirectly has addressed the conduct of the lawyer, and found no fault with it.

(a) The presumption of reasonableness has been rebutted

48. As stated by this Court, "a contextual analysis may 'rebut the presumption of reasonableness review for questions involving the interpretation of the home statute'".[90] The applicable context in this case is that the impugned conduct took place in the domain of the independent judiciary. As found by Justice D. M. Brown, this context rebuts the general presumption of a reasonableness review for findings of professional misconduct.

49. This position accords with this Court's recent decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary*,[91] where it was held that a standard of correctness applies to the question of whether the Alberta *Freedom of Information and Protection of Privacy Act* allows solicitor-client privilege to be set aside. Justice Côté said that, although the Alberta legislature had given the Information and Privacy Commissioner the power to consider the application of solicitor-client privilege in information requests, the application of this power was a question of central legal importance outside the area of expertise of the Commissioner.[92]

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[89] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, para 50 ["*Dunsmuir*"].
[90] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, para 22; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, para 16.
[91] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 ["*Alberta (Information and Privacy Commissioner)*"].
[92] *Alberta (Information and Privacy Commissioner)*, paras 19-27.

50. The interpretation and application of the LSUC home statute to in-court conduct has implications for all lawyers and, more importantly, all clients. Whether the courts or administrative bodies have the ultimate say in what conduct by a lawyer before a court is acceptable is a matter of central legal importance as it involves the power of the judiciary to maintain "its ultimate control over the courtroom by having the 'last word', so to speak, on whether a barrister's in-court conduct merits professional misconduct sanction".[93] That question is outside the area of expertise of the LSUC and its panels. A correctness standard recognizes that the courts are the final adjudicator of what conduct is permissible in courtrooms. The majority decision erred when considering the standard of review to be applied to the decision of the Appeal Panel.

51. The majority decision failed to consider the critical constitutional question. It failed to consider the important role of a trial judge and that the powers that a trial judge has to control the courtroom, including the power to refer conduct to a law society, when it determined that the appropriate standard of review of the Appeal Panel decision was reasonableness. At issue here was how Justice Hryn handled the trial and Mr. Groia's reliance on that handling. The Appeal Panel took a one-sided Monday morning quarterback view of Mr. Groia's conduct (ten years after the fact) and ignored the important legal and constitutional questions involved.

52. The majority decision also failed to take the context properly into account. It explicitly rejected the important differences between in-court behaviour by an officer of the court and out-of-court behaviour of all other types. Justice Cronk stated: "Nor do I see any principled reason for drawing a distinction between a lawyer's in-court and out-of-court conduct for the purpose of determining the appropriate standard of review".[94] In this she erred. The approach used by Justice Cronk creates an essentially unreviewable prosecutorial discretion for the LSUC to meddle after the fact in the conduct of trials. This is inconsistent with the principle of fundamental justice that a lawyer must be committed to his or her client's cause and that deference should be paid to the conduct of a trial by the trial judge.[95]

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[93] *ONCA Reasons*, at para 267, AR, Vol. III, Tab 15, pp. 100-101.
[94] *ONCA Reasons*, at para 66, AR, Vol. III, Tab 15, p. 27.
[95] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, para 97.

53. The majority decision further erred in relying on the decisions of this Court in *New Brunswick v. Ryan*,[96] *Doré v. Barreau du Québec*,[97] and the British Columbia Court of Appeal in *Goldberg v. Law Society of British Columbia*[98] as establishing that a reasonableness standard of review applied to disciplinary decisions of a law society:

> (a) In *Ryan*, a lawyer challenged a disciplinary decision of the Law Society of New Brunswick arising from his failure to advance his clients' claims and then blatantly lied about his actions. There was no consideration of the role law societies should play when dealing with in-court conduct before a judge, absent a judicial complaint, nor any consideration of the standard of review that would apply to such a case.
>
> (b) In *Doré*, a lawyer challenged a disciplinary decision of the Barreau du Québec arising from a letter he had sent to a judge containing personal attacks against the character and competence of the judge. Again, there was no consideration of the role law societies should play when dealing with in-court conduct before a judge (as there was no in-court conduct at issue), nor any consideration of the standard of review that would apply in such circumstances.
>
> (c) In *Goldberg*, a lawyer raised allegations on appeal that previous counsel had failed to provide adequate representation in three previous murder convictions. The British Columbia Court of Appeal found that these allegations of incompetency (which included allegations of cocaine abuse, rambling affidavit material that is "unworthy of any lawyer" and unfounded written arguments that were "among the worst presented to the court in recent memory"[99]) were groundless and irresponsible. The Court dealt with the lawyer's conduct by directing that Crown counsel bring the reasons to the attention of the law society.

54. This Court's recent decision in *Green v. Law Society of Manitoba*[100] applied a standard of review of reasonableness to a review of a law society rule which provides for an automatic

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[96] 2003 SCC 20 ["*Ryan*"].
[97] 2012 SCC 12, [2012] 1 S.C.R. 395 ["*Doré*"].
[98] 2009 BCCA 147 ["*Goldberg*"].
[99] *Goldberg*, para 4.
[100] 2017 SCC 20 ["*Green*"].

suspension of a lawyer where required CPD hours are not completed. This decision is distinguishable from Mr. Groia's case, as the prosecution of a lawyer and officer of the court for in-court submissions made to a trial judge was not present in *Green*. Instead, *Green* deals with a law society's ability to regulate the continuing professional education of lawyers, clearly within the relative expertise of a law society and not a question of general legal importance, nor does it engage the constitutionally protected independence of the judiciary or the rights of clients.[101]

(b) Comparative institutional expertise

55. Determining the appropriate standard of review requires a consideration of the expertise of the tribunal relative to the reviewing court over the subject matter of the appeal.[102] Applied to this appeal, the Appeal Panel's decision ought to have been reviewed by the Divisional Court and the ONCA majority on a correctness standard, as there is no one more aptly suited to determine when uncivil conduct has occurred in a courtroom than the presiding judge, especially where the appeal is essentially a review of how a trial judge conducted the trial. Only judges have that expertise as a result of "working day to day" with in-court conduct, especially as compared to a law society panel, which may include lay members and lawyers who have never litigated a case.[103]

(c) Conclusion

56. Here, where the conduct in question occurred in the course of submissions about prosecutorial misconduct made by Mr. Groia in open court on behalf of his client, directed to a trial judge who did not complain about his conduct, the standard of review of the Hearing Panel and Appeal Panel decisions, for both the formulation of the test for professional misconduct and the application of that test, should have been correctness. Only through the application of a correctness standard can this question of general importance to the legal system be resolved and the public interest be protected.[104]

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[101] *Green*, paras 22-25.
[102] *Dunsmuir*, para 60; *Ryan*, para 27; *Alberta (Information and Privacy Commissioner*), para 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, paras 81-90 (dissent).
[103] *ONCA Reasons*, para 307, AR, Vol. III, Tab 15, p. 116.
[104] *ONCA Reasons*, paras 279-280, AR, Vol. III, Tab 15, pp. 105-106.

B. When, if ever, can a law society discipline a lawyer for professional misconduct arising out of a lawyer's submissions to a judge in open court, while acting for a client?

57. When the LSUC decided to use the "findings" of the judicial review courts to prosecute Mr. Groia for his submissions made on behalf of a client to Justice Hryn, three critical issues were engaged: his duty of zealous advocacy, the freedom of expression of Mr. Felderhof to make full answer and defence through his lawyer and the judicial independence of Justice Hryn. These factors made an examination of the steps taken by Justice Hryn to control his courtroom and the reasonable reliance by Mr. Groia on his rulings about conduct paramount considerations. Only in rare circumstances, for example when the presiding judge refers the matter to a law society or makes a finding of contempt (or as in *Cosgrove*,[105] completely misconducts himself), is it constitutionally permissible for a law society to prosecute a lawyer for what he or she said in court submissions.

58. For these reasons, the test to be applied by a law society and its panels for in-court conduct—the test that takes into account and gives effect to the principles of zealous advocacy, freedom of expression and judicial independence—should be that set out by Justice D. M. Brown. It should consider:

> (a) What the lawyer did;
>
> (b) What the presiding judge did about the lawyer's conduct and how the lawyer responded to the directions of the presiding judge; and
>
> (c) What effect the conduct complained of had on the fairness of the in-court proceeding, including the ability of the opposing side to present its case.[106]

59. This test rightly focuses on the lawyer's conduct, how it was received by the presiding judge and whether it had any impact on the fairness of the trial. The important values that will inform the application of this test—zealous advocacy, freedom of expression and judicial independence—are considered in turn.

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[105] *Report to the Canadian Judicial Counsel of the Inquiry Committee Appointed under Subsection 63(3) of the Judges Act to Conduct an Investigation into the Conduct of Mr. Justice Paul Cosgrove, a Justice of the Ontario Superior Court of Justice*, November 27, 2008.
[106] *ONCA Reasons*, para 319, AR, Vol. III, Tab 15, pp. 121-122.

(a) Zealous Advocacy

60. Zealous advocacy forms a fundamental part of a lawyer's duty to his or her client, especially in a criminal prosecution where liberty and reputation are at stake. Its importance to the public should place it above considerations of "civility" in every case where there is a conflict. The majority decision failed to recognize the important tension between zealous advocacy and civility, the critical importance of context and tone, known best to a trial judge, and the chilling effect on the work of lawyers pleading in court that the majority decision will have. The Divisional Court correctly identified the importance of these tensions and the need to favour zealous advocacy when these interests clash.[107]

61. The Divisional Court expressed a "serious concern" that the test formulated by the Appeal Panel did not go far enough to protect zealous advocacy. The majority decision disagreed and refused to recognize the chilling effect on zealous advocacy occasioned by the fear of prosecution for professional misconduct. Justice Cronk simply dismissed the issue when she stated, "I am unable to accept the premise of an inherent collision or competition between the duty of zealous advocacy and the duty of courtesy and civility".[108] In this she erred. While these collisions may not be inherent, in many cases they are inevitable. For example, it is difficult, if not impossible, to allege prosecutorial misconduct except by using language that might be considered "uncivil" if used in another context.

62. Justice D. M. Brown understood the importance of these issues. He took a reasoned approach to dealing with this collision. He stated:

> All who have been called upon to review formally what took place in Phase One of the Felderhof trial have acknowledged **the important role played by counsel's zealous advocacy on behalf of accused persons**. Such advocacy ensures that those charged by the state with a crime receive a fair and public hearing by an independent and impartial tribunal…
>
> How does one measure that degree of excess, the tipping point at which zealous advocacy morphs into professional misconduct? Or, to pose the question in the way suggested by The Advocates' Society, how does one measure the "allowable margin of

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[107] *Divisional Court Reasons*, para 71, AR, Vol. II, Tab 11, p. 120.
[108] *ONCA Reasons*, para 131, AR, Vol. III, Tab 15, p. 52.

> error so that advocates do not feel unduly constrained by the threat of prosecution for incivility"?[109] [emphasis added]

63. Unlike the majority decision, Justice D. M. Brown's test emphasises the importance of the trial dynamic. He specifically addressed the need for trial counsel to be able to follow the directions of the trial judge who polices the boundary of acceptable behaviour in their courtroom – and that when they do so they should be immune from after-the-fact second-guessing by a regulator. Unless this Court builds a strong fence around courtroom behaviour and the power of the trial judge to control his or her courtroom, criminal and civil trials will be subject to an autopsy by a regulator, to the detriment of the accused person's right to a zealous defence, or in a civil case, to its prosecution or defence.

64. Mr. Groia was entitled to rely on Justice Hryn's acceptance of his conduct of Mr. Felderhof's defence, especially in the face of objections to it by the OSC, objections which Justice Hryn did not accept. Justice Hryn took "the daily temperature" of a high-stakes, hard-fought trial and had a wide discretion to decide how to address the "the degree of excess" in the "litigation style" of counsel on both sides.[110] As a function of his right to manage the trial, Justice Hryn observed Mr. Groia's in-court behavior, including the submissions regarding prosecutorial misconduct. Justice Hryn did not object to Mr. Groia's conduct or his choice of language during the trial.

65. By criticizing Mr. Groia, the Hearing Panel and Appeal Panel have each—indirectly but unmistakably and severely—criticized Justice Hryn's handling of the trial. The implication of their criticism is clear: Justice Hryn did not control his courtroom to their satisfaction and the Application courts got it wrong when they characterized his conduct of the trial as a "patient and even-handed resolve to proceed with a difficult and hard fought trial", that the "integrity of the trial" had not been affected and "the prosecution wsa not prevented from having a fair trial."[111]

66. If Justice Hryn found no fault with Mr. Groia's conduct (though repeatedly asked to), how could Mr. Groia (or any defence lawyer) know that years later a statutory regulator would? Allowing a regulator not present at the trial to second-guess a lawyer's trial conduct and strategy

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[109] *ONCA Reasons*, paras 352 and 354, AR, Vol. III, Tab 15, pp. 132-133.
[110] *Decision of Campbell J.*, paras 261-262, 273, AR, Vol. I, Tab 1, p. 75.
[111] *Decision of Campbell J.*, paras 10, 236, 254, 276, AR, Vol. I, Tab 1, pp. 4, 68, 72-73, 81; *ONCA Felderhof Decision*, paras 13, 82, AR, Vol. I, Tab 3, pp. 95, 123.

and the trial judge's management of the trial, with all the frailty of a written record and in the absence of complaint by anyone, is not only constitutionally impermissible but is also contrary to the public interest. Public confidence in the administration of justice is affected because of the chilling effect on the ability of lawyers to advocate on behalf of their clients. As Justice Abella noted in her dissent in *Green*, a suspension of a lawyer inevitably undermines public confidence in that lawyer.[112] What Justice Moldaver said about how to measure public confidence in *R. v. Oland* applies equally to this case:

> [P]ublic confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values.[113]

Such a person would applaud Mr. Groia's successful defence of Mr. Felderhof, and his continuing to do so long after Mr. Felderhof's ability to pay for his services was exhausted.

(b) Freedom of expression of clients through their lawyers

67. Justice D. M. Brown's test recognises and supports the freedom of expression of clients through their lawyers to argue their cases in court. This Court held in *Doré* that the severity of the conduct of lawyers "must be interpreted in light of the expressive rights guaranteed under the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves."[114] It is hard to imagine a more important aspect of freedom of expression than in-court submissions on behalf of a client by an officer of the court about prosecutorial misconduct. Here those arguments had support from Justice Hryn, who recognized that any application for relief would be made at the conclusion of the evidence.[115]

68. Justice Cory's comments on the importance of s. 2 (b) of the *Charter* in *R. v. Kopyto*[116] emphasizes the importance of freedom of expression as it relates to submissions made by advocates in open court:

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[112] *Green*, para 95.
[113] *R. v. Oland*, 2017 SCC 17, para 47 ["*Oland*"].
[114] *Doré*, para 63.
[115] Exh. 3 (1-70), Day 57, pp. 132-133 *(PDF pp. 136-137)*; Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 58, pp. 50-51*(PDF 119-120)* and pp. 56-58 *(PDF pp. 125-127)*
[116] 1987 CarswellOnt 124, 24 O.A.C. 81 (C.A.) ["*Kopyto*"].

> Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. […] So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very life-blood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.[117]

69. The late Edward Greenspan and the late David Roebuck said this about freedom of expression in this case:

> Mr. Felderhof hired Joseph Groia. Mr. Groia clearly recognized what losing the case meant to Mr. Felderhof and was vigorous in his defence. His attack on the OSC and its prosecution was not always moderate and respectful. He was, at times, caustic and sharp in his criticism of the prosecution. He may have used misplaced hyperbole, mockery and ridicule, the very things anyone in Canada can use when criticizing the prime minister, the cabinet or MPs on matters of national importance. It's called free speech.[118]

70. The importance of a lawyer's freedom of expression on behalf of a client is accentuated where, as here, Mr. Groia carried out his duty to his client to criticize what he honestly believed (and reasonably believed) was the state's abuse of power against an accused who faced incarceration and financial ruin.[119] Such expression lies at the core of protected speech.[120] Justice D. M. Brown said:

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[117] *Kopyto*, para 194.

[118] Edward Greenspan and L. David Roebuck. "*The Horrible Crime of Incivility.*" The Globe and Mail (Aug. 2, 2011), p. 2.

[119] The Appeal Panel agreed that allegations of prosecutorial misconduct do not rise to the level of professional misconduct if they are made in good faith and have a reasonable basis, and it proceeded on the assumption that Mr. Groia had an honest belief in those allegations (*LSUC Appeal Panel Reasons*, paras 235 and 238, AR, Vol. II, Tab 7, pp. 54-55).

[120] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, paras 71-75; *Harper v. Canada*, 2004 SCC 33, para 10; *R. v. Keegstra*, [1990] 3 S.C.R. 697, paras 28-30, 87, 90, 92, 94, 99, and 310.

> [T]he interests at stake in a criminal trial are extraordinarily serious, with the conviction of the accused possibly resulting in the loss of his or her liberty. The image of defence counsel as standing between the accused individual and the power of the state is not a fanciful one; it is the living reality of the contemporary criminal trial courtroom…
>
> The task of identifying when zealous courtroom advocacy on behalf of an accused crosses the boundary into professional misconduct must never lose sight of what is at stake in a criminal proceeding.[121]

71. Denying a lawyer's right to free expression on behalf a client in a court of law in favour of a vague definition of civility and its application after the fact fetters and chills the lawyer's ability to engage in vigorous advocacy, in turn damaging the public interest, as well as infringing the ability of an accused or client to make full answer and defence in a judicial proceeding. The majority decision erred when it considered only whether the Appeal Panel decision on expressive rights was "reasonable."[122]

(c) Judicial Independence

72. A basic tenet of the Canadian judicial system and the rule of law is that the judiciary operates as an independent branch of the government, as guaranteed by the *Constitution Act*.

73. As stated by this Court in *Dunsmuir*:

> [T]he Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the Constitution Act, 1867 has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent

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[121] *ONCA Reasons*, paras 316-317, AR, Vol. III, Tab 15, pp. 120-121; In contrast, the Appeal Panel failed to give proper consideration to the scope of a lawyer's freedom of expression on behalf of a client in a criminal proceeding. Although the Appeal Panel makes a passing reference to the expressive rights of lawyers, it failed to consider and apply those rights to the case before it. It never once considered what expressive rights Mr. Groia had and how those rights were to be applied in the difficult circumstances that Mr. Groia faced in the Felderhof trial (see *LSUC Appeal Panel Reasons*, paras 210-215, AR, Vol. II, Tab 7, pp. 48-50).

[122] *ONCA Reasons*, paras 152-161, AR, Vol. III, Tab 15, pp. 60-63.

> judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.[123]

74. While Justice Hryn is not a s. 96 superior court judge, these limitations have been confirmed by this Court to apply equally to judicial review of provincial court judges. In *Re Provincial Court Judges*,[124] Chief Justice Lamer said:

> [J]udicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*.[125] [emphasis in original]

Chief Justice Lamer added that judicial independence has "grown into a principle that now extends to all courts, not just the superior courts of this country."[126] Accordingly, under the Canadian constitution, it is the independent judiciary that has the sole power to control what takes place in a courtroom.

75. Judicial independence operates, at its core, on the power of a court to control its own process.[127] A judge has a wide variety of tools available to control the conduct of lawyers in a courtroom. These include giving directions, issuing orders to comply, reprimands, contempt proceedings, adjournments, extensions of time, cost awards, and referring the matter to a law society.[128] It is a judge's duty to make use of these tools in order to, among a judge's other obligations, maintain civility in the courtroom. As stated by the ONCA in *Marchand*, civility in the courtroom is not only the responsibility of lawyers but also "very much the responsibility of the trial judge".[129] Absent censure or a complaint by the trial judge, trial lawyers are entitled, and duty-bound, to represent their client zealously right up to the borderline set by the presiding

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[123] *Dunsmuir*, para 127.
[124] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 ["*Reference re Provincial Court Judges*"].
[125] *Reference re Provincial Court Judges*, para 83.
[126] *Reference re Provincial Court Judges*, para 106.
[127] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, para 33; *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.), para 24.
[128] *R. v. Anderson*, 2014 SCC 41, para 58; *ONCA Reasons*, paras 364-367, AR, Vol. III, Tab 15, pp. 136-137.
[129] *Marchand v. The Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.), para 148 ["*Marchand*"]; *ONCA Reasons*, para 301, AR, Vol. III, Tab 15, pp. 113-114; *ONCA Felderhof Decision*, para 94, AR, Vol. I, Tab 3, p. 127.

judge—not years later by a regulator, especially where, as here, Mr. Groia followed the direction of Justice Hryn. Trials are dynamic and operate in real time. Regulators are poorly positioned to second-guess what takes place in a courtroom—especially as they cannot see or hear what actually transpired.

76. A key constitutional and legal value in Canada is the rule of law.[130] Its significance is entrenched in the preamble to the Canadian Charter of Rights and Freedoms, which states that "Canada is founded upon principles that recognize … rule of law." The rule of law has protected individuals from arbitrary government action. This Court has recognized that the rule of law operates to prevent the provinces from administering justice in a way that prevents the right of Canadians to have full access to the courts.[131]

77. When the principles of the rule of law are applied to this case, it becomes clear that any action by a government regulator that infringes on the ability of the public to access the services of a zealous lawyer who will fearlessly represent their clients' interests in a court of law within the boundaries established by an independent judge ought not to be permitted.

(d) The ONCA majority test fails to protect the independence of the judiciary

78. The majority decision overturned the Divisional Court test for when incivility will constitute professional misconduct and reaffirmed the Appeal Panel's test.[132] The Appeal Panel's test ignored the constitutional independence of the judiciary. The majority decision found that because it had determined that the applicable standard of review for the test was reasonableness, it was not open to the Divisional Court to substitute its own view of what the correct test should be.[133] If the majority decision restatement of the Appeal Panel's test is permitted to stand, the constitutional principle that the judiciary determines the limits of trial conduct will have been undermined. The restatement entirely ignores the control that a presiding judge has over his or her courtroom and the tools available to exercise that control. It fails to take into account whether

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[130] See Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada", 55 U.T.L.J. 715 (2005).
[131] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, para 38-40.
[132] *ONCA Reasons*, para 166, AR, Vol. III, Tab 15, p. 61; para 31, *supra*.
[133] *ONCA Reasons*, para 163, AR, Vol. III, Tab 15, p. 64.

the lawyer acted in accordance with the direction of the presiding judge and whether the lawyer's conduct had any impact on the fairness of the trial.

C. Was there Professional Misconduct in this case?

79. In *Doré*, this Court defined incivility in the legal profession as "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy".[134] The Appeal Panel cited Professor Alice Woolley as support for its proposition that uncivil conduct becomes professional misconduct when it violates a lawyer's fundamental ethical obligations. "In other words", the Appeal Panel concluded, "mandating 'civility' protects and enhances the administration of justice . . . and should not be used to discourage fearless advocacy manifested by passionate, brave and bold language".[135] The Appeal Panel and the majority decision were wrong to not recognize that the chilling effect of Mr. Groia's conviction in the circumstances of this case would have exactly that effect. Mr. Groia's defence of Mr. Felderhof was in no way "a potent display of disrespect" to the participants in the Felderhof trial. To the contrary, Mr. Groia's conduct was necessary for the defence of Mr. Felderhof. He used the language and made the submissions necessary to lay the foundation for a s. 24(1) remedy.

80. Other courts have defined "incivility" in several ways: a "deliberate consistent pattern of rude, improper or disruptive behaviour"; overstepping the "generally accepted norms of moderation and dignity"; an "excessive degree of vituperation"; conduct that is unacceptable by "any reasonable standard of civility"; or conduct which has "fallen below an acceptable standard".[136]

81. The Divisional Court properly found that the *Rules of Professional Conduct* are far from "crystal clear" in their application.[137] Not only do the *Rules of Professional Conduct* not tell lawyers where the line between "civility" and "professional misconduct" will be drawn, but the *Rules* offer little guidance to lawyers in balancing their competing duties to their client, the courts, and the opposing lawyers. In open court, the presiding judge polices the line and lawyers must be able to rely on his or her judgment calls.

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[134] *Doré*, paras 61, 70-71.
[135] *LSUC Appeal Panel Reasons*, paras 209-211, AR, Vol. II, Tab 7, pp. 48-49.
[136] *Doré*, paras 70-71; *Marchand*, paras 139-140.
[137] *Divisional Court Reasons*, para 50, AR, Vol. II, Tab 11, p. 114.

82. Although rejected by Justice Cronk and the Appeal Panel as outdated,[138] *Re Bruce Allan Clark ("Clark")*,[139] was the leading authority in Ontario in 1999 and 2000, the relevant time period for Mr. Groia's conduct. In 1995, the LSUC Convocation sent a clear and strong message to the profession that the LSUC would protect the independence of the bar by supporting vigorous advocacy in open court. Convocation noted that the *Clark* case raised important questions about the limits of advocacy and the integrity of our system of justice:

> The Law Society must always be acutely sensitive to the danger that its disciplinary process may be used to punish vigorous advocacy. The Law Society should act aggressively to protect counsel from attempts to inhibit zealous advocacy on behalf of clients. This duty flows from the Society's responsibility—confirmed in the role statement approved by Convocation—to protect the independence of the bar.
>
> It is important to our decision that the use of what would in most other circumstances rightly be regarded as extravagant, disrespectful and discourteous language, in Mr. Clark's case emanated directly from the legal argument that he was vigorously advancing on behalf of his clients. In attempting to resolve the tension between vigorous advocacy in the face of judicial resistance and the duty to treat the tribunal with courtesy and respect, much will depend on the context.[140]

83. More recently, this Court's decision in *Canada (Attorney General) v. Federation of Law Societies of Canada*,[141] affirmed that it is a principle of fundamental justice that a lawyer be committed to a client's cause, free from governmental interference. Justice Cromwell stated:

> The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients.[142]

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[138] *ONCA Reasons*, para 147, AR, Vol. III, Tab 15, pp. 58-59.
[139] [1995] L.S.D.D. No. 199, ["*Clark*"].
[140] *Clark*, pp. 27-28.
[141] 2015 SCC 7 ["*Federation of Law Societies*"].
[142] *Federation of Law Societies*, para 97.

84. The Divisional Court recognized that for uncivil conduct in court to amount to professional misconduct, "it must be conduct that in addition to being uncivil, will also bring the administration of justice into dis[re]pute, or would have the tendency to do so."[143] Justice D.M. Brown found that the Divisional Court's articulation of the test was vague. He concludes that "when inquiring into whether a barrister's in-court conduct constitutes professional misconduct, a discipline tribunal must assess whether the conduct not only is uncivil, but also whether it undermined, or threatened to undermine, the fairness of the trial or other court proceeding in which it took place."[144] Without allowing for a certain "degree of excess"[145], a lawyer will be unduly constrained in fulfilling the duty of zealous advocacy that is owed to clients. Thus, in order for a law society panel to find that a lawyer's in-court conduct amounts to professional misconduct in those few cases where the conduct will be referred to a law society by a trial judge, or where there has been a contempt finding, it must be necessary for the panel hearing the case to find not only that is the impugned conduct is uncivil, but also that it undermined the fairness of the trial.

85. The LSUC is required to act in the public interest, not the interest of the profession. Everything the LSUC does in its regulation of lawyers must be in the best interests of the public.[146] As stated by Justice Abella in her dissent in *Green*, law societies "represent–and are dedicated to protecting–the public's confidence that those values will guide the lawyers who serve them."[147] This mandate requires that any evaluation of a lawyer's conduct in court must be viewed through the lens of the public interest, which fundamentally requires zealous advocacy in a trial, and not with some ill-defined "Marquess of Queensbury" advocacy rules. The LSUC has persistently argued that the "findings" of the courts in the Application were evidence of Mr. Groia's misconduct (even though the uncontradicted evidence was that on the Application Mr. Groia and Mr. Greenspan advanced Mr. Felderhof's interest over that of Mr. Groia). The Appeal Panel wrongly ignored the findings of both Justice Campbell and the Court of Appeal that the fairness of the Felderhof trial and the prosecutor's ability to present its case were never

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[143] *Divisional Court Reasons*, paras 75-76, AR, Vol. II, Tab 11, pp. 121-122.
[144] *ONCA Reasons*, para 359, AR, Vol. III, Tab 15, pp. 134-135.
[145] *ONCA Reasons*, para 353, AR, Vol. III, Tab 15, p. 133.
[146] *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, p. 336; *Green*, paras 79-81.
[147] *Green*, para 80.

compromised by Mr. Groia's conduct.[148] These findings were not *obiter*, unlike the Application courts' comments about Mr. Groia's conduct. They were the *ratio* of the decisions.

86. The Appeal Panel's finding that Mr. Groia's conduct caused a serious adverse impact on the prosecution's first witness is unfounded. It is ultimately for the trial judge to ensure that witnesses are being treated fairly. The record discloses that Justice Hryn was very much alive to this issue.[149] Mr. Groia's concern for Mr. Francisco's health and well-being is to be found throughout the transcript, up to and including his willingness to shorten and pre-disclose his cross-examination if the OSC agreed to limit its reply—an offer that the OSC refused.[150]

87. The Appeal Panel also erred by relying on the reasons for decision of the courts in the Application as proof or evidence against Mr. Groia in this case, pursuant to Rule 24.07(2) of the *Rules of Practice and Procedure* of the LSUC.[151] Under Rule 24, while the transcript and reasons of a decision of another adjudicative body may be admissible as evidence, the specific findings made by the trier of fact are only proof of the fact so found *if* there is no evidence to the contrary *and if* the individual against whom the findings of fact were made was a party to the earlier proceeding. Neither was the case here. Mr. Groia was not a party to the Application, and there was abundant evidence to the contrary.

88. Giving proper consideration to how the lawyer reacted to the direction of the presiding judge will not only protect the lawyer and the client he or she is duty-bound to serve, but also will serve to strengthen the independence of the judiciary and the public's confidence that an accused or litigant's "day in court" means just that—not a multi-year sojourn where a regulator second-guesses their lawyer's conduct. Where, as here, the conduct took place in a courtroom, Justice Hryn gave directions and Mr. Groia followed those directions, the LSUC should not have

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[148] *Felderhof ONCA Reasons*, paras 13, 77, 81-82, AR, Vol. I, Tab 3, pp. 95, 121-123; *Decision of Campbell J.*, paras 253-254, 276, AR, Vol. I, Tab 1, pp. 72-73, 81; *ONCA Reasons*, para 432, AR, Vol. III, Tab 15, pp. 164-165.
[149] Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF*, Day 56, p. 28 *(PDF p. 28)*, pp. 55-57 *(PDF pp. 32-34)*; Day 58, pp. 41, 97, 105 *(PDF pp. 116, 154, 162)*.
[150] Exh. 3 (1-70), Day 58, pp. 54-60, 67-69, 72-75, 78-83, 93-95, 97-107 *(PDF pp. 56-62, 70-72, 75-78, 81-86, 96-98, 100-110)*; Day 65, pp. 4-12, 18 *(PDF pp. 14-22, 28)*; Day 66, pp. 14-15 and 19 *(PDF pp. 22-23, 27)*; *Evidence of Mr. Groia, Jan. 31, 2012*, p. 176, l. 21 – p. 190, l. 19 and p. 202, l. 5 – p. 219, l. 9, Transcripts, Law Society Hearing, 13.
[151] *Rules of Practice and Procedure*, Rule 24.07.

prosecuted Mr. Groia for professional misconduct, and the Hearing and Appeal Panels should not have convicted him.

D. Conclusion

89. What must the public, that reasonable member described by Justice Moldaver in *R. v. Oland*,[152] think about the conviction of Mr. Groia for being too zealous in his successful defence of Mr. Felderhof, against all odds, for years without pay? Did he not serve the ends of justice far better than an indifferent but "civil" lawyer who sees his or her client wrongfully convicted? The point where zealous representation becomes uncivil and amounts to professional misconduct is not capable of a bright line definition; rather, it is highly contextual. What must that reasonable member of the public think about the conviction of Mr. Groia, when there was never a complaint to the LSUC by Justice Hryn, or, indeed, by anyone? There is a natural tension between zealous advocacy and incivility. Put differently, in certain circumstances, of which this case is a paradigm example, lawyers are ethically obligated to engage in advocacy right up to the line that separates civil from uncivil conduct. It cannot be uncivil to argue to the court that there is prosecutorial misconduct where the claim is honestly and reasonably made. Rather, there is an obligation on a lawyer to make those arguments fearlessly. The Appeal Panel and the courts below failed to deal with this reality or to offer the profession any meaningful guidance on how not to be the "next Joe Groia". It is not always clear where the "line" is. The presiding judges before whom lawyers appear have traditionally and rightly policed that line. They are best placed to do so.

90. Mr. Groia had a professional obligation to Mr. Felderhof to make the arguments about prosecutorial misconduct that he honestly believed were reasonably based.[153] The OSC conduct in Phase I of the Felderhof prosecution was sub-standard, and prejudicial to Mr. Felderhof. Court orders were required to obtain proper disclosure. The conduct of the OSC prosecution was censured by the trial judge. Justice Hryn's Day 67 and 68 rulings speak for themselves. Had Mr. Groia been a less zealous advocate, Mr. Felderhof might have been found guilty and incarcerated–but we likely would not be in this Court. Without a complaint from anyone, the

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[152] *Oland*, para 47.

[153] See for example, *Rules of Professional Conduct*, Rule 4.01, Canadian Bar Association Code, c. XXII, Rule and Commentary 1. See also *Evidence of B. Greenspan*, Aug. 18, 2011, p. 29, l. 18 – p. 32, l. 6, Transcripts, Law Society Hearing, 10.

LSUC sought to discipline Mr. Groia based on *obiter* comments in an Application to which he was not a party and on the basis that he ought not to have defended his client in the resolute manner that he reasonably and honestly thought was necessary. The Appeal Panel agreed and the Divisional Court and the majority decision deferred to it. They were wrong and their error should be corrected.

PART IV - SUBMISSION ON COSTS

91. Mr. Groia requests his costs in this appeal and in the courts and tribunals below as set out more particularly in paragraph 92 below.

PART V - ORDER REQUESTED

92. Mr. Groia respectfully requests that this appeal be allowed with costs in this appeal, costs in the courts below to be assessed, and costs before the Hearing and Appeal Panels fixed at $200,000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of April, 2017.

Earl A Cherniak

Earl A Cherniak, Q.C.

Martin Mendelzon

PART VI - TABLE OF AUTHORITIES/STATUTORY PROVISIONS

PARAS.

PARAS.

OTHER SOURCES:

LEGISLATION:

The Constitution Act, 1867(UK), 30 & 31 Victoria, c 3

Loi constitutionnelle de 1867 Référence : Loi constitutionnelle de 1867 (R-U), 30 & 31 Vict, c 3

Law Society Act, R.S.O. 1990, c. L. 8, S. 4.2

Loi sur le Barreau L.R.O. 1990, CHAPITRE L.8. S. 4.2

Law Society Tribunal, Hearing Division, Rules of Practice and Procedure R. 24.07

Proof of prior facts

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

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

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

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

Règles de Pratique de Procédure (visant les instances du Comité d'audition du Barreau), R. 24.07

Preuve de faits antérieurs

24.07 (1) Les constatations de fait précises qui figurent dans les motifs de la décision d'un organisme juridictionnel du Canada constituent la preuve, en l'absence de preuve contraire, des faits en cause si, selon le cas:

a) il n'a pas été interjeté appel de la décision et le délai d'appel est expiré;

b) il a été interjeté appel de la décision, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Si les constatations de fait visées au paragraphe (1) concernent un particulier, ce paragraphe ne s'applique que si celui-ci est ou était partie à l'instance qui a donné lieu à la decision

APPENDIX – NOTICE OF CONSTITUTIONAL QUESTION

NOTE: Pursuant to Rule 38.1 the Appellant has filed the electronic record filed in the ONCA. All footnote references to documents (other than those expressly referencing the part I record materials in AR. VOLUMES I – III) are to the electronic record.

SCC File No: 37112

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOSEPH PETER PAUL GROIA

APPELLANT
(Appellant)

-and-

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

NOTICE OF CONSTITUTIONAL QUESTION

(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

TAKE NOTICE that I, Earl A. Cherniak, Q.C., counsel for the appellant, assert that the appeal raises the following constitutional question:

1. Is the *Law Society Act*, R.S.O. 1990, c. L.8, *ultra vires* or inoperative insofar as it infringes on the constitutional independence of the courts by allowing the Law Society of Upper Canada to interfere with the regulation by the judiciary of the conduct of counsel and counsel's freedom of speech on behalf of his or her client, in a court of law?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Toronto in the Province of Ontario, this 3rd day of March, 2017.

Beedell as agent for

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