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-

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REPLY OF THE APPELLANT, JOSEPH PETER PAUL GROIA, TO THE INTERVENERS

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

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PART I – OVERVIEW

1. The Interveners have helped to bring clarity and perspective to two of the core issues on this Appeal. Those are:

a) When, if ever, can a law society regulator discipline a lawyer for his or her in-court submissions absent a request or a contempt finding by the presiding judge? The broad, unrestricted review powers claimed by the Law Society of Upper Canada (the "**LSUC**") have been severely (and correctly) criticised by the Advocates Society, the Canadian Bar Association, the Canadian Civil Liberties Association, the Criminal Lawyers Association of Ontario, the British Columbia Civil Liberties Association and the Independent Criminal Defence Advocacy Society.

b) Why should Canadian courts show deference to a law society regulator's assessment of courtroom submissions, by applying a reasonableness standard of review, when law society regulators claim they need to show no deference to how the presiding judge assessed and dealt with the same conduct? Canadian courts should not defer to regulators on this critical issue. A bright line needs to be drawn around the constitutionally protected independence of the judiciary and their powers to control and assess conduct that was confined to in-court submissions of counsel in defence of their clients.

2. The duty to control and assess the submissions of lawyers on behalf of their clients as officers of the court in a courtroom lies squarely within the constitutional realm of the judiciary. How trials are conducted must be kept free from undue interference from the legislature and its subordinate bodies exercising delegated powers, especially because those bodies often appear in court as party litigants. To require the judiciary to defer to the views of a statutory regulator about where to set the line for permissible conduct in a courtroom, when a lawyer is seeking to advance the rights of his or her client within the wide range of speech protected by freedom of expression, will irreparably shake public confidence in the administration of justice. It is worth noting that in this case a regulator with delegated regulatory powers charged a lawyer for being too forceful in his open court criticisms of another regulator with delegated quasi-criminal law powers.

3. The appellant Joseph Peter Paul Groia ("**Mr. Groia**") submits this reply primarily to the submissions of the interveners the Attorney General of Saskatchewan, Director of Public Prosecutions, Ontario Crown Attorneys' Association, Ontario Trial Lawyers' Association, Law

Society Tribunal, The Federation of Law Societies of Canada, le Barreau du Québec, and the Attorney General for Ontario with respect to the foregoing core issues on this appeal.

4. Mr. Groia is not challenging the overall constitutionality of the *Law Society Act*[1] (the "***Act***"). Rather, he is challenging the constitutional validity of the *Act* being used to discipline a lawyer for the words used in submissions made to a trial judge, with which the judge found no fault. The LSUC claim to have jurisdiction to interfere with judicial independence and the right of clients to a forceful and zealous defence is unprecedented. This issue was raised and argued at each level below. It is not a new issue raised for the first time in this Court.

5. Canadian courts have the power and the duty to manage and control the proceedings conducted before them. Rules of professional conduct related to civility must be applied taking into account this constitutional imperative. There are limits to the powers given to law society regulators. Respect for the principle of judicial independence requires that law societies give significant, if not conclusive weight and deference to the presiding judge's assessment and acceptance of counsel's in-court submissions. The public interest demands no less.

6. The standard of review of law society disciplinary decisions related to in-court submissions of counsel should be correctness. The issue of when a lawyer's submissions about prosecutorial misconduct to a judge in open court can amount to professional misconduct is one of fundamental importance to our legal system. Unlike presiding judges, members of law society tribunals do not have the expertise or experience needed to properly assess in-court speech. They do not see and hear the submissions live. They cannot appreciate the dynamic of the trial as it unfolds. No deference should be afforded to their decisions where they conflict with how the presiding judge dealt with the in-court submissions.

PART II – STATEMENT OF ARGUMENT

A. Failure to properly take into account the authority of the presiding judge to control and assess courtroom conduct risks undermining the independence of the judiciary.

7. In their submissions, several Interveners overlook or minimize the differences between in-court and out-of-court conduct. In doing so, they fail to understand or they ignore how the purported jurisdiction of law societies over counsel's in-court submissions engages the

[1] RSO 1990, c. L.8.

constitutionally-protected principles of judicial independence and freedom of expression. Their approach is myopic and inherently flawed.

8. Counsel's in-court submissions (or in-court conduct of a case) must always be treated differently from behaviour that occurs outside of the courtroom. The former takes place in a courtroom presided over by a judge whose responsibility is to preserve procedural fairness and the proper administration of justice. Judges establish the boundary line of what are or are not appropriate submissions. Lawyers and their clients trust and rely on judges to do that every day. Out of court conduct is not judicially supervised. The distinction is crucial. As this Court noted in *R v Anderson*, "[t]he Courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them."[2] This power must be fully and unwaveringly respected by regulators and the courts.

9. Contrary to the submissions of the Attorney General for Ontario, presiding judges have an active duty to manage the conduct of counsel in order to uphold the proper administration of justice, as was recently reinforced by this Court in *R v Cody*.[3] In *Cody*, this Court found that trial judges "must not be reticent about finding defence action to be illegitimate where it is appropriate to do so."[4] This duty of the presiding judge is accorded a high-level of deference by the courts and where it is not exercised, should be equally accorded a high-level of deference by law societies.[5] As stated in *Cody*, quoting from this Court's decision in *R v Jordan*:

> We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (Jordan, at para. 114). As this Court observed in Jordan, the role of the courts in effecting real change involves
>
> > implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must

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[2] *R v Anderson*, 2014 SCC 41, [2014] SCR 167 (SCC), para 58 ["*Anderson*"].
[3] 2017 SCC 31, paras 36-39 ["*Cody*"].
[4] *Cody*, para 31.
[5] *Cody*, para 31.

> be mindful of the impact of their decisions on the conduct of trials. [para. 139][6]

10. Presiding judges have a variety of tools at their disposal to supervise counsel's submissions as well as in-court conduct.[7] As was stated explicitly by this Court in *R v Anderson*:[8]

> This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, **incivility**, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings. [Emphasis added]

11. The implicit suggestion, unsupported by evidence and belied by the record, made by the Attorney General for Ontario that Justice Hryn was "unduly passive", "ineffective in addressing incivility" and did not control his courtroom is both incorrect on the record and unfair to Justice Hryn. The attack is reminiscent of the Ontario Securities Commission's rejected accusations on its judicial review application that Justice Hryn "lacked basic human sensitivity" and that he "lent…his office" to the defence.[9] One example of Justice Hryn's willingness to use his powers to control his courtroom when necessary can be found in his Day 68 ruling when he censured the prosecution for thoroughly inappropriate comments that it had made in challenging his rulings:[10]

> This is the second occasion where I have found inappropriate comments by the Securities Commission, the first being by Frank Switzer as spokesperson for the Securities Commission and today by counsel. I expect this to be the last.

Justice Hryn's control of his courtroom supports the proposition made by the Canadian Bar Association that absent criticism by the presiding judge, it is appropriate to conclude that the presiding judge found counsel's in-court conduct to be without reproach.[11]

12. The concerns raised by the Attorney General of Saskatchewan and the Ontario Trial Lawyers' Association that allowing judges to maintain their independence in the control of their courtrooms will lead to increased delay or inefficiency are entirely misplaced. The continued

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[6] *Cody*, para 37.
[7] Canadian Bar Association Factum, para 23 [CBA].
[8] *Anderson*, *supra* note 2, para 58.
[9] Application Factum of the Ontario Securities Commission, dated October 9, 2001, paras 7 and 704
[10] Exh. 7 (7-2), *Transcript Brief of the Respondent, R v. JBF, Day 68, p. 23 (PDF 23).*
[11] *CBA*, *supra* note 7.

exercise of these judicial duties will not lead to any increased delays; rather, they will increase the efficiency of proceedings. Inappropriate conduct that impacts on the proceeding will be identified and dealt with by presiding judges in accordance with the principles of the proper administration of justice and the public interest. Counsel will make submissions within the boundaries set by the judge, confident that they need not fear an *ex post facto* criticism and autopsy by an absentee regulator.

13. When it comes to law society assessment of in-court submissions, law societies should recognize that courts have the primary role of determining what is and what is not appropriate. The presiding judge is best placed to do so. The different roles of courts and law societies require each to respect the role of the other. While several of the Interveners argue that law societies should have an unfettered right to discipline counsel for in-court conduct, constitutional imperative mandates that it is the independence of the courts that should take precedence. Law societies with government delegated powers should never be permitted to interfere in the judicial function. As stated by this Court in *Ontario v Criminal Lawyers' Association of Ontario*:[12]

> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other". [Emphasis added.]

14. In *Canadian National Railway Co v McKercher*, this Court considered the roles of courts and law societies in resolving issues relating to conflict of interest; conduct which occurs outside the supervision of a presiding judge. It did not, as suggested by the Attorney General of Saskatchewan,[13] caution against confusing the respective roles. Issues relating to conflicts of interest are distinct from a review of submissions in court. However, even in relation to

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[12] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3, para 29.
[13] Attorney General of Saskatchewan Factum, para. 9.

behaviour that takes place outside of the courtroom, this Court in *McKercher* has recognized that courts and law societies "may properly have regard for the other's views".[14]

15. Contrary to the Ontario Crown Attorneys' Association's claim, in *Krieger v Law Society of Alberta*[15] this Court did not establish that a law society has jurisdiction over the in-court conduct of a lawyer.[16] The *Krieger* case dealt with whether the Law Society of Alberta could discipline Crown Counsel regarding a failure of his duty to provide proper disclosure (as also occurred in *Felderhof*). This case is entirely distinguishable, as there was no consideration of in-court submissions. Unlike this case where no one complained to the LSUC, a complaint had been made to the Law Society of Alberta by the accused.[17] *Krieger* set the boundaries of the Law Society's jurisdiction in relation to the independence of the Attorney General, but it did not discuss the "inherent jurisdiction of the court to control its own processes" as a bulwark to regulatory review.[18]

B. Deferential review by law societies protects the constitutionally-protected principle of judicial independence.

16. In *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, Justice Gascon, writing for this Court, stated that "[t]he need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence."[19] Here, the constitutional requirements of judicial independence and freedom of expression in a courtroom are both threatened.

17. The manner in which the presiding judge conducts a trial deserves significant, if not conclusive, deference by a regulator. Where the presiding judge does not sanction the submissions of counsel, or even criticise them, it is appropriate to conclude that she found counsel's conduct to have been within acceptable limits. Thus, before proceeding with

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[14] *Canadian National Railway Co v McKercher*, 2013 SCC 39, para 16.
[15] [2002] 3 SCR 372 ["*Krieger*"].
[16] Ontario Crown Attorneys' Association Factum, para 3.
[17] *Krieger*, para. 11.
[18] *Krieger*, para 47.
[19] *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, para 57.

disciplinary action against counsel, a law society must consider the powerful presumption that there was no in-court misconduct by counsel. Perhaps more importantly, trial lawyers need to be able to rely on the absence of criticism from the trial judge in determining whether they are too close to the invisible line between zealous advocacy and excessive zeal.

18. The Canadian Bar Association submission correctly states that any test for professional misconduct must show deference to the independent judiciary's primary role in preserving procedural fairness and the proper administration of justice. Similarly, Mr. Groia asks this Court to shield courtroom speech from law society second-guessing, absent exceptional circumstances. The constitutionally protected principle of judicial independence will be violated if a disciplinary body is able to second-guess the manner in which a presiding judge has supervised counsel's courtroom conduct. [20] The chill on defence lawyers from unrestrained review by a regulator will also severely damage the public interest.

19. Contrary to the submissions of the Attorney General of Saskatchewan, the need to protect judicial independence will not exclude law societies from regulating all forms of conduct of counsel in court. There will remain cases where presiding judges will ask regulators to do exactly that, or may implicitly do so, by citing counsel for contempt of court. Those cases will be exceptional – and this case is not one of them. As was stated by the Criminal Lawyers' Association of Ontario in its factum, "[r]emoved from the lawyer-client relationship, the pressure of the trial, the weight of a potential conviction, regulators cannot truly appreciate the real time judgment calls that defence counsel must make to protect their clients."[21]

20. Requiring law societies to give significant deference to the assessments of the presiding judge does not, as suggested by the Attorney General of Saskatchewan and The Federation of Law Societies of Canada, act as a barrier to the regulator's jurisdiction over a lawyer.[22] Instead, it requires law societies to treat the presiding judge's conduct of a trial and treatment of counsel with appropriate deference. This precondition respects the constitutionally-protected principle of

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[20] CBA, *supra* note 7, at para 25.
[21] Criminal Lawyers' Association Factum, at para 11.
[22] Attorney General of Saskatchewan Factum, at para 36; The Federation of Law Societies of Canada Factum, at para 22.

judicial independence and ensures that neither counsel nor judges "feel unduly constrained by the threat of subsequent disciplinary proceedings against counsel."[23]

21. The test laid out by Justice D.M. Brown takes all of these factors into account and gives effect to judicial independence, as it requires the law society to consider:[24]

> 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.

C. An extra word about *Jodoin* and *Cody*

22. Both *Jodoin*[25] and *Cody* were decided by this Court after Mr. Groia had filed his factum on this Appeal. Both decisions support his arguments. In *Jodoin*, this Court noted that courts have "the power to manage and control the proceedings conducted before them", including misconduct that brings the administration of justice into disrepute.[26] It came before this Court because costs had been awarded against a lawyer personally. In *Cody*, this Court emphasized the crucial role played by trial judges in addressing in-court conduct (such as an application alleging reasonable apprehension of bias against the trial judge which was found to be meritless, frivolous or illegitimate[27]) and underlined the high level of deference owed to such decisions:[28]

> The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" [cite omitted]. It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.

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[23] *Law Society of Upper Canada v Groia*, 2016 ONCA 471 at para 140.
[24] *Ibid* at para 319.
[25] *Québec (directeur des poursuites criminelles et pénales v Jodoin*, 2017 SCC 26 ["*Jodoin*"].
[26] *Jodoin*, para 16.
[27] *Cody*, para 41.
[28] *Cody*, para 31.

Similarly, in *Jodoin* this Court found that the Quebec Court of Appeal erred in not showing the required level of deference to the findings of the judge who imposed the cost sanctions against the lawyer at first instance.[29] The same high level of deference must also be shown by regulators when considering whether to proceed against a lawyer for in-court submissions absent a complaint from the presiding judge.

23. In *Jodoin*, this Court considered law society regulation of in-court conduct by stating "that there is nothing to prevent the law society from exercising in **parallel** its power to assess its members' conduct and impose appropriate sanctions."[30] In the context of assessing and sanctioning counsel's conduct, the use of the word "parallel" makes it clear that law society and court jurisdiction over in-court conduct should not be exercised in a contradictory manner, as it has been in this case, where no criticism was levelled at Mr. Groia by the presiding judge. Failing to defer to how the trial judge assessed Mr. Groia's submissions and making a finding of professional misconduct directly contrary to how the trial judge dealt with them, is not a power being exercised in "parallel".

D. Conclusion

24. The principles of judicial independence and freedom of expression require law societies to recognize and respect the presiding judge's power to manage and control the proceedings conducted before that judge. In determining whether to pursue disciplinary action against counsel for in-court submissions, law societies should give the presiding judge's assessment of those submissions significant deference, if not conclusive weight. In deciding whether to bring disciplinary action against counsel, law societies must at the very least respect judicial independence, the realities of the trial process and the right of clients to make full answer and zealous defence through their lawyers' submissions.

25. A correctness standard of review is the only appropriate standard to address these issues of central legal importance. Members of a law society panel do not have more, or even equal, expertise in assessing courtroom submissions when compared to the presiding judge hearing the trial itself. To suggest, as the Court of Appeal for Ontario did, that courts need to defer to the

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[29] *Jodoin*, paras 51-52.
[30] *Jodoin*, para 23 [Emphasis added].

LSUC assessment of Mr. Groia's conduct through a reasonableness standard of review runs the very real risk that right-thinking members of the public will conclude that it is now law society regulators who ultimately decide how justice is administered in Canadian courts. That is not only wrong constitutionally, it is also wrong in principle and contrary to the public interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August, 2017.

Earl A. Cherniak, Q.C.

Martin Mendelzon
Counsel for the Appellant, Joseph Peter Paul Groia

TABLE OF AUTHORITIES/STATUTORY PROVISIONS

PARAS.

1. *Canadian National Railway Co v McKercher*, 2013 SCC 39 14

2. *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 16

3. *Krieger v Law Society of Alberta*, [2002] 3 SCR 372 15

4. *Law Society of Upper Canada v Groia*, 2016 ONCA 471 .....20, 21

5. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 13

6. *Québec (directeur des poursuites criminelles et pénales v Jodoin*, 2017 SCC 26 .....22, 23

7. *R. v. Anderson*, 2014 SCC 41 .....8, 10

8. *R. v. Cody*, 2017 SCC 31 .....9, 22

LEGISLATION

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