S.C.C. File No. 37112

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

B E T W E E N:

JOSEPH PETER PAUL GROIA

APPELLANT
(Appellant)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT, THE LAW SOCIETY OF UPPER CANADA

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

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PART I – OVERVIEW AND SUMMARY OF FACTS

A. OVERVIEW

1. To practice law is a privilege. It is the privilege to act as a participant in the Canadian legal system.

2. Each participant in this system discharges her role in the pursuit of a common end: the resolution of disputes between citizens of a democracy, rationally and objectively in accordance with the rule of law. Each participant has unique powers and responsibilities that are essential to the effective and efficient administration of justice. This case concerns a lawyer's responsibilities.

3. The lawyer's role within the legal system is to firmly and resolutely advocate her client's cause within the limits of the law and to do so with "dignified restraint".[1] In doing so she seeks victory, in the words of Justice Middleton, "by Sword of the Knight, and not by the Dagger of the Assassin".[2] It is not the lawyer's role to secure an advantage for her client at all costs. There exist constraints on a lawyer's conduct because a system in which disputes are determined objectively, rationally, and fairly is the best means of doing justice.

4. In order to discharge her function, a lawyer must be independent. But independence does not mean freedom from oversight. The Law Society of Upper Canada (the "Law Society") has regulated the admission and conduct of lawyers in the Province of Ontario since 1792. It is the Law Society's duty to ensure that lawyers fulfill their responsibilities in order to ensure that the justice system is able to achieve its primary and fundamental purpose.

5. The Law Society's role is complementary but distinct from that of a trial judge. A trial judge is charged with ensuring a just and fair process. The trial judge is not tasked with

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[1] *Doré v. Barreau du Québec*, 2012 S.C.C. 12 *("Doré")* (CanLII) at para. 68

[2] John D. Arnup, *Middleton: The Beloved Judge*, (Toronto: Osgoode Society, 1988), Book of Authorities of the Law Society of Upper Canada ("Respondent's Authorities"), Tab 1

adjudicating issues of professional misconduct. Adding to the responsibility of the trial judge in an overburdened civil and criminal justice system will not enhance the adjudication process, but distract a trial judge from her primary purpose.

6. This case is about the discipline of a member of a self-regulated profession. Mr. Groia has been found by his peers to have engaged in professional misconduct. There is nothing extraordinary about that conclusion.

7. The Appellant asks this Court to overturn the finding of professional misconduct because he alleges it infringes the independence of the judiciary, interferes with freedom of expression, and compromises zealous advocacy. While these important principles are undeniably part of the constellation of values that comprise the Canadian legal system, there is no conflict between the duty of professionalism and these principles in this case.

8. The *Rules of Professional Conduct* requiring civility are found in the Model Code published by the Federation of Law Societies of Canada and have been adopted by the bodies that regulate lawyers in every jurisdiction in Canada.[3]

9. Much of the Appellant's argument relies on an untenable distinction between words spoken in court by a lawyer and those spoken out of court. Factually and legally, there is no basis to distinguish between the in-court and out-of-court conduct of lawyers. In court, where the administration of justice is most publicly displayed, a lawyer's duty of professionalism takes on greater, not lesser significance. The presence of a trial judge does not alter the standards expected of a lawyer.

10. Although trial judges have the responsibility and authority to control courtroom proceedings, Mr. Groia is wrong to assign the exclusive responsibility for the conduct of trial

[3] Federation of Law Societies of Canada, *Model Code of Professional Conduct*; Law Society of Upper Canada *Rules of Professional Conduct* (Current), Rules 2.1-1; 2.1-2; 5.1-1; 5.1-5

lawyers to them. The Law Society has a different but complementary role to play in regulating in court conduct in the public interest. Its efforts are undertaken in parallel with the court's exercise of the discretionary power to intervene to control its own process. Both the bench and bar discharge their duties, however, for fundamentally different purposes that are not mutually exclusive.

11. This is not a case about the independence of the judiciary. The recent decision of this Court in *Jodoin* has confirmed that the Law Society has the jurisdiction and the duty to regulate the profession.[4] A judge's ability to discharge her task of ensuring a fair process is in no way undermined by a Law Society's exercise of its parallel jurisdiction to discipline a lawyer.

12. Lawyers in the discharge of their professional duties do not enjoy an absolute freedom of speech. Personal attacks on an opponent or allegations of prosecutorial misconduct, made without a reasonable basis or in bad faith, are of low value and merit comparatively little protection in any freedom of expression analysis. Simply because words are spoken by a lawyer does not necessarily mean they are more important or worthy of greater constitutional protection. Limits on a lawyer's expression in the discharge of his profession have long been accepted as appropriate and necessary. Mr. Groia seeks to transform the freedom of speech into a right to pursue victory at all costs.

13. In this case, the public's legitimate expectation that lawyers will conduct themselves with professionalism requires that serious allegations of misconduct be made without the repetitive and personalized invective that characterized Mr. Groia's misconduct, and that they are made at an appropriate point in the proceeding when the submissions may lead to a remedy.

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[4] *Quebec (Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 (CanLII), at paras. 20-23

14. There is a long tradition of academic writing and jurisprudence articulating the importance of the duty of professionalism.[5] There is no conflict between zealous advocacy and civility.

15. The *Rules of Professional Conduct* require professionalism because uncivil conduct seriously undermines the effective administration of justice. The notion of professionalism implicitly urged on the Court by Mr. Groia would inevitably further undermine the public's perception of the legal profession, contribute to the culture of inefficiency and waste of scarce resources that this Court has sought to change, and ultimately undermine the legitimacy of the results of the adjudication of public and private disputes in courts and tribunals across Canada.

16. Mr. Groia's appeal should be dismissed with costs.

B. THE PROCEDURAL HISTORY

R. v. Felderhof

17. John Felderhof was a Bre-X officer and director. He was charged by an eight count information dated May 11, 1999 with violations of Sections 76 and 122 of the *Securities Act* for insider trading and authorizing misleading news releases about Bre-X. The trial proceeded in the Ontario Court of Justice before The Honourable Justice Peter Hryn.

18. The trial commenced on October 16, 2000 and occurred in two phases. Phase One concerns the events of the first 70 days, leading up to an application to the Superior Court for judicial review by the Crown. Phase Two of the trial describes the events from the resumption of

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[5] Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System", (2007) 11 *Canadian Criminal Law Review* 97; "Principles of Civility for Advocates", *The Advocates' Society: Institute for Civility & Professionalism*, (2009); G. Arthur Martin, "The Practice of Criminal law as a Career" (2002) reprinted in *Law Society of Upper Canada Gazette*, pp. 93-96, Respondent's Authorities, Tab 2; G. Arthur Martin, "*The Role and Responsibility of the Defence Advocate*" (1970), 12 C.L.Q., pp. 376-393, Respondent's Authorities, Tab 3; Austin M. Cooper, "The 'Good' Criminal Law Barrister", 23 *Advocates' Society Journal* No. 2, 7-12 (Autumn 2004)**;** The Honourable J.W. Morden, *Call to the Bar Address*, February 22, 2001, Respondent's Authorities, Tab 5

the trial after the Court of Appeal for Ontario dismissed a Crown appeal, until the acquittal of Mr. Felderhof. The events of Phase One were the subject of the Law Society's Notice of Application against Mr. Groia dated November 18, 2009.[6]

Pre-Trial Proceedings

19. The defence brought motions for particulars and additional disclosure before the trial began.[7] The conduct of the motions formed part of the allegations against Mr. Groia. Some of the correspondence and oral submissions of Mr. Groia dealing with the pretrial matters were highly critical of the prosecutors. For example, on October 4, 2000, Mr. Groia levelled the serious allegation that the prosecution had adopted an approach to win at any costs.[8] In his oral submissions, Mr. Groia made comments about the prosecutors' lack of diligence and attacked their integrity.[9]

The Constitutional Challenge to the Securities Act and Stinchcombe Motion

20. The trial commenced with a two-day constitutional challenge to s. 122 of the *Securities Act*. It was followed by a motion for a stay for failure to make disclosure as required under *Stinchcombe*, which was heard from Days 3-15 of the trial.[10]

21. The submissions on the *Stinchcombe* motion were punctuated by Mr. Groia's personal attacks on the prosecutors. He continued to assert that they were motivated by an animus towards Mr. Felderhof.[11] He said the prosecutors were determined to make Mr. Felderhof's

[6] Notice of Application dated November 18, 2009, Exhibit 1, Tab 1
[7] Law Society Hearing Panel Decision, dated June 28, 2012 ("Reasons for Decision of the Hearing Panel"), Appellant's Record, Vol. I of III, Tab 4 at para. 101, pp. 155-156
[8] Letter from Mr. Groia to Mr. Naster dated October 4, 2000, Exhibit 6-6, Tab 13, p. 300
[9] Exhibit 3-11, Day 11 at pp. 65-67
[10] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at para. 115, pp. 158-159
[11] Exhibit 3-11, Day 11 at pp. 66-69

ability to defend himself as difficult as possible and that they were too lazy to comply with their disclosure obligations.[12]

22. When the motion was argued, however, Mr. Groia conceded he did not have sufficient grounds to obtain a stay.[13] The motion was allowed, but only in so far as the Crown was ordered to generally comply with its obligations under *Stinchcombe*.[14] The Court was also critical of an OSC spokesperson who had made a statement in a media scrum at the start of the trial that the OSC's goal was "simply to seek a conviction" in the *Felderhof* matter.[15]

Openings and the First Witness

23. The prosecution made an opening statement on Day 16 of the trial. Its opening lasted eight days. Mr. Groia opened for the defence for two days.[16]

24. The case against Mr. Felderhof involved an extensive documentary record. There had been pretrial case management to assist in sorting out issues of admissibility of the documentary record, but at the time of the opening of trial, no agreement had been reached.[17]

25. The first witness called by the OSC was Mr. Francisco on Day 26 of trial. His evidence-in-chief lasted 20 trial days. Mr. Francisco was cross-examined for 10 days before he became ill. His evidence was not completed before the end of Phase One of the trial.[18]

26. Mr. Francisco was a witness who was used by both the prosecution and defence to try to prove documentary evidence. As a consequence, he was required to be present while lengthy

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[12] Exhibit 3-11, Day 11 at pp. 63-67, 79; Exhibit 3-16, Day 16 at pp. 42-43, 60, 66-67, 74-75
[13] Ruling of Hryn J. on the Stinchcombe Motion, Exhibit 3-16, Day 16 at p. 11, ln. 10-29
[14] *Ibid.*, at p. 30
[15] Exhibit 3-16, Day 16, at p. 6, ln. 23 - p. 7, ln. 19
[16] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at para. 119, p. 160
[17] Reasons for Decision of the Court of Appeal for Ontario, dated December 10, 2003 ("Reasons of the Court of Appeal in *R. v. Felderhof*"), Appellant's Record, Vol. I of III, Tab 3, at para. 75, p. 120; Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at para. 108, p. 157; Affidavit of Donald Park, sworn September 28, 1999, Exhibit 6-2, Tab 9A, pp. 35-282
[18] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at para. 9, p. 133

arguments were made about evidentiary disputes. Mr. Francisco had counsel who attended Court on several occasions in an effort to expedite the proceedings and minimize the harm to Mr. Francisco caused by the length of his evidence.[19]

27. During the course of Mr. Francisco's evidence Mr. Groia made repeated allegations of prosecutorial misconduct against the prosecutors, but when invited to bring a motion, declined to do so, acknowledging he could not succeed on the motion.[20] He also declined the prosecutors' request to stop making the allegations until he intended to move.[21]

28. Apart from a period between Day 38 and Day 43 when the Court heard a motion by the prosecution to admit documentary evidence on an omnibus basis,[22] Mr. Francisco's evidence continued until Day 65 of the trial when he fell ill.[23]

29. When Mr. Francisco was unable to appear on Day 67, the Court ordered the prosecution to call another witness, Dr. Kavanaugh, rather than adjourn to deal with the document issues.[24] Since Mr. Naster did not have the witness ready, Mr. Groia raised an issue of contempt of Court by the OSC.[25]

The Second Witness Appears: Day 69

30. Dr. Kavanaugh began his testimony in chief on Day 69 and 70 after which the trial was adjourned for a previously scheduled break. Before it resumed, the prosecution moved before the Superior Court for judicial review of Justice Hryn's decisions, including his refusal to control Mr. Groia's conduct.

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[19] Exhibit 3-58, Day 58 at p. 54, ln, 20 – p. 55, ln. 28; Exhibit 3-65, Day 65 at pp. 1-4
[20] Exhibit 3-54, Day 54 at pp. 35-37; Exhibit 3-58, Day 58 at p. 90, ln. 30 – p. 91, ln. 19
[21] Exhibit 3-54, Day 54 at p. 38, ln. 12 - p. 39, ln. 25
[22] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at para. 125, p. 161
[23] Exhibit 3-65, Day 65 at p. 1, ln. 1 – p. 4, ln. 9
[24] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at paras. 169-170, pp. 173-174
[25] Exhibit 3-68, Day 68 at p. 12, ln. 10, p. 13, ln. 2-5; p. 14, ln. 9-17

The Application for Judicial Review

31. The OSC brought an application for judicial review on April 17, 2001. Mr. Groia brought a counter-application on behalf of Mr. Felderhof, seeking the resumption of the trial.

32. One of the grounds relied upon by the OSC in the judicial review was the failure of Justice Hryn to control Mr. Groia's conduct. It was specifically argued that Mr. Groia's conduct violated the *Rules of Professional Conduct*.[26]

33. Counsel for the OSC and Mr. Felderhof filed lengthy written submissions, including on the issue of Mr. Groia's conduct.[27] The entire record of the trial proceedings was before Justice Campbell during the hearing of the Application. Justice Campbell released lengthy reasons for decision on October 31, 2002, dismissing the application and counter-application.[28]

34. Justice Campbell made findings about the correctness of legal positions argued by Mr. Groia, and his conduct in dealing with the Court and the prosecutors. Justice Campbell specifically found that Mr. Groia's conduct was improper and that he was wrong to attack the prosecutor's integrity.[29] He also found that Justice Hryn had demonstrated a "patient refusal to descend into the arena or to depart from his established position of judicial neutrality".[30]

35. Mr. Felderhof sought his costs on the application and on February 13, 2003, Justice Campbell released his reasons dealing with the issue.[31] Although Mr. Felderhof had been successful, Justice Campbell declined to award costs against the OSC on the basis that Mr. Groia's conduct had justified its decision to bring the application.[32]

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[26] Factum of the OSC, Exhibit 2, Tab 2 at paras. 685-705, pp. 625-648
[27] Additional Submissions of the Respondent, Exhibit 2, Tab 4; Factum of Mr. Felderhof, Exhibit 2, Tab 3
[28] Superior Court of Justice Reasons for Decision of Campbell J. dated October 31, 2002 ("Reasons for Decision of Campbell J."), Appellant's Record, Vol. I of III, Tab 1, pp. 1-84
[29] *Ibid.,* at paras. 268-273, pp. 77-80
[30] Reasons for Decision of Campbell J, Vol. I of III, Tab 1, para. 286, p. 84
[31] Superior Court of Justice Reasons on Costs of Campbell, J. dated February 13, 2003, ("Reasons for Decision of Campbell J. (Costs)"), Appellant's Record, Vol. I of III, Tab 2, pp. 85-90
[32] *Ibid.,* at paras. 16-18, p. 89

Appeal to the Court of Appeal for Ontario

36. The OSC appealed the Decision of Justice Campbell to the Court of Appeal for Ontario. Mr. Felderhof cross-appealed on the issue of costs.[33] Several parties were granted leave to intervene.

37. The appeal by the OSC raised the issue of proof of documentary evidence and Mr. Groia's conduct during Phase One.[34]

38. Mr. Groia appeared for Mr. Felderhof with Brian Greenspan who argued the main appeal. Stanley Fisher Q.C. argued the cross-appeal. Submissions filed on behalf of Mr. Felderhof denied the allegations of incivility, including in a lengthy separate appendix that addressed that issue directly.[35] Another appendix addressed the alleged incivility of the prosecutors.[36]

39. The appeal and cross-appeal were dismissed on December 10, 2003, by reasons of Justice Rosenberg, concurred in by Justices Doherty and Carthy.[37] The Court agreed with Justice Campbell that Mr. Groia's conduct had not deprived the Trial Judge of jurisdiction.[38]

40. Justice Rosenberg's reasons confirmed that Mr. Groia was wrong in law about a number of the legal submissions he made during the trial. These included the issue of the admissibility of documentary evidence,[39] the role of the prosecutors at trial,[40] his submissions that the failure of the prosecutors to lead certain evidence in chief was an abuse of process,[41] and the basis on which his allegations of prosecutorial misconduct were made.[42]

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[33] Factum of Mr. Felderhof on Appeal, Exhibit 2, Tab 14
[34] Factum of the OSC on Appeal, Exhibit 2, Tab 12; Excerpt Book of the OSC on Appeal, Exhibit 2, Tab 13
[35] Appendix 2 and 3 to the Factum of Mr. Felderhof on Appeal, Exhibit 2, Tab 14, pp. 1642-1650
[36] Appendix 1 to the Factum of Mr. Felderhof on Appeal, Exhibit 2, Tab 14, pp. 1637-1641
[37] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, pp. 91-130
[38] *Ibid.*, at para. 97, p. 128
[39] *Ibid.*, at paras. 7, 73, pp. 93; 119-120
[40] *Ibid.*, at para. 95, pp. 127-128
[41] *Ibid.*, at paras. 88, 93, pp. 125, 128
[42] *Ibid.*, at para. 8, 94

41. The Court was highly critical of Mr. Groia's conduct, including on a point that departed from Justice Campbell's reasons. Justice Rosenberg did not agree with Justice Campbell that Mr. Groia had the right to make the repeated allegations of prosecutorial misconduct[43] and that a prosecutor should have a thick skin.[44] The Court explained that Mr. Groia was not entitled to make the allegations of prosecutorial misconduct until he was prepared to bring his motion for abuse of process.[45]

42. Justice Rosenberg strongly endorsed the importance of civility in the conduct of litigation.[46] In particular, he noted the clear requirements of Rules 4 and 6 of the *Rules of Professional Conduct* and, while acknowledging that Mr. Groia had a right under some circumstances to bring motions for abuse of process and prosecutorial misconduct, criticized the manner in which Mr. Groia had threatened to do so:

> This has nothing to do with trials not being "tea parties." Every counsel and litigant has the right to expect that counsel will conduct themselves in accordance with The Law Society of Upper Canada, Rules of Professional Conduct. Those rules are crystal clear. Counsel are to treat witnesses, counsel and the Court with fairness, courtesy and respect. See Rules 4 and 6 and Commentaries. I have set out what seems to have been the genesis for the acrimony between counsel in this case. Even if Mr. Groia honestly believed that the prosecution tactics were excessive and could amount to an abuse of process, this did not give him licence for the kind of submissions he made in this case. As the application judge said, "[a]buse of process and prosecutorial misconduct … form part of the arsenal of defence tactics." But, motions based on abuse of process and prosecutorial misconduct can and should be conducted without the kind of rhetoric engaged in by defence counsel in this case.[47]

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[43] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at para. 88, p. 125
[44] *Ibid.*, at para. 93, p. 127
[45] *Ibid.*, at para. 76, pp. 120-121
[46] *Ibid.*, at para. 83, pp. 123-124
[47] *Ibid.*, at para. 96, p. 128

43. In dismissing Mr. Felderhof's cross-appeal on costs, the Court noted the need to discourage Mr. Groia's unacceptable conduct as a proper basis to deprive the successful party of costs.[48]

44. Following release of the decision of the Court of Appeal, the Second Phase of the trial of Mr. Felderhof started on March 30, 2004.[49]

The Proceeding before the Hearing Panel

45. At Mr. Groia's request, the Law Society delayed pursuing its investigation and prosecution until the trial in *R. v. Felderhof* had concluded.[50] The conduct application proceeded before a three member panel following unsuccessful attempts to resolve the matter, and the dismissal of Mr. Groia's motion to quash the Notice of Application.[51]

46. The Application before the Hearing Panel was heard over 19 days. The case for the Law Society took three days. The Hearing Panel then heard the evidence of eight defence witnesses, including an expert witness. It received 101 exhibits that included the transcripts from the first 71 days of trial in the matter of *R. v. Felderhof*, the material filed with the Superior Court of Justice and the Court of Appeal for Ontario, and the reasons for decision of those Courts.

47. Mr. Groia testified in chief for five days after calling the evidence of the following witnesses: Peter L. Roy (one of the lawyers involved in the Bre-X class proceedings on behalf of Nesbitt Burns and the Bank of Montreal); Mr. Felderhof; Nicholas A. Richter (one of Mr.

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[48] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at para. 100, pp. 129

[49] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4 at paras. 13-14, p. 134. Exhibit 14 before the Hearing Panel was the transcript of Day 71 of the Proceedings before Justice Peter Hryn.

[50] Letter from Mr. Groia to J. Cross, March 9, 2004, Exhibit 6-6, p. 325-328; Reasons for Decision in *R v Felderhof* released July 31, 2007

[51] Reasons for Decision of the Hearing Panel dated April 18, 2013 ("Reasons for Decision as to Penalty"), Appellant's Record, Vol. I of III, Tab 5 at para. 79, p. 201; *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2010 ONLSHP 78 (CanLII), Respondent's Record, Tab 1, pp. 1-15

Groia's associates during Phase One); Kevin Richard (another associate who worked with Mr. Groia during Phase One); Brian Greenspan; Stanley Fisher, Q.C.; and Professor Alice Woolley.[52]

48. The Hearing Panel found that Mr. Groia's attacks on the prosecution in *R. v. Felderhof* were unjustified and constituted conduct that fell below the standards of civility, courtesy, and good faith required by the *Rules of Professional Conduct*.[53]

49. The Hearing Panel found that Mr. Groia had not advanced his allegations in good faith:

> The hearing panel is drawn to the conclusion that Mr. Groia's motivation could only have been to disrupt the orderly proceeding of the trial by provoking the prosecution and creating the conditions for the trial to collapse under its own weight.[54]

50. The Hearing Panel ordered a penalty of a suspension of two months.[55] It also ordered that Mr. Groia pay $246,960.53 within the year for the Law Society's reasonable costs, disbursements, and HST.

C. DECISION OF THE APPEAL PANEL

51. The Appeal Panel concluded that the Hearing Panel's reasons reflected a misapplication of the doctrine of abuse of process that had caused the Hearing Panel to give the reasons of the reviewing Courts too much weight.[56] As a consequence, the Appeal Panel determined that the findings of fact made by the Hearing Panel were not entitled to deference.[57]

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[52] Evidence of Peter Roy, Hearing Transcript, August 8, 2011; Evidence of John Felderhof, Hearing Transcripts, August 8 and 9, 2011; Evidence of Nicholas Richter, Hearing Transcripts, August 9 and 10, 2011; Evidence of Kevin Richard, Hearing Transcript, August 10, 2011; Evidence of Brian Greenspan, Hearing Transcript, August 18, 2011; Evidence of Stanley Fisher, Hearing Transcript, August 19, 2011; Evidence of Professor Alice Woolley, Hearing Transcript, August 12, 2011.

[53] *Professional Conduct Handbook*, 1999, ss. 10, 10.7, 13, 14, 14.8; *Rules of Professional Conduct, 2000*, 4.01(1), 6, 6.03(1), 6.03(5)

[54] Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4, at para. 135, p. 165

[55] Reasons for Decision as to Penalty, Appellant's Record, Vol. I of III, Tab 5, at para. 75, p. 305

[56] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 201, p. 46

[57] *Ibid.*, at para. 237, p. 55

52. The Appeal Panel was invited by the parties to conduct a review of the evidence and draw its own conclusions, rather than send the matter back for re-hearing in the event it concluded that there was a legal error in the Hearing Panel's decision.[58] The Appeal Panel undertook an extensive review of the record on that basis.

53. The Appeal Panel affirmed the Hearing Panel's conclusions on the main issue of the proof of professional misconduct. [59] Since it had not heard the evidence, the Appeal Panel disregarded the Hearing Panel's negative findings about Mr. Groia's credibility and assumed instead that he was acting in good faith. Nonetheless, it found that taken as a whole Mr. Groia's submissions made as counsel in *R. v. Felderhof* were best characterized as "a relentless personal attack on the integrity and the *bona fides* of the prosecutors."[60] It concluded that, "nothing the prosecutors did justified this onslaught. These attacks on their integrity and *bona fides* did not have a reasonable basis."[61]

54. The assessment of Mr. Groia's conduct in Part VII of the Appeal Panel's reasons is comprehensive and provides numerous examples that justified the findings of professional misconduct. The excerpts from the trial transcript cited by the Appeal Panel in its reasons are not exhaustive. They were selected as a sample of Mr. Groia's submissions, which the Appeal Panel emphasized may not necessarily capture the full impact of Mr. Groia's misconduct: "it is difficult to convey the cumulative effect of the unabated repetition over the course of 10 hearing days of Mr. Groia's vehement and very lengthy attacks on the prosecution."[62]

55. Mr. Groia's submissions were analysed by the Appeal Panel, with reference to the testimony of Mr. Groia, his witnesses, and the submissions advanced on his behalf before the Hearing Panel and Appeal Panel.[63] Having exhaustively reviewed the entirety of the record of

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[58] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 238, pp. 55
[59] *Ibid.*, at para. 10, pp. 9
[60] *Ibid.*, at para. 318, pp. 76
[61] *Ibid.*, at para. 322, p. 77
[62] *Ibid.*, at para. 318, pp. 76
[63] Mr. Groia's testimony was often indistinguishable from the legal submissions advanced on his behalf.

the proceedings in the trial of *R. v. Felderhof* and before the Hearing Panel, the Appeal Panel concluded that Mr. Groia's submissions crossed the line as they included:

(a) repeated personal attacks on the integrity of the prosecutors; and

(b) repeated allegations of prosecutorial misconduct that did not have a reasonable basis and were not justified by the context.[64]

56. The Appeal Panel also found that Mr. Groia's conduct had a serious adverse impact on the trial by:

(a) causing numerous delays in the evidence of the trial's first witness;

(b) distracting the prosecutors from the presentation of the evidence; and

(c) forcing the Trial Judge to become involved in many unnecessary disputes.[65]

57. The Appeal Panel reduced the penalty from a two month suspension to one month and reduced the amount of costs awarded to the Law Society to account for the time it found had been spent on the abuse of process issue.[66]

D. REASONS OF THE DIVISIONAL COURT

58. The Divisional Court rejected Mr. Groia's argument that the Law Society did not have jurisdiction to regulate his conduct, and that certain preconditions proposed by Mr. Groia should constrain the exercise of the Law Society's statutory duty to investigate and regulate the

[64] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 10, pp. 9
[65] *Ibid.*, at para. 332, p. 79
[66] *Ibid*., at para. 12, p. 9; Law Society Appeal Panel Reasons for Decision on Costs dated March 21, 2014, Appellant's Record, Vol. II of III, Tab 9 , pp. 94-97

profession in the public interest. The Divisional Court also rejected Mr. Groia's argument that the regulation by the Law Society of the conduct in court interferes with judicial independence.[67]

59. The Divisional Court concluded that the decision of the Appeal Panel was entitled to a high degree of deference, and concluded that the decision of the Appeal Panel met the standard for reasonableness articulated in *Dunsmuir*.[68] Justice Nordheimer went on to add an additional element to the test the parties had agreed, before the Appeal Panel, should be applied to find incivility:

> In my view, however, there must be an additional element attached to the uncivil conduct, in order for it to rise to the level of professional misconduct. For uncivil conduct to rise to the level that would properly engage the disciplinary process, it must be conduct that, in addition to being uncivil, will also bring the administration of justice into dispute, or would have the tendency to do so.[69]

60. Although the Divisional Court expressed the requirements for professional misconduct in different terms, it concluded that the Appeal Panel had considered all of the relevant factors in reaching its decision.[70] The Divisional Court also upheld the penalty and costs decisions of the Appeal Panel, dismissing the appeal with costs.[71]

E. THE COURT OF APPEAL FOR ONTARIO

61. For reasons released June 16, 2016, Justice Cronk writing for a Majority of the Court affirmed the decision of the Appeal Panel in its entirety and dismissed the appeal.[72] In doing so

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[67] Divisional Court Reasons, Appellant's Record, Vol. II of III, Tab 11, at paras. 34-45, p. 110
[68] *Ibid.*, at para. 97, p. 128**;** *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9 (CanLII) at para. 54 *("Dunsmuir")*
[69] Divisional Court Reasons, Appellant's Record, Vol. II of III, Tab 11, at para. 75, pp. 121-122
[70] *Ibid.*, at para. 78, p. 123
[71] Divisional Court Reasons as to Costs dated March 16, 2015, Appellant's Record, Vol. II of III, Tab 13, at para. 5, p. 147
[72] Reasons for Decision of the Court of Appeal for Ontario dated June 14, 2016 ("ONCA Reasons"), Appellant's Record, Vol. III of III, Tab 15, at paras. 1-243, pp. 1-94 (the "Majority")

the Court departed from the Divisional Court and endorsed the contextual analysis adopted by the Appeal Panel in its assessment of Mr. Groia's conduct:

> 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 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.[73]

62. Writing in dissent, Justice D.M. Brown applied a standard of correctness and a different test for professional misconduct.[74] Justice Brown concluded that the courtroom context necessarily vitiated the deference otherwise shown to the exercise of the Law Society's statutory jurisdiction to inquire into the conduct of a licensee.

63. Although Justice Brown agreed that Mr. Groia had levelled improper personal attacks against the prosecutors in *R. v. Felderhof* and made allegations of prosecutorial misconduct without a reasonable foundation for doing so, he would have overturned the finding of misconduct on the basis of a modified test and his interpretation of the record.[75]

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[73] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 36, 112, 178-179; Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at paras. 235-236
[74] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 244-445, pp. 95-169
[75] *Ibid.*, at para. 414, pp. 95-169

F. THERE WAS NO REASONABLE BASIS FOR MR. GROIA'S ATTACKS

64. The Appellant's factum, however, repeats a narrative of Mr. Groia's conduct that seeks to resurrect the unsupportable submission that his attacks had a reasonable basis.[76] It relies on a narrative that is inconsistent with the record, and has been rejected at every stage of this proceeding. It was also the narrative that was rejected by Justice Campbell and the Court of Appeal for Ontario in the judicial review proceedings. Mr. Groia consistently minimizes or ignores the conduct that formed the core of the Law Society Tribunal's findings of professional misconduct against him by maintaining that he did in fact have a reasonable basis for his attacks, and that his conduct can be justified with reference to the Trial Judge.

The Pre-Trial Disclosure Motion

65. Mr. Groia has argued at every stage below, but not in this Court, that the submissions of the prosecutors on December 22, 1999 formed an important part of the foundation for his subsequent attacks.[77]

66. On December 22, 1999 the parties first appeared before Justice Hryn to address issues relating to the Crown's disclosure, namely whether documents disclosed in electronic format also had to be produced in hard copy.[78] As described by the Appeal Panel, at this appearance, "Mr. Groia began to develop a theme he would return to during the course of the trial: that the Crown was reneging on its commitments and intentionally trying to make it impossible for Mr. Felderhof to get a fair trial."[79] Indeed, even prior to this attendance, Mr. Groia had alleged an abuse of process by the prosecution in correspondence relating to the disclosure dispute.[80]

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[76] Appellant's Factum dated April 18, 2017, at para. 70
[77] Factum of Mr. Groia before the Court of Appeal dated July 31, 2015, at paras. 14-15, Respondent's Record, Tab 2
[78] Justice Hryn made the order for the OSC to provide the disclosure (otherwise produced on CD-ROM discs) in hard copy immediately after Mr. Naster agreed to do so (Exhibit 3-B, Trial Transcript, pp. 162-164)
[79] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 251, p. 59
[80] Letter from Mr. Groia to Mr. Naster dated October 15, 1999, Exhibit 6-2, Tab 9A, pp. 126-129

67. The Appeal Panel clearly understood, but rejected, Mr. Groia's position. It reasoned that Mr. Naster's submission that he was "duty bound" to put all relevant documentation before the Court had to be seen in the context of the discussion of the pre-trial disclosure issues, and "could not reasonably be taken as a 'promise' that the Crown would now consent to admissibility of all relevant documents by the defence, regardless of whether there was an evidentiary foundation."[81]

The Stinchcombe Motion

68. On September 29, 2000 the defence brought a *Stinchcombe* motion to stay the proceedings based on inadequate disclosure, returnable on the first day of trial, October 16, 2000 to be heard together with a *Charter* challenge to s. 122 of the *Securities Act*.[82]

69. The motion consumed the first 16 days of trial. The Appeal Panel found that Mr. Groia's submissions were punctuated by attacks on the prosecution's integrity and allegations of intentional unfairness towards Mr. Felderhof. The Appeal Panel concluded that there was no foundation for Mr. Groia's allegations in the record at this point in the proceedings.[83]

70. Given its prominence in Mr. Groia's narrative of Phase One, it must be said that the defence was not successful in its *Stinchombe* application in any meaningful way. The Appeal Panel noted that, on Day 11, Mr. Groia had conceded that the defence could not meet the high test for a stay.[84] Justice Hryn denied the stay and made a general order for the OSC to comply with its *Stinchcombe* obligations – those it already had. The finding that the OSC had not been duly diligent pertained to a narrow category of documents which, by Day 16 of trial, had been produced to the defence.[85] Justice Hryn did not find the failures to have been intentional, and

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[81] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at paras. 39, 305, pp. 15, 74
[82] *Ibid.*, at paras. 46, 49, p. 16
[83] *Ibid.*, at para. 266, p. 136
[84] *Ibid.*, at para. 51, p. 90; Exhibit 7-1, Transcript Brief, Tab 11, p. 70, ln. 10-14
[85] Justice Hryn found that the OSC had not been duly diligent in its handling of the disclosure of the 197 boxes of the Bre-X "Jakarta original" documents, which had been copied by PricewaterhouseCoopers ("PwC"). The Defence was invited to inspect the Jakarta originals after the OSC received them in early June, 2010 but it was not until October 16, 2000 that PwC responded to an April, 2000 letter from the OSC, indicating that it could not be sure that

found that, "given the very complex nature of this case and the approximately one million pieces of paper, these oversights are not extraordinary".[86] Nothing in this ruling invited or provided any support for Mr. Groia's subsequent personal attacks on the prosecutors.

The Documentary Record and Role of the Prosecutor

71. Much of Mr. Groia's uncivil conduct lies in the pursuit of a strategy based on erroneous legal positions concerning the admissibility of documents and the role of the prosecution. Apart from the legal positions he took, Mr. Groia was also unwilling to refrain from attacking his opponents in a personal way, even when asked directly by them to stop.[87]

72. As set out by the Appeal Panel, the admissibility and management of the documentary record became a central issue in the case. The OSC was required by Mr. Groia to prove every document it sought to admit on the basis of strict proof.[88] Despite the fact that no agreement had been reached on the admissibility of the documents contained in the binders prepared by the prosecution, the fact of their inclusion in the so-called "C binders" figured prominently in Mr. Groia's attacks. When the defence could not strictly prove a document it wished to admit into evidence and it had been contained in a "C binder" Mr. Groia's position was that it could be admitted into evidence because the prosecution had "vouched" for the documents as relevant and authentic.[89]

73. The Court of Appeal in *R. v. Felderhof* held that there was no legal basis for Mr. Groia's position on this issue.[90] The Appeal Panel agreed there was no legal basis for Mr. Groia's

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all original documents had been copied (and thus disclosed). As a result, certain over-sized and other documents had to be disclosed. This was done by Day 16 of Trial. (Exhibit 3-16, Day 16)

[86] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 53, p. 17

[87] Exhibit 7-2, Day 54, p. 38, ln. 12 - p. 39, ln. 21; Exhibit 7-2, Day 56, p. 20, ln. 7-15; Exhibit 7-2, Day 56, pp. 29, 57; Exhibit 7-2, Day 61, p. 48, ln. 25 – p. 51, ln. 16; Exhibit 7-2, Day 68, p. 2, ln. 4 – p. 9, ln. 14

[88] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 45, p. 16

[89] *Ibid*., at para. 279, pp. 139-140

[90] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at paras. 73-75, pp. 119-120; ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, paras. 200-201, p. 78

repeated attacks and found that its finding of misconduct was based on its finding that Mr. Groia attacked the prosecutors, and impugned their integrity, without a reasonable basis to do so.[91]

74. The Appeal Panel gave numerous examples of Mr. Groia's attacks on the prosecution as the trial wore on, in the context of disputes concerning the admissibility of three separate documents. In each instance, Mr. Groia sought to tender the document through Mr. Francisco who was not aware of the document and could not identify it.[92] In each instance, the evidence of Mr. Francisco was interrupted while lengthy arguments were made concerning the document's admissibility.[93] Excerpts from Mr. Groia's submissions concerning two of the documents are referred to by the Appeal Panel in its reasons.[94] The Appeal Panel found that Mr. Groia made further unfounded insults and comments impugning the prosecutor's integrity in relation to the third document.[95]

75. The Majority agreed with the Appeal Panel's conclusions on Mr. Groia's misconduct on Day 53 of the Felderhof trial.

> [202] There can be no doubt, in my opinion, that Mr. Groia's remarks on day 53 exceeded the boundaries of zealous advocacy and met the test for incivility. The content and tenor of his words directly impugned the honesty of the OSC prosecutors, their even-handedness and integrity as officers of the court, and their commitment to their fundamental duties, as 'ministers of justice', to trial fairness and impartiality. The Appeal Panel's findings regarding Mr. Groia's conduct on day 53 are far from unreasonable.[96]

76. The other foundation for Mr. Groia's attacks concerned his misapprehension of a prosecutor's obligations, which was found by the Court of Appeal in *R. v. Felderhof* to be

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[91] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 280, p. 66
[92] *Ibid*., at para. 63-69, pp. 19-20
[93] Exhibit 3-53, Day 53 at pp. 1-62
[94] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 284, pp. 67-68; See also (re: Placer Dome) Exhibit 3-52, Day 52 at pp. 110, 127,139, 140, 144; (re: J.P. Morgan) Exhibit 3-53, Day 53 at p. 39, 40-41, 50, 54-55, 129, 130.
[95] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 312, p. 75
[96] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 202, p. 78-79

"simply wrong".[97] In what the Appeal Panel described as "sarcastic and biting" submissions, key parts of which are excerpted in its reasons, Mr. Groia attacked the prosecutors on Day 54 for having a convict at all costs approach, and using a "conviction filter" with respect to the documents it chose to tender. [98] The Appeal Panel found that on Days 55-57 of the trial Mr. Groia "repeatedly cast aspersions on opposing counsel" when he had no foundation to do so.[99]

77. Mr. Groia's position that there was a reasonable basis for his attacks, must be assessed with reference to his acknowledgment to Justice Hryn on Day 58 that he did not "have a record yet that I would in good conscience as an advocate urge upon you as a sufficient basis today that their conduct meets the standard yet."[100] Mr. Groia invited the Crown to stipulate that they had engaged in misconduct. Not surprisingly, they declined to do so.[101] Day 58 ended with Mr. Groia continuing to make submissions attacking the prosecutor for failing to accept the defence position with respect to the admissibility of evidence through Mr. Francisco.[102]

78. Over the course of the remaining days of Phase One, one of the prosecutors repeatedly asked Mr. Groia to either seek a remedy based on his allegations of prosecutorial misconduct, or refrain from making those submissions.[103]

79. A consistent theme of Mr. Groia's position is that he had a reasonable basis to believe the prosecutors were acting unfairly, and that he was guided by the trial judge's rulings. A review of the record supports the Appeal Panel's conclusion that the prosecutors did nothing to justify Mr.

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[97] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at para. 79, p. 122
[98] Exhibit 3-54, Day 54 at pp. 4, 7, 8, 10, 11, 12, 25; Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at paras. 289, 290, 293, pp. 69-71;
[99] Exhibit 3-55, Day 55 at pp. 32, 36, 68, 102, 108, Exhibit 3-56, Day 56 at pp. 15, 16, 111; Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 299, pp. 72-73
[100] Exhibit 3-58, Day 58 at p. 90, ln. 31 – p. 91, ln. 3
[101] Exhibit 3-58, Day 58 at p. 90, ln. 26 – p. 91, ln. 5
[102] Exhibit 7-2, Tab 60, p. 61, ln. 5 – p. 63, ln. 13
[103] Exhibit 3-61, Day 61 at p. 48, ln. 25 – p. 51, ln. 16

Groia's misconduct, and that at no time did the Trial Judge endorse the attacks being levelled on the prosecution by Mr. Groia, or the manner in which he had chosen to do so.[104]

80. The Majority clearly and persuasively rejected the position taken by Mr. Groia in that Mr. Groia was following the Trial Judge's directions as to how to manage his unfounded attacks:

> [213] As I have attempted to emphasize, Mr. Groia began making allegations of deliberate prosecutorial misconduct on the first day of the trial. He repeatedly returned to these allegations throughout the proceeding. When he began his cross-examination of Mr. Francisco, on day 52, he forcefully renewed his attacks on the integrity of the OSC prosecutors. Nothing the trial judge did or said stopped Mr. Groia from repeatedly making unfounded allegations of prosecutorial misconduct or comments that impugned the integrity of the OSC prosecutors.
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> [214] Consider that, on day 61, the trial judge told Mr. Groia to refrain from making allegations unless they were based on a different factual foundation. On day 65, he intervened when Mr. Groia again began to allege prosecutorial misconduct. But even this did not deter Mr. Groia from making inappropriate and offensive remarks on day 66, set out above. By then, regrettably, the pattern had been set. [105] [emphasis added]

PART II – QUESTIONS IN ISSUE

81. The Law Society's position on the issues raised by Mr. Groia is as follows:

(a) The standard of review to be applied when reviewing disciplinary decisions of the Law Society Tribunal in this case should be the *Dunsmuir* reasonableness standard. There is no basis to apply a different standard to in-court conduct;

(b) The test for professional misconduct applied by the Appeal Panel on the specific issue raised in this case is correct, or at least is reasonable. The test applied is not inconsistent with the fulfillment of Mr. Groia's other duties including the duty of

[104] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 295, p. 71-72
[105] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 213-214, p. 85

zealous advocacy, does not unreasonably or disproportionately limit his expressive freedom, nor does it infringe upon the independence of the judiciary;

(c) The finding of misconduct in this case was both reasonable and correct. There was no reasonable basis for Mr. Groia's attacks or the manner in which they were made. Nor does the Trial Judge's conduct of the trial insulate Mr. Groia from a finding of misconduct.

PART III – STATEMENT OF ARGUMENT

A. A REASONABLENESS STANDARD OF REVIEW IS APPROPRIATE

82. The Majority's conclusion on the standard of review issue, applying the reasonableness standard of review and rejecting Mr. Groia's argument in favour of a correctness review, is fundamentally correct and should not be disturbed.[106]

83. The Law Society is a specialized administrative body that has been responsible for the regulation of the legal profession since 1792. Its interpretation of the *Act* is at the core of its mandate to regulate the legal profession in the public interest, is entitled to deference, and should be reviewed on a reasonableness standard. This includes balancing considerations of applicable *Charter* interests in adjudicating allegations of misconduct.[107]

84. The reasonableness standard of review of Law Society disciplinary decisions is well established in the jurisprudence, both prior and subsequent to this Court's landmark decision in *Dunsmuir*.[108]

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[106] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 58-59; pp. 24-25

[107] *Doré, supra* at paras. 54-58*; Trinity Western University v. The Law Society of Upper Canada,* 2016 ONCA 518, ("*Trinity Western*") (CanLII) at paras. 65-71; *Loyola High School v. Quebec (Attorney General),* 2015 S.C.C. 12 (CanLII) at paras. 34-42; *Mouvement laïque québécois v. Saguenay (City)*, 2015 S.C.C. 16 ("*Saguenay*") (CanLII) at paras. 45-48 and paras. 165-173 per Abella (dissent)

[108] *Law Society of New Brunswick v. Ryan*, 2003 S.C.C. 20 (CanLII) at para. 42 *("Ryan")*; *Doré, supra* at paras. 45,66, and 71; *Goldberg v. Law Society of British Columbia*, 2009 BCCA 147 ("*Goldberg*") (CanLII), at paras. 35-37

85. The presumptive application of the *Dunsmuir* reasonableness standard of review to decisions, such as this one, by a specialized statutory decision-maker interpreting and applying their home statutes on matters closely related to their function is also now well-established.[109] This principle has been applied, in *Green*, to rule-making undertaken by a law society in furtherance of its statutory mandate to regulate the profession in the public interest.[110]

86. As this Court held in *Ryan*, deference to a law society discipline decision is rooted, firstly, in their manifest expertise in conduct matters: "practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity".[111]

87. Moreover, as Justice Iacobucci held on behalf of the unanimous Court in *Ryan*, deference to disciplinary decisions is appropriate because it gives effect to the legislature's intention to protect the public interest by "allowing the legal profession to be self-regulating. The Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members."[112]

88. These underlying rationales identified in *Ryan* for giving deference to law society disciplinary decisions – giving effect to the legislature's intent, and gaining the benefit of its specialized expertise – were reiterated and amplified in *Dunsmuir*'s discussion about the animating purpose of the law of judicial review, as described in *Doré*:

> In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a

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[109] *Saguenay*, at para. 46; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII) at paras. 30, 34 and 39; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII) at para. 55; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII) at para. 25; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII) at para. 32

[110] *Green v. Law Society of Manitoba*, 2017 SCC 20, (CanLII) at paras. 20-25.

[111] *Ryan, supra.*, at para. 31, citing *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, (CanLII) at p. 890

[112] *Ryan, supra*, at para. 40

> monopoly on adjudication in the administrative state (para. 49).[113]

89. A reasonableness standard of review of law society disciplinary decisions is entirely appropriate, given that they are fundamentally fact-dependent and discretionary in nature.[114] Indeed, to the extent administrative decision-makers weigh the impact of *Charter* values and the fulfillment of their statutory mandate on the specific facts of the case, they are generally in the best position to do so.[115]

90. Mr. Groia is wrong to suggest that a reasonableness standard of review "creates an essentially unreviewable prosecutorial discretion".[116] This submission misstates the proper operation of a reasonableness review which is entirely capable - as it has been by the Majority – of being applied robustly in both its procedural and substantive components in the particular circumstances before the Court.[117] Courts' ability to intervene where there is "no line of analysis" which can support the decision reached is clearly preserved. Where the decision rests on a question of law which is "*both* of central importance to the legal system *and* outside the specialized area of expertise of the administrative decision maker" the court may intervene to correct an extricable question of law.[118] This of course will arise in respect of some disciplinary proceedings involving lawyers. An apt example is found in *Krieger* where the Court considered the scope of prosecutorial discretion immunity and its impact on the jurisdiction of a law society over Crown attorneys.[119]

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[113] *Doré, supra* at para. 30; see also *Stewart v. Elk Valley Coal Corp.,* 2017 SCC 30 (CanLII), at para. 19
[114] *Ibid*., at para. 66
[115] *Ibid*., at paras. 53-54; *Trinity Western, supra*, at para. 68; *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495, (CanLII) at paras. 49-75
[116] Appellant's Factum, at para. 52
[117] *Dunsmuir, supra* at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII) at paras. 11-17
[118] *Dunsmuir, supra* at para. 60 citing *Toronto (City) v. C.U.P.E.., Local 79* 2003 SCC 63 (CanLii) at para. 62
[119] *Krieger v. Law Society of Alberta,* 2002 SCC 65 (CanLII)

91. The Law Society's broad public interest mandate must be interpreted using a "broad and purposive approach".[120] Justice Cronk was correct to find that there is nothing in the language of the Law Society's enabling legislation, the general prohibition at s. 33 on engaging in "professional misconduct or conduct unbecoming a licensee", or its *Rules of Professional Conduct* which confines their application in respect of in-court conduct, as proposed by Mr. Groia.[121]

92. The Majority's analysis did not fail to consider the constitutional arguments raised by Mr. Groia, as alleged at paragraph 51 of his factum. It provided thorough, persuasive, and correct reasons for its rejection of each of the arguments put forward by Mr. Groia. The Majority concluded, in part:

> [63] I do not accept the argument that, in order to properly recognize the judiciary's constitutional responsibility to control what takes place in a courtroom, the correctness standard must apply where a discipline regulator deals with allegations of professional misconduct involving an advocate's conduct in a courtroom before a presiding judge. [….]
>
> [66] 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.
>
> [67] Finally, as I explain later in these reasons, the application of the reasonableness standard of review in cases like this one in no way intrudes on a presiding judge's authority to control the process in his or her courtroom. If anything, recognition of the complementary but differing roles of the courts and the Law Society regarding oversight of an advocate's in-court conduct frees the trial judge to focus on his or her central role – the determination of the issues before the court and the management of the trial.

93. In dissent, Justice D.M. Brown would have assigned primary responsibility for governing counsel's conduct to the trial judge to ensure that the Court had "the final word, on whether a

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[120] *Green*, *supra* at para. 28
[121] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 73-79, pp. 29-32

barrister's in-court conduct amounts to professional misconduct."[122] The position advanced by Brown J.A. fails to account for the emerging constitutional principle of the independence of the bar, and the legislature's choice to secure the protection of the public interest in this regard through self-regulation.[123]

94. The dissent's reasoning also, "rests on a misconception of the functions and responsibilities of trial judges and those of the Law Society as regulator of the legal profession in Ontario".[124] This Court has made a clear distinction between the purposes for which law societies and courts exercise their respective jurisdiction over counsel who appear before courts. They are purposes which are "not mutually exclusive".[125] As a majority of this Court held in *Jodoin*:

> [22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public. […] However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:
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> > The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted] (*R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331, at para. 35)
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> [23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before

[122] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para 313, p. 119
[123] P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (2007), Respondent's Authorities, Tab 4
[124] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 94, 97, pp. 38-40
[125] *Jodoin, supra* at paras. 22-23 citing *R .v. Cunningham,* 2010 SCC 10 (CanLII) at para. 35

> them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.[126]

95. The nature and purpose of the inquiries into counsel's conduct undertaken by courts and law societies, respectively, are not co-extensive. The Court's recent decisions concerning the analysis to be applied in assessing whether an accused's s. 11(b) *Charter* right to a trial within a reasonable time has been met, confirm these important differences.[127] In *Cody*, this Court held that where a court finds that the conduct of defence counsel should be held against the accused in the context of the s. 11(b) delay analysis required following the decision in *Jordan*, it need not be conduct which would be tantamount to a finding of professional misconduct.[128] Conversely, unprofessional conduct in court may have no bearing on the delay analysis, or on the fairness of the proceedings as a whole, but may nevertheless warrant the Law Society's attention as the regulator.

96. As the Court of Appeal in *Felderhof* and *Marchand* made clear, and the Appeal Panel held, courts do not decide what constitutes professional misconduct; law societies do.[129] This context requires respectful deference by the judiciary reviewing law society disciplinary decisions.

B. THE TEST FOR PROFESSIONAL MISCONDUCT ESTABLISHED BY THE APPEAL PANEL IS REASONABLE (AND CORRECT).

97. Mr. Groia argues that the regulation by the Law Society of in-court conduct, and in particular the contextual test applied by the Appeal Panel in his case, fails to adequately account for the independence of the judiciary, the expressive freedoms of lawyers exercising their duties

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[126] *Jodoin*, *supra*, at paras. 22-23
[127] *R. v. Jordan*, 2016 SCC 27 (CanLII)*; R. v. Cody*, 2017 SCC 31 (CanLII)
[128] *Cody*, *supra* at para. 35.
[129] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 199, p. 45; *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, (2000) 51 O.R. (3d) 97 (CA), 2000 CanLII 16946 (ON CA), at para. 141

in court on their client's behalf, and the impact as a zealous advocacy arising from a claimed conflict with the obligation of civility.

98. Each of these arguments is based on a false dichotomy and each was reasonably considered by the Appeal Panel and reasonably rejected.

99. Mr. Groia advances these arguments based on the delivery of a Notice of Constitutional Question for the first time, challenging the constitutionality of the *Law Society Act*. He should not be permitted to do so.[130] The evidence called before the Hearing Panel was restricted to the facts of this case and would have expanded significantly had such a challenge been brought when it was appropriate to do so.

The Trial Judge

100. Mr. Groia would assign exclusive responsibility to the regulation of in-court conduct to the presiding judge, and would have a constitutional restriction imposed on the Law Society's ability to respond to unprofessional in-court conduct. In this Court, he argues for narrow exceptions in which there is a judicial referral to the law society, a finding of contempt, or grave judicial misconduct as in *Cosgrove*.[131] His argument is wrong as a matter of law and policy.

101. The Appeal Panel was right to reject Mr. Groia's position and to conclude that the reaction of the trial judge although relevant, is not determinative.[132] Justice Cronk agreed with the Appeal Panel (and the Divisional Court) that while the views of the presiding judge are important, they are not "dispositive" of the misconduct inquiry.[133] Justice Cronk based her analysis in the differing roles, responsibilities, expertise and experience of the courts and the Law Society. As she put it, Mr. Groia's "unprecedented argument, if accepted, would sanction

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[130] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (CanLII) at paras. 98-113; *Guindon v. Canada*, 2015 SCC 41 (CanLII) at paras. 20-23; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (CanLII) at para. 48
[131] Appellant's Factum, at para. 57
[132] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, para. 225, p. 52
[133] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 105, p. 43

the abrogation by the Law Society of its responsibilities to the public and the legal profession, as expressly vested in it by the legislature."[134]

102. This conclusion is firmly grounded in the Law Society's duties and powers established in the *Act*, in particular ss. 33 and 49.3, which confers both the power to establish and enforce standards of professional conduct consistent with its duty to regulate all licensees in the public interest, and a broad discretion to interpret its own mandate.[135] It is also consistent with proper understanding of the respective roles and responsibilities of the independent bench and independent bar, as set out above.

103. The Appeal Panel's approach, as Justice Cronk noted, "frees the trial judge to focus on his or her central role – the determination of the issues before the court and the management of the trial".[136] She rejected the argument, repeated in this Court by Mr. Groia, that the Law Society's exercise of its disciplinary jurisdiction in the absence of a judicial complaint amounted to impermissible second-guessing of the trial judge's conduct of a trial:

> [106] [….] The Law Society's exercise of its jurisdiction over an advocate's in-court conduct is not an after-the-fact review of a trial judge's decisions about how to manage his or her courtroom. Rather, it is a review squarely focused on the advocate's conduct and whether that conduct falls below the minimum standards of professionalism for advocates as set by the Law Society. As the Law Society put it during oral argument, an advocate's professional obligations "do not bend" with the level or intensity of a particular presiding trial judge's response to incivility.
>
> [107] To conclude otherwise would render the regulation of professional conduct by lawyers subject to idiosyncratic variation, with attendant uncertainty and unpredictability. This would advance neither the public interest nor the interests of the legal profession. An advocate is not freed from the obligation to comply with the conditions of his or her licence to practise law

[134] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at paras. 101, 109, p. 45
[135] *Law Society Act*, R.S.O. 1990, c. L.8,(CanLII) ss. 4, 33-34, 49.3
[136] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 67, p. 28

> by the simple act of donning his or her gown and entering the fray of a courtroom.[137]

104. The Appeal Panel was also correct to reject the prerequisites to the exercise of the Law Society's authority proposed by Mr. Groia, and revisited in this Court:

> Simply stated, as a matter of public protection, it cannot be that the Law Society's disciplinary jurisdiction over unprofessional courtroom communications should only be exercised in those cases where both the trial judge and counsel misbehave.[138]

105. There will be cases where a presiding judge either determines not to or fails to address courtroom misconduct.[139] Mr. Groia's argument in this Court, and Justice Brown's dissent, both fail to allow for any regulatory response in such a case.

106. The *Code-Lesage* Report noted that one reason complaints had not been made by judges was doubt among the judiciary as to whether the Law Society would do anything to address the issue if a complaint was made.[140] Subsequently, protocols have been established in Ontario between the Law Society and many courts and administrative tribunals to facilitate this dialogue.[141]

107. Even if there had been judicial intervention, or a complaint to the law society, under the analysis proposed by Justice Brown and adopted by Mr. Groia, the misconduct analysis should further require that the conduct have undermined the fairness of the proceeding before any finding of professional misconduct could be made.[142] As a consequence, the Law Society could take no regulatory response. It could not, for example, initiate an investigation, address the

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[137] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, paras. 106-107, pp. 43-44.
[138] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, paras. 225-226, p. 44
[139] *Law Society of Upper Canada v. Murphy*, 2010 ONLSHP 23 at paras. 17, 19
[140] Hon. Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, at p. 141 (Chapter 6)
[141] Letters to Chief Justice Heather Forster Smith, Chief Justice Warren K. Winkler from Malcolm Heins dated March 31, 2010; Tribunal Complaints Protocol, December 2012
[142] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, at para. 432, p. 165

matter in an informal regulatory meeting and mentorship; nor, if authorized to do so, seek a finding of professional misconduct and appropriate penalty.[143]

108. It is not in the public interest to permit the regulation of in-court conduct to be contingent on the extent to which counsel may be able to conduct themselves unprofessionally and escape judicial intervention. Mr. Groia's argument that this result is constitutionally required has no basis, and must be firmly rejected.

109. Professional standards are not informed by what a lawyer can get away with in a race to the bottom. Rather, it is the advocate's duty to ensure his conduct lives up to the dignity of the office. It is the advocate's duty to strike to raise, not lower, the bar.

Expressive Freedoms

110. In *Doré*, a unanimous Court recognized that a lawyer's right of free expression was limited by the legitimate public expectation that they will behave with civility.[144] This Court held that disciplinary bodies must demonstrate that they have given due regard to the importance of the expressive rights at issue, in that they have proportionately balanced the expressive rights at issue with the statutory objective.[145]

111. In *Doré*, this Court found that Mr. Doré's personal right to free expression was reasonably circumscribed. This approach has been adopted by Courts of Appeal across Canada in considering similar challenges to law societies' discipline decisions.[146]

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[143] Malcolm Mercer, "Disclosure and Investigated Complaints", www.slaw.ca, April 28, 2017, discussing the Law Society's "2016 End-of-Year Report for the Professional Regulation Division" and "Analysis of Complaints in Professional Regulation in 2016".
[144] *Doré*, *supra* at para. 71
[145] *Ibid.*, at para. 66
[146] *Drolet-Savoie c. Tribunal des professions*, 2017 QCCA 842 (CanLII), paras. 38, 42-46, 53; *Foo v. Law Society of British Columbia*, 2017 BCCA 151 (CanLII), at paras. 42-45; *Goldberg, supra*, at paras. 54-59

112. In evaluating the extent to which Mr. Groia's expressive freedoms are actually engaged, and thus the reasonableness of the Appeal Panel's balancing under the *Doré* framework, this Court may be informed by its s. 2(b) jurisprudence in which the nature of the expressive activity at issue is an important part of the analysis. Where the speech is of "low value", the level of constitutional protection is attenuated, in that it will be more easily outweighed by the statutory objective of the legislation restricting the expression at issue.[147]

113. Mr. Groia's unfounded attacks on the prosecution fall into this category. That is, most of what Mr. Groia seeks to protect is speech by a lawyer in the discharge of their duties that is characterized by a "deliberate consistent pattern of rude, improper, or disruptive conduct" and by submissions that impugn an opponent's integrity and make allegations of prosecutorial misconduct without a reasonable basis for doing so.

114. This type of speech does not advance the three underlying rationales of s. 2(b) of the *Charter*, and indeed can significantly harm their realization and protection through a justice system that must be seen to resolve disputes in a fair and reasoned manner in accordance with the law. Unprofessional attacks like those sought to be protected by Mr. Groia undermine the truth-seeking function of a trial by distracting the court and the lawyer's opponents from their work.[148]

115. In *R. v. Felderhof,* Justice Rosenberg offered a compelling articulation of the public interest in the Law Society's regulation of the conduct at issue:

> … [C]onduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of

[147] *R. v. Sharpe*, 2001 SCC 2 (CanLII) at para. 181; *R. v. Lucas*, [1998] 1 S.C.R. 439 (CanLII) at paras. 93-96; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 (CanLII) at paras. 112-114, 145

[148] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, para. 332, p. 79

> criminal justice and thereby undermines the legitimacy of the results of the adjudication.[149]

116. The individual fulfillment of a lawyer in their submissions in court is necessarily circumscribed by their obligation of professionalism and by their duties to the court, to their clients, and to the other participants in the justice system. All lawyers, including defence counsel, are subject to reasonable limits restricting the scope of the exercise of their expressive freedoms in court. These include the requirement that counsel possess a good faith basis for putting unproven facts to a witness in cross-examination, that they not intentionally mislead the court and that they not lead an affirmative defence which is inconsistent with admissions made to counsel by the accused.[150]

117. In this Court, Mr. Groia articulates the expressive interest at stake as that of the client. The finding in this case does not substantively preclude the client from raising any legitimate argument during the course of the proceeding. The limit constrains how and when the lawyer advances those arguments, and to the extent it prohibits unsubstantiated personal attacks, it does so in order to further the ultimate purpose of the administration of justice.

118. Certain aspects of the type of expression at issue do require careful protection in order to foster truth-seeking and self-government, both rationales underlying s. 2(b) of the *Charter*. In particular, the freedom to make allegations of prosecutorial misconduct and abuse of process and to have them adjudicated fairly by a court, and the freedom to be found to be incorrect by the court without fear of professional consequence are important to protect. Similarly, the Appeal Panel's test and Majority each specifically allowed for an "advocate's isolated lapse of judgment or occasional disparaging comment".[151]

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[149] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at para. 83, p. 151
[150] *R. v. Lyttle*, 2004 SCC 5, at paras. 43-44 and 48
[151] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at paras. 233, 241, pp. 54, 56; ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 141, p. 56

119. But that is not this case. As Justice Rosenberg's synthesis of the substantive legal, procedural, and ethical considerations bearing on defence counsel, then and now, demonstrates, allegations of such a serious nature must be advanced at the appropriate time in the proceedings, and then only in an appropriate manner:

> The defence has the right to make allegations of abuse of process and prosecutorial misconduct, but only where those allegations have some foundation in the record, only where there is some possibility that the allegations will lead to a remedy and only at the appropriate time in the proceedings. See *R. v. Kutynec* (1992), 7 O.R. (3d) 277, 70 C.C.C. (3d) 289 (C.A.) The trial judge was not obliged to repeatedly listen to those allegations outside of a specific Charter or abuse of process motion. Thus, I do not agree that the trial judge was obliged to listen to Mr. Groia's complaints every time he was moved to make one. The trial judge should have instructed Mr. Groia to stop and to reserve his concerns about the conduct of the prosecution until the time came to make the abuse of process motion. Even when that time came, defence counsel is obliged to make submissions without the rhetorical excess and invective that Mr. Groia sometimes employed. [….]
>
> Even if Mr. Groia honestly believed that the prosecution tactics were excessive and could amount to an abuse of process, this did not give him licence for the kind of submissions he made in this case. As the application judge said [at para. 267], "[a]buse of process and prosecutorial misconduct . . . form part of the arsenal of defence tactics." But, motions based on abuse of process and prosecutorial misconduct can and should be conducted without the kind of rhetoric engaged in by defence counsel in this case.[152]

120. As to the Appeal Panel's treatment of the freedom of expression issue as such, the Majority concluded:

> [160] The Appeal Panel might have said more on this issue. Nonetheless, when its reasons are read as a whole, as they must be, I am satisfied that it reasonably balanced Mr. Groia's expressive rights and those of Mr. Felderhof with the key objective under the Act and the Conduct Rules of ensuring professionalism by advocates, including courtesy, civility and zealous advocacy, in the public interest. As the Supreme Court held in *Doré*, at para. 68, lawyers "not only have a right to speak

[152] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at paras. 88, 96, pp. 125, 128

> their minds freely, they arguably have a duty to do so". However, in fulfilling that duty, advocates "are constrained by their profession to do so with dignified restraint". These comments are apposite here.[153]

121. In these circumstances, there can be no doubt that the contextual test fashioned by the Appeal Panel reasonably and proportionately accounts for any expressive freedom weighed against the statutory objective of regulating the profession in the public interest.

Zealous Advocacy

122. The duty of zealous advocacy, or the duty of commitment to the client's cause, has never meant that the scope of a lawyers' expression on their client's behalf in court is unlimited. The majority of the Court of Appeal, together with the dissent, confirmed that the importance of the duty of civility to the public interest is not in doubt:

> Civility is not merely aspirational. It is a codified duty of professional conduct enshrined in the Conduct Rules and, as repeatedly confirmed by the courts, an essential pillar of the effective functioning of the administration of justice. In Ontario, at least, its necessity and importance in our legal system is now settled law. [154]

123. The Appeal Panel's contextual analysis reasonably accounts for the concerns regarding any "zealous advocacy chill" raised by Mr. Groia throughout. Its contextual test was properly shown deference by the Majority in that it reasonably accounted for the *Charter* values raised by Mr. Groia. These concerns were reasonably considered as part of the Appeal Panel's consideration of the 'zealous advocacy' issue. [155] The Appeal Panel concluded:

> …[Z]ealous advocacy did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct. Zealous advocacy did not dictate that Mr. Groia improperly impugn the integrity of his opponents. Zealous advocacy did not require Mr.

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[153] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 160, p. 63
[154] *Ibid.*, at para. 119, p. 268
[155] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 233, p. 54

> Groia to frequently resort to invective in describing opponents who were trying to do their jobs.[156]

124. Justice Cronk similarly concluded that Mr. Groia's argument misconceived the characterization of the content of the duty of zealous advocacy:

> [131] 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. This premise misconceives the advocate's duty of professionalism.
>
> [132] The duty of zealous advocacy must be jealously protected and broadly construed. But it is not absolute and must not be abused. Nor do the Conduct Rules assign it paramountcy. The Conduct Rules provide for a constellation of obligations that together make up the overarching duty of professionalism that conditions the privilege of practising law in Ontario.

125. The duty of civility is contained in s. 5.1-2 of the Model Code of the Federation of law Societies of Canada.[157] It has been adopted in the professional code of conduct in every jurisdiction in Canada as an important component of the regulation of the profession. Nothing in the rules requiring professionalism precludes a lawyer from advancing legitimate arguments. Zealous advocacy does not include unsupported attacks on opposing counsel.

C. THE FINDING OF MISCONDUCT WAS REASONABLE

126. The Majority found the Appeal Panel's application of this test, its central findings as to liability, were both reasonable and correct, and should be upheld:

> Having reviewed the relevant parts of the record, described in part above, I conclude that [the Appeal Panel's] critical findings were amply justified. Mr. Groia's remarks on the days in question, quoted above, were uncivil and discourteous and exceeded even the most broadly defined reasonable boundaries of zealous advocacy. They struck, without a reasonable basis, at the heart of the OSC prosecutors' duties to the court, to opposing

[156] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 328, p. 78
[157] *Model Code of Professional Conduct, supra.* s. 5.1-2.

> counsel and to the administration of justice – in short, at their most basic duties as 'ministers of justice' and officers of the court. They also affected the orderly progression of the trial and the dignity of the proceedings and contributed to the delay in the completion of the testimony of the first witness at trial. […]
>
> I have no doubt that what occurred in this case, if viewed by an informed and objective member of the public, could only have diminished confidence in the administration of justice.[158]

127. The Appeal Panel's decision is within the range of possible, acceptable outcomes and should be upheld as reasonable under the *Dunsmuir*.

128. The Appeal Panel's decision is entirely consistent with those of the reviewing Courts in *R. v. Felderhof,* who considered the very same record as the Hearing Panel and Appeal Panel considered in this proceeding. As Justice Campbell noted, during the hearing of the OSC's application the conduct of counsel was "vigorously attacked and vigorously defended".[159]

129. Given the prominence of Mr. Groia's conduct in the grounds relied upon by the OSC in the certiorari application, the issues considered by the Courts were at a minimum related to those considered by the Appeal Panel. The finding of Justice Campbell that Mr. Groia's conduct was "appallingly unrestrained and on occasion unprofessional" was essential to the decision denying Mr. Felderhof his costs.[160] Justice Rosenberg confirmed Justice Campbell's decision concerning Mr. Groia's conduct: "Mr. Groia's rhetoric was improper. The application judge so found and I agree."[161]

130. These reasons were properly admitted in evidence under Rule 24.08(2) of the Law Society's *Rules of Practice and Procedure*, and at common law.[162] Although the Majority found that it was not necessary to resolve the issue of the permissible use of the reasons in evidence, it

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[158] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 211-212, pp. 84-85
[159] Reasons for Decision of Campbell J. (Costs), Appellant's Record, Vol. I of III, Tab 2, at paras. 16 - 18, 21, pp. 89-90
[160] *Ibid.*, at para. 18, p. 88; Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at para. 194, pp. 44-45
[161] Decision of the Court of Appeal in *R. v. Felderhof*, Appellant's Record, Vol. I of III, Tab 3, at para. 80, p. 80
[162] Rule 24.08(2), Law Society Tribunal *Rules of Practice and Procedure*

specifically rejected the "troubling" submission, repeated at paragraph 85 of the Appellant's factum, that Justice Rosenberg's reasons on the civility issue in *R. v. Felderhof* were 'merely obiter', confirming the obvious point that they were in fact "foundational to its decision" and should not be discounted.[163]

131. Mr. Groia had every opportunity to enlarge the record before the Hearing Panel to contradict or lessen the weight to be given to the finding that the OSC's application was reasonable due to Mr. Groia's extreme conduct.[164] In their evidence before the Hearing Panel, Mr. Groia and his witnesses emphasized a distinction between defending Mr. Groia's conduct in the context of the Application where the issue was the Trial Judge's jurisdiction, and the defence of his conduct before the Hearing Panel where the issue was Mr. Groia's professional conduct. But there is no support for the argument that there was any actual difference and the Hearing Panel and Appeal Panel rejected the argument.[165]

132. A lawyer facing findings of a court or tribunal in subsequent conduct proceedings should be expected to make a specific and believable answer in order to overcome the weight assigned to such findings.[166] Mr. Groia's evidence before the Hearing Panel was of no assistance to him, and demonstrated a refusal even at that time to accept the conclusions of the reviewing Courts.[167]

133. On this evidence, and having regard to the entirety of the record before the Hearing Panel and Appeal Panel, the Majority's conclusion should not be disturbed:

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[163] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 116
[164] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, at paras. 7, 48
[165] Evidence of Joseph Groia, Hearing Transcript, February 6, 2012, p. 140, ln. 13 – p. 143, ln. 8 (re: issue before Justice Campbell); p. 146, ln. 18 – p. 149, ln. 10 (re: explanation for how not in his client's interest to defend his conduct); Reasons for Decision of the Hearing Panel, Appellant's Record, Vol. I of III, Tab 4, at para. 94, p. 154; Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at para. 216, pp. 44-45
[166] *Opara v. Law Society of Upper Canada*, 2015 ONSC 3348, at para. 31.
[167] Evidence of Joseph Groia, Hearing Transcript, February 2, 2012, pp. 22 - 25 (re: "seek a conviction"); Evidence of Joseph Groia, Hearing Transcript, February 6, 2012, p. 52, ln. 23 – p. 53, ln. 6 (re: "conviction filter"); Evidence of Joseph Groia, Hearing Transcript, January 30, 2012, pp. 170-171 (re: theory of admissibility); Evidence of Joseph Groia, Hearing Transcript, February 7, 2012, p. 132, ln. 11 – p. 133, ln. 25 (re: distinction between C and D binders);

> The requirement of professionalism for lawyers, both inside and outside a courtroom, including zealous advocacy accompanied by courtesy, civility and good faith dealings, secures the nobility of the profession in which lawyers in this province are privileged to practise. The Appeal Panel concluded that this requirement was breached in this case. This conclusion, in my opinion, was both reasonable and correct.[168]

PART IV – SUBMISSION CONCERNING COSTS

134. The Law Society requests its costs in this appeal.

PART V – ORDER REQUESTED

135. The Law Society respectfully requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF JUNE, 2017.

J. Thomas Curry

Jaan Lilles

Andrew M. Porter

Lawyers for the Respondent, The Law Society of Upper Canada

[168] ONCA Reasons, Appellant's Record, Vol. III of III, Tab 15, para. 241, p. 93

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE

Case Authority	***Para(s)***
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Ernst v. Alberta Energy Regulator, 2017 SCC 1 at paras. 98-113	99
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Goldberg v. Law Society of British Columbia, 2009 BCCA 147 (CanLII), at paras. 35-37, 54-59	84, 111
Green v. Law Society of Manitoba, 2017 SCC 20 (CanLII) at paras. 20-25, 28	85, 91
Guindon v Canada, 2015 SCC 41 (CanLII) at paras. 20-23	99
Krieger v. Law Society of Alberta, 2002 SCC 65 (CanLII)	90
Law Society of New Brunswick v. Ryan, 2003 SCC 20 (CanLII) at paras. 31, 40 and 42	84, 86 and 87

LEGISLATION

Source	*Para(s)*
Law Society Act, R.S.O. 1990, c. L. 8, (CanLII) ss. 4, 33-34, 49.3	102
Professional Conduct Handbook, 1999, Rules. 10, 10.7, 13, 14, 14.8 10 When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law; 10.7 At all times the lawyer should be courteous and civil to the Court and to those engaged on the other side. Legal contempt of Court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline. … 13 The lawyer should assist in maintaining the integrity of the profession and should participate in its activities. … 14 The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith. Public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing n the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the Rule will impair the ability of lawyers to perform their function properly. 14.8 The lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.	48
Rules of Professional Conduct, 2000, 4.01(1), 6, 6.03(1), 6.03(5)	48
Rules of Professional Conduct (Current) Rule 2.1-1, 2.1-2, 5.1-1, 5.1-5	10
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Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System", (2007) 11 *Canadian Criminal Law Review* 97, available at http://canadiancriminallaw.com/Faculty%20of%20Law/comm/Counsels%20Duty%20of%20Civility.pdf	14
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G. Arthur Martin, "The Practice of Criminal law as a Career" reprinted in *Law Society of Upper Canada* Gazette (2002), pp. 93-96	14
G. Arthur Martin, "*The Role and Responsibility of the Defence Advocate*" (1970), 12 C.L.Q., pp. 376-393	14

Malcolm Mercer, Disclosure and Investigated Complaints, April 28, 2017, available at http://www.slaw.ca/2017/04/28/disclosure-and-investigated-complaints	107
P. J. Monahan. "The Independence of the Bar as a Constitutional Principle in Canada" in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (2007), pp. 117-149	93
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"Principles of Civility for Advocates", *The Advocates' Society: Institute for Civility & Professionalism*, (2009), available at http://www.advocates.ca/TAS/Advocacy/Institute_of_Civility___Professionalism/TAS/Advocacy_Pages/Institute_for_Civility_and_Professionalism.aspx?hkey=b9a78b4c-a60c-4d85-9aad-0d5fdba09493	14
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JOSEPH PETER PAUL GROIA
Appellant (Appellant)

-and-

THE LAW SOCIETY OF UPPER CANADA
Respondent (Respondent)

S.C.C. File No. 37112

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

FACTUM OF THE RESPONDENT, THE LAW SOCIETY OF UPPER CANADA

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