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

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

B E T W E E N:

JOSEPH PETER PAUL GROIA

APPELLANT
(Appellant)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

- and –

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PART I – OVERVIEW

1. The Law Society makes this in reply to the submissions of the Interveners with respect to the following issues:

(a) whether the Constitutional Question raised by Mr. Groia should be answered;

(b) the appropriate standard of review;

(c) the analysis to be applied in adjudicating allegations of professional misconduct; and

(d) the admissibility and use of reasons for decision in Law Society conduct proceedings.

PART II – ARGUMENT

The Constitutional Question

2. The Law Society agrees with the submissions of the Director of Public Prosecutions (the "DPP") that this Court should decline to consider the constitutional question raised by Mr. Groia as it is not necessary to decide, and in any event does not properly arise on this record.

3. The form of the constitutional question stated by Mr. Groia illustrates that it is not the validity of the *Law Society Act* that he seeks to challenge, but rather its application to the facts of his case.

4. The nature of the determination of whether a lawyer has engaged in professional misconduct contrary to s. 33 of the *Law Society Act* does not lend itself to a traditional s. 1 analysis and favours the approach which obtains the benefit of the "rich source of thought and

experience about law and government" inherent in the type of specialized administrative decision-making at issue in this case.[1]

5. In any event, the Law Society agrees with the Attorney General for Saskatchewan, DPP, Barreau du Quebec, Ontario Crown Attorneys' Association ("OCAA"), and Federation of Law Societies that there is no infringement of the independence of the judiciary arising from a law societies' regulation of in-court conduct, given their differing roles and the "primacy and breadth" of law societies' jurisdiction, recognized in *Canadian National Railway Co. v. McKercher LLP*, and *Law Society of British Columbia v. Mangat*.[2]

The Applicable Standard of Review

6. The Law Society agrees with the submissions of the OCAA, Federation of Law Societies of Canada, Barreau du Quebec, DPP, and Law Society Tribunal that the applicable standard of review is reasonableness.

7. In particular, the Law Society adopts the submission of the Federation of Law Societies that, "law societies have developed a particular expertise in respect of the conduct of members of the profession that relates to the protection of the public interest."[3]

8. This point is also made succinctly by the Law Society Tribunal, at paragraph 16, that the presence of at least two practicing lawyers on every panel hearing a conduct application ensures

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[1] *Doré v. Barreau du Quebec*, 2012 SCC 12, citing Prof. John Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall L.J.* 51, at p. 73, at paras 27, 34.

[2] Factum of the Federation of Law Societies, at paras. 14-25; Factum of the Attorney General for Saskatchewan at paras. 8-29; Factum of the Director of Public Prosecutions, at paras. 57-64; Factum of Barreau du Quebec, at paras. 11-18; Factum of the Ontario Crown Attorneys' Association, at paras. 6-9; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at paras. 13-16; *Law Society of British Columbia v. Mangat* [2001] 3 SCR 113 at paras. 39-46

[3] Factum of the Federation of Law Societies, at paras. 23-24.

that "the day-to-day, in the trenches, reality of legal practice is brought to bear at every hearing." The composition of the Appeal Panel in this case illustrates the significant expertise of the decision-maker under review. The Law Society Tribunal's interpretation and application of the Law Society's conduct rules, in the more than one hundred conduct applications filed with it annually, is very much "at the very heart of the Tribunal's expertise, its very *raison d'etre*."[4]

9. The only Interveners who directly advocate for the application of a correctness review are the British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society ("BCCLA/ICDA"). They assert a need for uniformity in the test to be applied to in-court misconduct across jurisdictions that rebuts the presumption of reasonableness which would normally apply to the Law Society's interpretation of its home statute.[5]

10. The Law Society makes the following points in reply to this submission. First, the need for uniformity is not so pressing in our federal system as to obviate the deference that is otherwise shown. There may well be significant variations in regulatory regimes arising from each province's exercise of jurisdiction over property and civil rights, as there are in the procedural and substantive contexts in which lawyers discharge their professional responsibilities in each jurisdiction. As a matter of principle, it would be constitutionally permissible for provincial regulators to draft different professional conduct requirements or interpret the same or similar requirements differently. From the perspective of the law of judicial review, some lack of uniformity may therefore be both necessary and appropriate as a function of our federalist system of government.

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[4] Factum of the Law Society Tribunal, at paras. 19, 23.
[5] Factum of the British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society, at paras 6-8.

11. Second, and in any event, any need for uniformity arising from the agreements entered into between provinces has been addressed by the widespread adoption of the Federation of Law Societies' *Model Code*.[6]

12. Finally, the context-specific nature of the analysis to be applied in adjudicating allegations of professional misconduct does not disclose a discrete question of law which has the ability to subvert the legal system as a whole, necessitating a correctness review.

The Analysis to be Applied

13. The Law Society agrees with the Crown Attorneys' Association, and Ontario Trial Lawyers Association that the analysis applied by the Appeal Panel was reasonable. The Law Society further agrees with the Federation of Law Societies that it is not necessary to provide a full definition of the "civility" standard in this appeal.[7] The contextual and fact-specific analysis endorsed by the Appeal Panel is necessary to regulate professionalism in the varying circumstances encountered by the Law Society fulfilling its statutory duty to regulate the profession in the public interest, and is tailored to the facts of the case.

14. The Appeal Panel clearly set out an analysis which takes into account all the "dynamics, complexity and particular burdens and stakes of the trial."[8] Its application of this analysis on the facts, led it to find that Mr. Groia committed acts of professional misconduct when he repeatedly attacked the integrity of opposing counsel without a reasonable basis to do so.

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[6] Factum of the Federation of Law Societies, paras.5-7, and Appendix A.
[7] Factum of the Federation of Law Societies, at para 32.
[8] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at paras. 7, 233, pp. 7, 52.

15. The Appeal Panel also held that even where a reasonable basis for an allegation of prosecutorial misconduct exists, the *Rules of Professional Conduct* require that counsel not advance the allegation in an unprofessional manner as Mr. Groia was found to have done.[9]

16. Given the necessarily contextual, fact-specific, and discretionary nature of any professional misconduct inquiry, it is neither necessary nor desirable to attempt to further define a comprehensive "test" distilling the requirements of the constellation of professional obligations which could be engaged in all cases where a lawyer's conduct in court is at issue. A wide variety of conduct may justify a finding of professional misconduct and come to be referred to as a finding of "incivility", each requiring a different contextual analysis and interpretation of the *Rules of Professional Conduct*.

17. On this issue, the Law Society does not agree with the positions adopted by the Canadian Bar Association ("CBA"), the Canadian Civil Liberties Association ("CCLA"), BCCLA/ICDA, Advocates' Society, and the Criminal Lawyers' Association ("CLA"), respectively. The substantive alterations to the "test" proposed by the above-noted Interveners are dealt with in turn, below.

18. The requirement that lawyers conduct themselves with professionalism, including the requirements of civility, courtesy and good faith, imposes requirements consistent with the regulation of the profession in the public interest. The harmful effects of incivility on the administration of justice, whether in bad faith or not, are summarized succinctly by the Federation of Law Societies at paragraphs 26 through 31.

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[9] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7, at paras. 186, 236, pp. 41, 53.

19. The BCCLA argues by analogy for a professional misconduct analysis that is premised on recognition of the general immunity from civil liability for defamation of statements made by lawyers and others involved in the administration of justice, and for a "qualified privilege" of general application save for where bad faith or malice is established. But as the British Columbia Court of Appeal discussed in *Goldberg v. Law Society of Upper Canada*, the law of defamation does not provide an apt analogy to determining regulatory liability.[10] If anything, the immunity from civil liability afforded to lawyers for statements made in the discharge of their duties increases the need for a more robust scope for regulatory intervention in the public interest.

20. Another analogy offered by the CLA at paragraphs 8-12, is the recognition of the role of defence counsel on par with the Crown. In so far as the CLA suggests that defence counsel occupy a role of fundamental importance in our democracy which forms a central part of the context to be considered, this is not controversial and is fully endorsed by the Law Society. However, as this Court held in *Krieger*[11] and *R v. Anderson*,[12] and as discussed by the DPP at paragraphs 35-41, both Crown and defence counsel's "conduct before the court" is properly the subject of review by law societies, as distinct from the exercise of the Crown's prosecutorial discretion, which attracts an added deference and protection from both judicial review and civil liability.[13]

21. The Interveners who seek to change the analysis accepted and applied by the Appeal Panel, and in respect of which deference is owed, exaggerate the broader significance of the analysis supporting the finding of misconduct in this case.

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[10] *Goldberg v. Law Society of British Columbia*, 2009 BCCA 147, at paras. 46-53.
[11] *Krieger v Law Society of Alberta*, 2002 SCC 65, at paras. 38, 39, 55
[12] *R. v. Anderson*, 2014 SCC 41 at paras. 35, 36
[13] Factum of the Director of Public Prosecutions, paras. 35-41.

22. The Appeal Panel's reasons do not reasonably admit of a "genuine risk" as claimed by the CBA (paras. 24), and echoed by the CLA (para. 3), BCCLA (para. 16), and CCLA (para. 20), which in essence suggests that adversarial positions will not be taken during litigation, or if pursued and later considered to be incorrect or unreasonable will be presumed to constitute professional misconduct.

23. First, as set out above, the highly unusual facts of the case do not support such a risk. No step was taken by Mr. Groia in Phase One of *R v. Felderhof* to provide the defence with a procedural foundation for his attacks on the prosecutors. Neither do the reasons of the Appeal Panel disclose such a risk; it specifically held that incorrect legal submissions do not provide a basis for a finding of professional misconduct.[14]

24. Further, nothing in the Hearing Panel or Appeal Panel's reasons displaces the burden of proof on the Law Society in conduct applications authorized by the Law Society's Proceedings Authorization Committee, as suggested by the BCCLA at paragraphs 15-16.[15]

25. The proposed formulations of a "test" similarly tend to misconstrue the concept of zealous advocacy. The Law Society adopts the submissions of the Attorney General for Ontario at paragraphs 6-9 summarizing the correct context in which to understand both the concept of zealous advocacy, and the harmful effects that arise when incivility is demonstrated.

The Use of Reasons

26. The Advocates' Society argues against the admissibility of reasons under *Malik*[16] in every case where the lawyer was acting as an advocate in the ordinary course during the

[14] Reasons for Decision of the Appeal Panel, Appellant's Record, Vol. II of III, Tab 7 at, para. 280 , p. 64.
[15] Factum of the British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society, at paras. 15-16.

underlying proceeding, and they are tendered as proof of matters in issue. This position fails to recognize the broad discretion conferred by Rule 24.08(2) of the Law Society Tribunal's *Rules of Practice and Procedure*, and the significant public interest in the admission in evidence of reasons in conduct proceedings.

27. If the Advocates' Society's position on admissibility on all matters at issue were adopted, it would introduce a systemic gap in the regulation of the profession in the public interest. This is illustrated in the *Opara* case where the licensee's conduct was the subject of a number of findings by both judges and an administrative adjudicator before whom he appeared as counsel, yet no transcript taken of the underlying proceedings, which included *ex parte* attendances. The reasons at issue contained, *inter alia*, detailed factual descriptions of the conduct at issue. Such descriptions of events inside the courtroom may constitute the only available evidence other than the respondent lawyer's testimony as to what has occurred. As the Divisional Court in that case recognized, they must be taken into account for the Law Society to be able to enforce professional standards in those venues: judges and other tribunals cannot be compelled to give evidence at discipline proceedings. [17] It would be unseemly to introduce such a feature in the regulation of the legal profession in Canada.

28. This case concerned whether there was any foundation for the personal attacks on Mr. Groia's opponent. The reasons of the reviewing Courts in *R. v. Felderhof* — analysing the same record — constituted highly relevant evidence whose weight was entitled to be considered in the context of the evidence adduced by Mr. Groia.

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[16] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18.
[17] *Opara v. Law Society of Upper Canada*, 2015 ONSC 3348, at para. 28.

29. There are two issues to which the reasons of the reviewing Courts in *R. v. Felderhof* were highly relevant. First, notwithstanding the Court of Appeal for Ontario's decision in *R. v. Felderhof*, in his testimony before the Hearing Panel Mr. Groia maintained that he was correct in law to have made the submissions he did.[18] The reasons were admissible as proof that Mr. Groia was incorrect as to the legal positions he took during Phase One concerning the role of the prosecutor and the admissibility of documents. Second, the findings concerning Mr. Groia's conduct in the Costs decision of Justice Campbell were admissible as *prima facie* proof that there was no reasonable basis for Mr. Groia's attacks on the prosecutors. The Law Society agrees with the submissions of the Attorney General for Ontario that these findings were necessary to that decision, and to the extent they were relevant to these issues, deserved protection from collateral attack.[19]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2016.

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[18] 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).

[19] Factum of the Attorney General for Ontario, paras. 13-19

PART VI – TABLE OF AUTHORITIES
JURISPRUDENCE

Case Authority	***Para(s)***
British Columbia (Attorney General) v. Malik, 2011 SCC 18 (CanLII)	25
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Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), at paras. 27, 34	4
Law Society of British Columbia v. Mangat [2001] 3 SCR 113 at paras. 39-46	5
Goldberg v. Law Society of British Columbia, 2009 BCCA 147 (CanLII), at paras. 46-53	19
Krieger v. Law Society of Alberta, 2002 SCC 65 (CanLII) at paras. 38, 39, 55	20
Opara v. Law Society of Upper Canada, 2015 ONSC 3348 (CanLII), at para. 28	27
R v. Anderson, 2014 SCC 41 (CanLII) at paras. 35, 36	20

LEGISLATION

Source	***Para(s)***
Law Society Act, R.S.O. 1990, c. L. 8, (CanLII) ss. 33.	4
Law Society of Upper Canada, Law Society Tribunal, Hearing Division, *Rules of Practice and Procedure*, Rule 24.08(2) Reasons (2) At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence.	25
Rules of Professional Conduct, Law Society of Upper Canada (current).	14, 15

SECONDARY SOURCES

Prof. John Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall L.J.* 51, at p. 73 4	4

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

THE SUPREME COURT OF CANADA
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