File Number: 37112

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

BETWEEN:

JOSEPH PETER PAUL GROIA

APPELLANT
(Appellant)

and

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

and

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF SASKATCHEWAN, LAW SOCIETY TRIBUNAL, ATTORNEY GENERAL OF ONTARIO, THE ADVOCATES SOCIETY, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, BARREAU DU QUÉBEC, ONTARIO TRIAL LAWYERS' ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, ONTARIO CROWN ATTORNEYS' ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INTERVENERS

FACTUM OF THE INTERVENER DIRECTOR OF PUBLIC PROSECUTIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Public Prosecution Service of Canada
National Capital Regional Office
160 Elgin Street, 14th floor
Ottawa, Ontario K1A OH8

James D Sutton
Allyson Ratsoy
Tel.: 613-960-3922
Fax: 613-960-3717
Email: james.sutton@ppsc-sppc.gc.ca
allyson.ratsoy@ppsc-sppc.gc.ca

Counsel for the intervener,
Director of Public Prosecutions

Kathleen Roussel
Director of Public Prosecutions
Public Prosecution Service of Canada
160 Elgin Street, 12th floor
Ottawa, Ontario K1A 0H8

François Lacasse
Tel.: 613-957-4770
Fax: 613-941-7865
Email: flacasse@ppsc-sppc.gc.ca

Ottawa agent for the intervener,
Director of Public Prosecutions

Lerners LLP
130 Adelaide Street West
Suite 2400, PO Box 95
Toronto, Ontario M5H 3P5

Earl A Cherniak QC
Jasmine T Akbarali
Tel.: 416-601-2350
Fax: 416-867-2402
Email: echerniak@lerners.ca

Counsel for the appellant, Joseph Peter Paul Groia

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Box 466 Station D
Ottawa, Ontario K1P 1C3

Jeffrey W Beedell
Tel.: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa agent for the appellant, Joseph Peter Paul Groia

Lenczner Slaght Royce Smith Griffin LLP
130 Adelaide Street West, Suite 2600
Toronto, Ontario M5H 3P5

J Thomas Curry
Tel.: 416-865-3096
Fax: 416-865-9010
Email: tcurry@litigate.com

Jaan E Lilles
Tel.: 416-865-3552
Fax: 418-865-9010
Email: jlilles@litigate.com

Andrew Porter
Tel.: 416-865-3554
Fax: 416-865-9010
Email: aporter@litigate.com

Counsel for the respondent, The Law Society of Upper Canada

Dentons Canada LLP
Barristers and Solicitors
99 Bank Street, Suite 1420
Ottawa, Ontario K1P 1H4

David R Elliott
Corey A Villeneuve (law clerk)
Tel.: 613-783-6366
Fax: 613-783-9690
Email: corey.villeneuve@dentons.com

Ottawa agent for the respondent, The Law Society of Upper Canada

Ministry of Justice and Attorney General
Government of Saskatchewan
820-1874 Scarth Street
Regina SK S4P 4B3

Sharon H Pratchler QC
Tel.: 306-787-5584
Fax: 306-787-9111
Email: Sharon.pratchler2@gov.sk.ca

Counsel for the intervener, Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Box 466 Station D
Ottawa, Ontario K1P 1C3

D Lynne Watt
Tel.: 613-786-0171
Fax: 613-788-3587
Email: lynne.watt@gowlingwlg.com

Ottawa agent for the intervener, Attorney General of Saskatchewan

Law Society Tribunal
402-375 University Avenue
Toronto, Ontario M5G 2J5

Lisa Mallia
Tel.: 416-947-3488
Fax: 416-947-5219
Email: lmallia@lsuc.on.ca

Counsel for the intervener, Law Society Tribunal

Supreme Advocacy LLP
340 Gilmour St, Suite 100
Ottawa, Ontario K2P 0R3

Eugene Meehan QC
Marie-France Major
Tel.: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener, Law Society Tribunal

Ministry of the Attorney General
Crown Law Office – Criminal
720 Bay Street, 10th floor
Toronto ON M7A 2S9

Milan Rupic
Tel.: 416-326-4592
Fax: 416-326-4656
Email: milan.rupic@ontario.ca

Counsel for the intervener, Attorney General of Ontario

Burke-Robertson LLP
Barristers & Solicitors
441 MacLaren Street, suite 200
Ottawa, Ontario K2P 2H3

Robert Houston QC
Tel.: 613-236-9965
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Ottawa agent for the intervener, Attorney General of Ontario

Lax O'Sullivan Lisus Gotlieb LLP
145 King Street West, Suite 2750
Toronto, Ontario M5H 1J8

Terrence J O'Sullivan
Tel.: 416-598-3556
Email: tosullivan@counsel-toronto.com

Mathew R Law
Tel: 416-849-9050
Fax: 416-598-3730
Email: mlaw@counsel-toronto.com

McCarthy Tetrault LLP
66 Wellington Street West, Suite 4900
TD Bank Tower
Toronto Ontario, M5K 1E6

Deborah Templer
Tel.: 416-601-8421
Fax: 416-868-0673
Email: dtempler@mccarthy.ca

Counsel for the intervener, The Advocates Society

McMillan LLP
45 O'Connor Street, 20th floor
Ottawa, Ontario K1P 1A4

David Debenham
Tel.: 613-691-6109
Fax: 613-231-3191
Email: david.debenham@mcmillan.ca

Ottawa agent for the intervener, The Advocates Society

Farris, Vaugh, Wills & Murphy LLP
PO Box 10026, Pacific Centre South
25th floor, 700 West Georgia Street
Vancouver, British Columbia V7Y 1B3

Joseph J Arvay QC
Catherine George
Tel.: 604-684-9151
Fax: 604-661-9349
Email: jarvay@farris.com

Counsel for the interveners, British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Box 466 Station D
Ottawa, Ontario K1P 1C3

Jeffrey W Beedell
Tel.: 613-786-0171
Fax: 613-788-3587
Email: jeff.bedell@gowlingwlg.com

Ottawa agent for the interveners, British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society

Barreau du Québec
445, boul Saint-Laurent
Montréal, Québec H2Y 3T8

Sylvie Champagne
André-Philippe Mallette
Tel.: 514-954-3400 ext. 5103 / 5100
Fax: 514-954-3463
Email: schampagne@barreau.qc.ca
apmallette@barreau.qc.ca

Counsel for the intervener, Barreau du Québec

Supreme Advocacy LLP
340 Gilmour St, Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel.: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener, Barreau du Québec

Allan Rouben
Barrister & Solicitor
70 Bond Street, Suite 200
Toronto, Ontario M5B 1X3

Tel.: 416-360-5444
Fax: 416-365-7702
Email: arouben@bellnet.ca

Counsel for the intervener, Ontario Trial Lawyers Association

Connolly Obagi LLP
200 Elgin Street, Suite 1100
Ottawa, Ontario K2P 1L5

Thomas P Connolly
Tel.: 613-683-2244
Fax: 613-567-9571
Email: tom.connolly@connollyobagi.com

Ottawa agent for the intervener, Ontario Trial Lawyers Association

Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montreal, Québec H3B 1R1

Pierre Bienvenu
Andres C Garin
Tel.: 514-847-4747
Fax: 514-286-5474
Email:
pierre.benvenu@nortonrosefulbright.com
Andres.garin@nortonrosefulbright.com

Counsel for the intervener, The Canadian Bar Association

Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4

Matthew J. Halpin
Tel.: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa agent for the intervener, The Canadian Bar Association

Canadian Civil Liberties Association
90 Eglinton Avenue East, Suite 900
Toronto, Ontario M4P 2Y3

Cara Zwibel
Tel.: 416-363-0321 ext 255
Fax: 416-861-1291
Email: czwibel@ccla.org

Counsel for the intervener, Canadian Civil Liberties Association

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Box 466 Station D
Ottawa, Ontario K1P 1C3

D Lynne Watt
Tel.: 613-786-0171
Fax: 613-788-3587
Email: lynne.watt@gowlingwlg.com

Ottawa agent for the intervener, Canadian Civil Liberties Association

Greg Delbigio QC
Alison M Latimer
595 Burrard Street, 27th floor
PO Box 49123, Three Bentall Centre
Vancouver, British Columbia V7X 1J2

Tel.: 604-602-4266
Fax: 604-688-4711
Email: greg@gregdelbigio.com

Counsel for the intervener, Federation of Law Societies of Canada

Michael J Sobkin
Barrister and Solicitor
331 Somerset Street West
Ottawa ON K2P 0J7

Tel.: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa agent for the intervener, Federation of Law Societies of Canada

Cavalluzzo Shilton McIntyre Cornish LLP
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto, Ontario M5T 2S6

Paul J J Cavalluzzo
Adrienne Telford
Tel.: 416-964-1115
Fax: 416-964-5895
Email: pcavalluzzo@cavalluzzo.com

Counsel for the intervener, Ontario Crown Attorneys' Association

Addario Law Group
171 John Street, Suite 101
Toronto, Ontario M5T 1X3

Frank Addario
Samara Secter
Tel.: 416-979-6446
Fax: 1-866-714-1196
Email: faddario@addario.ca

Counsel for the intervener, The Criminal Lawyers' Association of Ontario

Goldblatt Partners LLP
30 Metcalfe Street, Suite 500
Ottawa, Ontario K1P 5L4

Colleen Bauman
Tel.: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa agent for the intervener, The Criminal Lawyers' Association of Ontario

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. As observed by Justice Rosenberg in *Felderhof*, "a hard-fought trial is not a tea party."[1] What he did not say, though the idea is implicit in his judgment, is that 'neither is that trial the Wild West.' Some order is needed. Civility helps ensure that order.

2. While it is true that a person accused of a crime has much at stake during a criminal trial, it is also true that other important interests exist in that forum. A number of others involved in that process have interests at stake that must be considered. Complainants, witnesses, jurors, other counsel (including the prosecutor), the court itself, and society at large are concerned with the proper administration of justice. The values protecting what those others have at stake must be balanced with freedom of expression.

3. Civility enhances the administration of justice. The limited extent to which imposing a civility standard has an impact on freedom of expression in a courtroom is a reasonable and proportionate balance with the need for zealous advocacy.

4. Provided that other aspects of Crown conduct and decision-making are not conflated with in-court conduct, there is no imbalance or asymmetry between the standard of civility for the in-court conduct of Crown counsel and that of defence counsel in a criminal trial. The same standard applies to both.

5. The courts and law societies share responsibility in controlling counsel's conduct. The standard to assess unacceptable in-court incivility, however, may differ between the two in view of the different role they play and the different interest they protect. While the disciplinary role of law societies is reactive and focuses on the regulation of the legal profession, the courts' role is preventive in order to protect the repute of the administration of justice and, most importantly, to ensure trial fairness, a function not bestowed upon law societies.

6. The DPP relies on the facts as set out by the parties to the appeal.

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[1] *R v Felderhof*, [2003] OJ No 4893, 180 CCC (3d) 498 ("*Felderhof (ONCA)*"), at para 91, quoting Campbell J in *R v Felderhof*, [2002] OJ No 4103 ("*Felderhof (JR)*").

PART II: POSITION ON THE QUESTION IN ISSUE

7. The Court should not rule on the constitutionality of Ontario's *Law Society Act* in order to decide the issues necessary to resolve this case. The resolution of this case can be achieved by applying well-established principles relating to judicial review of administrative decisions, as the courts below did.

8. If the Court chooses to answer the constitutional question, the answer should be that the *Law Society Act*, in authorizing the Law Society of Upper Canada to investigate and discipline lawyers for in-court incivility amounting to professional misconduct, does not infringe either judicial independence or freedom of expression.

9. Encompassed by the appellant's stated constitutional question, and set out by him as issues "A" and "B" in paragraph 46 of his factum, are issues relating first, to judicial independence, including both the standard of review of discipline decisions and responsibility for regulation of counsel's in-court conduct, and second, to freedom of expression, including the defining of incivility and the interplay of civility with zealous advocacy. The DPP's submissions on the substance underlying the constitutional question are organized below in accordance with the issues identified by the appellant on that aspect of his question "B" dealing with freedom of expression.

10. The DPP has nothing to add to the submissions of the respondent Law Society of Upper Canada (its factum, paras 82-96) on the appellant's question "A" regarding what standard of review should apply to law society discipline decisions relating to in-court misconduct.

11. The DPP has nothing to add to the submissions of the respondent Law Society of Upper Canada (its factum, paras 97-109) on the aspect of the appellant's question "B" relating to the shared responsibility of courts and law societies for regulating in-court misconduct.

12. The DPP takes no position with respect to the appellant's question "C": whether the impugned conduct in this case amounted to professional misconduct.

PART III: ARGUMENT

A) THE CONSTITUTIONAL QUESTION

13. This Court should decline to answer the constitutional question. The answer is not necessary to resolve the issues in this case.

14. Moreover, where it is not the statute in question, but rather some action taken pursuant to the statute that limits rights and freedoms, no question of the constitutional validity of the statute properly arises. Orders or actions taken pursuant to the discretion granted by the statute may limit rights or freedoms and thus be subject to *Charter* scrutiny; the statute itself should not be the target of challenge.[2]

15. The constitutional question stated by the appellant is raised for the first time on the appeal in this Court. It was not addressed in the courts below, as the Court of Appeal observed.[3] This Court does not have the benefit of the views of the lower courts on the question.[4] The appropriate record has not been created.[5]

16. The appellant has stated as stand-alone questions the same issues that he advances as a basis for his allegation of *ultra vires* or inoperability of the *Law Society Act*. Those questions were answered by the courts below without reference to the constitutionality of the *Law Society Act*. The stand-alone questions were treated by the courts below as involving a review for constitutional compliance of an administrative decision, not as a review of a statute for constitutional compliance.

17. The difference between the review for constitutionality of administrative decisions and the review for constitutionality of statutes has implications for the approach the Court takes to its

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[2] *Slaight Communications v Davidson*, [1989] 1 SCR 1038 ("*Slaight*"), at 1080 per Lamer J, dissenting in part but not on this point.
[3] *Groia v Law Society of Upper Canada*, 2016 ONCA 471 ("*Groia (ONCA)*"), at para 277, per Brown JA, in dissent.
[4] *Giguère v Chambre-des-notaires-du-Québec*, 2004 SCC 1, [2004] 1 SCR 3 ("*Giguère*"), at para 34.
[5] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 ("*Bell ExpressVu*"), at paras 58, 59; *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873 ("*Christie*"), at para 28.

task in this case.[6] As Abella J noted for the Court in *Doré* "an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional section 1 analysis an awkward fit." It becomes unclear upon whom the onus would fall to "formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective." [7]

18. Yet the protection of *Charter* values in the administrative decision context can be achieved by seeking balance and proportionality.[8]

19. Because no attack on the *Law Society Act* was before the lower courts, the record does not contain material responsive or helpful to the necessary *Oakes* analysis if the *Law Society Act* were found to infringe the *Charter*.[9] No *Oakes* analysis has been performed by the lower courts.

20. Restricting this appeal to a review of an administrative decision obviates the need for a full *Oakes* analysis, with its attendant awkwardness in this case. As this Court noted in *Doré*, the *Charter* value, expressive freedom, for which the appellant seeks recognition in this case, can be applied in a balanced and proportional way in the administrative review context.

21. The principle of judicial independence can also be applied in a balanced and proportional way in the administrative review context. The same question posed by the Court about expressive freedom in *Doré* can be asked in respect of judicial independence: "In assessing whether an adjudicated decision violates [judicial independence] … has the decision-maker disproportionately, and therefore unreasonably, limited [judicial independence]?"[10]

22. If the Court chooses to answer the constitutional question, the answer should be "No, the *Law Society Act* does not infringe either the principle of judicial independence or the *Charter* protection of freedom of expression, and is not *ultra vires* or inoperative."

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[6] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 ("*Doré*"), at paras 36, 38, 42, 43.
[7] *Doré*, *supra* note 6, at para 4.
[8] *Doré*, *supra* note 6, at para 5.
[9] *R v Oakes*, [1986] 1 SCR 103.
[10] *Doré*, *supra* note 6, at para 6.

B) FREEDOM OF EXPRESSION

1. The *Charter* does not guarantee unrestricted expression in the courtroom

23. As important as freedom of expression is, this Court recognized more than 30 years ago that its value must be balanced against other important values. In considering freedom of expression in the courtroom in the context of the need for zealous advocacy in defence of an accused in a criminal trial, this Court should balance that freedom against other important values at stake in that forum.

24. In *Fraser*, Dickson CJ, for the Court, speaking of freedom of speech in a pre-*Charter* context, described it as follows:[11]

> 'F]reedom of speech' is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*.
> But **it is not an absolute value**. Probably no values are absolute. **All important values must be qualified, and balanced against, other important, and often competing values**. This process of definition, qualification and balancing is as much required with respect to the value of 'freedom of speech' as it is for other values. [Emphasis added]

25. More recently, in *CBC v Canada*, Deschamps J, for the Court, made the following statement: "This Court has noted on several occasions that the protection of s. 2(b) of the *Charter* is not without limits and that governments should not be required to justify every exclusion or regulation of a form of expression—whether it concerns the location or the means of employing that form of expression—under s. 1."[12]

26. The Court also noted in *CBC v Canada* that: "Although the Court confirmed that all expressive content is, ***prima facie***, worthy of protection, it then added that an expressive activity may be excluded from s. 2(b) protection because of how it is undertaken—the method of expression—or because of the **location** where it would take place." [Emphasis in original][13]

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[11] *Fraser v PSSRB*, [1985] 2 SCR 455 ("*Fraser"*), at 462-63.
[12] *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 ("*CBC v Canada*"), at para 32.
[13] *CBC v Canada*, *supra* note 12, at para 35, referring to the Court's judgment in *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141.

27. Where it takes place and the manner of expression are thus important considerations in evaluating *Charter* section 2(b) protection. This Court recognized in *CBC v Canada* that the fair administration of justice required the serenity of hearings: "The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms … ."[14] The historical function of a courtroom includes a search for the truth, and freedom of expression should be protected there. However, because unlimited freedom of expression may interfere with order and decorum, as well as the search for truth, and thus, the administration of justice, some limits on that expression are reasonable.

28. Indeed, this Court has already held in *Doré* that the *Charter*-protected right to freedom of speech does not guarantee a lawyer unrestricted speech.[15] Instead, the Court imposed limits on a lawyer's speech. It must "bear the stamp of objectivity, moderation and dignity."[16] Although the *Doré* circumstances related to a letter to a judge, not submissions in open court, there is no reason based on law or policy that the same limits should not apply when the protected speech takes place in a courtroom before a judge. Indeed, what happens in courtrooms is the most public face of the justice system—it may be even more important for the administration of justice to have those limits imposed there.

29. Limits on expressive freedom in the courtroom have been recognized by this Court in another context. Even the important *Charter*-protected right of cross-examination is subject to limitations on freedom of speech in the courtroom. In *Lyttle*, Major and Fish JJ, for the Court, said the following about the *Charter*-protected right of cross-examination:[17]

> The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and **barred from resorting to harassment, misrepresentation, repetitiousness** or, more generally, from putting questions whose prejudicial effect outweighs their probative value. [Emphasis added]

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[14] *CBC v Canada*, *supra* note 12, at para 69.
[15] *Doré, supra* note 6, at paras 61, 65, 68.
[16] *Doré*, *supra* note 6, at para 60.
[17] *R v Lyttle*, 2004 SCC 5, [2004] 1 SCR 193 ("*Lyttle*"), at para 44.

2. Zealous advocacy does not trump civility

30. Civility need not conflict with zealous advocacy. No question of one trumping the other need arise. Both civility and zealous advocacy are part of the lawyer's "overarching duty of professionalism."[18] They both contribute to the best interests of the administration of justice and public respect for the justice system.

31. The appellant asks whether the values expressed by Lord Brougham in his defence of Queen Caroline—"to save that client … is [the advocate's] first and only duty"— still apply today, almost two hundred years later. The answer depends on the context.

32. This Court referred to Lord Brougham's words in *Neil*[19] and in *McKercher,*[20] where it expressed a more reasonable understanding of the spirit of Lord Brougham's statement. However, that cannot be taken as an unreserved acceptance of the statement. Just as with *Charter* interpretation in any case, context is everything.[21] In both *Neil* and *McKercher*, the context included a concern with potential conflicts of interest. What was at issue there was the lawyer's duty of loyalty and commitment to the client *vis à vis* another client or potential client. If Lord Brougham's words are taken to mean that counsel owes no other duty in any context, then that value should not be said to still exist today. Defence counsel have, for example, a duty not to mislead the court.

33. The existence and importance of a duty of loyalty and commitment to the client is well-established. However, a better statement of counsel's duty, in the context of this case—submissions in open court in advancing a client's interests— is the statement of Lord Reid in the House of Lords in *Rondel v Worsley*:[22]

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his

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[18] *Groia (ONCA), supra* note 3, at paras 132, 136-139.
[19] *R v Neil*, 2002 SCC 70, [2002] 3 SCR 631 ("*Neil*"), at para 12; quoted at appellant's factum para 2.
[20] *Canadian National Railway Co. v McKercher*, 2013 SCC 39, [2013] 2 SCR 649 ("*McKercher*"), at para 25; quoted at appellant's factum para 2.
[21] See, *eg*, the comments of Wilson J in *Edmonton Journal v Alberta (Attorney General)*, [1985] 2 SCR 1326 ("*Edmonton Journal*"), at 1355-56.
[22] *Rondel v Worsely*, [1969] 1 AC 191 ("*Rondel v Worsely*"), at 227-28; see also *Groia (ONCA), supra* note 3, at para 133.

> client's case. But, as an officer of the court concerned in the administration of justice, he has an **overriding duty** to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. [Emphasis added]

34. That statement was approved by this Court in *Lyttle*,[23] where the Court was considering "the constraints on cross-examination arising from the ethical and legal duties of counsel when they allude in their [cross-examination] questions to disputed and unproven facts." This is another example of the recognized and accepted restraints on freedom of expression in the courtroom.

3. The fact that Crown and defence counsel have different roles in a criminal trial has no bearing on establishing a standard of civility

35. It is important not to conflate other powers and functions of Crown counsel with in-court conduct, the subject of concern in this case. The fact that some Crown counsel functions and powers are reviewable on different standards than those of defence counsel does not support the suggestion that there should be different standards for Crown and defence relating to in-court conduct, and that defence counsel should have more freedom to engage in uncivil conduct in a criminal trial.[24] Those other Crown functions and powers have no equivalent for defence counsel. They do not create an imbalance. A comparison is not apt.

36. The Crown counsel role differs from that of defence counsel. Although they have a number of duties and responsibilities in the course of criminal proceedings, Crown counsel, unlike defence counsel, do not have a client to whom they owe a duty of loyalty and commitment. As Charron J noted in *McNeil*: "The Crown is not an ordinary litigant. As minister of justice, the Crown's undivided loyalty is to the administration of justice."[25]

37. It is noteworthy that the Federation of Law Societies' *Rules of Professional Conduct* contains a section devoted only to the "Duty as Prosecutor." Of course, prosecutors are also

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[23] *Lyttle*, *supra* note 17, at paras 46, 66.
[24] This is at least implied by the Criminal Lawyers' Association in the application for leave to intervene: see Affidavit of Daniel Brown, para 6(a), p 7 of their record.
[25] *R v McNeil*, [2009] SCR 66 ("*McNeil*"), at para 66.

governed by the same rules regarding professional responsibility, including civility, as are defence counsel. [26]

38. The holding of this Court in *Krieger*[27] and *Anderson*[28] to the effect that the exercise of prosecutorial discretion is not reviewable by the courts except for abuse of process does not create a lesser standard for prosecutors in respect of their "tactics and conduct before the court."[29] Nor does it make their conduct virtually unreviewable.

39. The review paradigm arising from *Krieger* and *Anderson* takes pains to distinguish between "prosecutorial discretion" and "tactics and conduct before the court." Only conduct before the court is of concern in this case. As expressed in the vernacular, it is the difference between apples and oranges. And any comparison of civility standards for the Crown with those for defence counsel should place only in-court conduct in the balance pan.

Tactics and conduct before the court

40. As noted by Moldaver J, for the Court, in *Anderson:*[30]

> There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.
>
> All Crown decision making is reviewable for abuse of process. However, as I will explain, exercises of prosecutorial discretion are **only** reviewable for abuse of process. In contrast, tactics and conduct before the court are subject to a wider range of review. The court may exercise its inherent jurisdiction to control its own process even in the absence of abuse of process. [Emphasis in original]

41. The Court in *Anderson* also distinguished between tactics and inappropriate behaviour in the courtroom:[31]

> While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system **does** accord a high degree of deference to the tactical

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[26] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Rules 5.1-3, 2.1-1, 2.1-2, 5.1-1, 5.1-5.
[27] *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 ("*Krieger*").
[28] *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 ("*Anderson*").
[29] *Krieger*, *supra* note 27, at para 47, *Anderson*, *supra* note 27, at para 36.
[30] *Anderson*, *supra* note 28, at paras 35, 36.
[31] *Anderson*, *supra* note 28, at para 59, citing *R v SGT*, 2010 SCC 52, [2010] 1 SCR 688 ("*SGT*"), at paras 36-37.

> decisions of counsel. In other words, while courts may sanction the conduct of the **litigants**, they should generally refrain from interfering with the conduct of the **litigation** itself. [Emphasis in original]

42. This Court has said on more than one occasion that tactical decisions of counsel must be accorded deference by the trial judge. To do otherwise than show deference risks the trial judge ceasing to be a neutral arbiter, becoming instead an advocate for one party.[32]

43. The court's discretion to control abuse arising from the tactical decisions of counsel allows a court to "ensure the integrity of the justice system."[33] That should be the factor informing the degree of deference showed.

44. The standard of review of Crown tactical decisions may be considered to be higher than that for defence counsel. The Court noted in *Anderson* that a Crown tactical decision could be reviewed for *Charter* compliance.[34] It is doubtful that a defence tactical decision could be reviewed on that basis. Indeed, in *Cody*, this Court noted that "[t]he determination of whether defence conduct is legitimate is 'by no means an exact science,'" and that appellate courts must show a high level of deference to trial judges' determination of its [defence conduct] appropriateness.[35]

45. While it may be true, as noted by Moldaver J in *Anderson*, that no deference is owed to counsel behaving inappropriately in the courtroom, some trial judges will nevertheless be reluctant to sanction counsel or to intervene regarding uncivil behaviour. They may be concerned that to do so could cause the appearance of ceasing to be the required neutral arbiter. However, in the final analysis, trial judges should take into account the effect of the incivility on trial fairness in deciding whether to intervene in respect of inappropriate behaviour in the courtroom.

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[32] *SGT*, *supra* note 31, at para 36.
[33] *Québec (Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 ("*Jodoin*"), at para 16.
[34] *Anderson*, *supra* note 28, at para 60.
[35] *R v Cody*, 2017 SCC 31, ("*Cody*"), at para 31.

46. An aspect of inappropriate behaviour before the court is the concern of this case. Such behaviour can cover a wide range of conduct including, for example, "tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire."[36]

47. Although a precise definition of incivility is difficult to describe and may be "undesirable,"[37] incivility has been described by this Court in *Doré* as "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy."[38] That is an acceptable and workable definition of incivility, particularly from a law society's perspective. As discussed below, a trial judge may have an additional concern—trial fairness.

48. In *Goldberg*, the British Columbia Court of Appeal upheld a disciplinary ruling against a lawyer based on allegations he had made against another lawyer without proper or sufficient evidentiary foundation.[39]

49. Conduct rules requiring civility should not impede defence counsel from making allegations of prosecutorial misconduct. However, "those allegations [must] 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."[40] They should be made without the use of invective, especially that aimed at the prosecutor's professional integrity.

50. Inappropriate behaviour in the courtroom is reviewable by a court and by a law society, on the same standard for both Crown and defence counsel in each case, although not necessarily on the same standard in both fora.[41]

51. It is well established that zealous advocacy by defence counsel, arising from the duty of loyalty and commitment to a client's cause, is important, particularly in a criminal trial, given what is at stake in that forum.

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[36] *Anderson*, *supra* note 28, at para 58.
[37] *Groia (ONCA)*, *supra* note 3, at para 124.
[38] *Dore*, *supra* note 6, at para 61.
[39] *Goldberg v Law Society of British Columbia*, 2009 BCCA 147 ("*Goldberg*"), at paras 57-59.
[40] *Felderhof (ONCA)*, *supra* note 1, at para 88.
[41] The theme of different standards for courts and law societies is developed in the next section of this factum.

52. Rand J's classic description in *Boucher* of the Crown's duty contemplated zealous advocacy from the Crown, but advocacy that was nonetheless fair:[42]

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: **it should be done firmly and pressed to its legitimate strength but it must also be done fairly.** The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [Emphasis added]

53. In *Elliott*, the Court of Appeal for Ontario referred to a work by Proulx and Layton and recognized the Crown's duty as an advocate in court as follows:[43]

> The prosecutor has a dual role in the justice process. On the one hand, Crown counsel must seek to act fairly to achieve a just result in the furtherance of the public interest. **On the other hand, the prosecutor can legitimately act as an advocate in striving to obtain a just conviction.** Probably the greatest challenge for a prosecutor is reconciling the frequent tension involving these duties. [Emphasis in *Elliott*, not in original]

54. In *Mallory*, the Court of Appeal for Ontario, in addressing allegations of improper submissions by Crown counsel, observed that:[44]

> The closing address is the proper forum for argument and the Crown is certainly entitled to argue its case forcefully. The Crown should not, however, engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness: [Cites omitted].

Prosecutorial discretion

55. In *Anderson*, Moldaver J, for this Court, notes that "the term 'prosecutorial discretion' is an expansive term that covers all 'decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.'" He also notes that it would be "impossible to create an exhaustive list" of such decisions but provides examples of prosecutors exercising prosecutorial discretion. [45]

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[42] *Boucher v The King*, [1955] SCR 16 ("*Boucher*"), at p 23.
[43] *R v Elliott*, 2003 OAC 219, [2003] OJ No 4694 ("*Elliott*"), at para 153, quoting from the Honourable Michel Proulx and David Layton, *Ethics and Canadian Law*, (Toronto: Irwin Law, 2001), at 697.
[44] *R v Mallory*, [2007] OJ No 236, 220 OAC 239 ("*Mallory*"), at para 340.
[45] *Anderson*, *supra* note 28, at para 44.

> [F]urther examples to those in *Krieger* include: the decision to repudiate a plea agreement; the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal.

Conduct relating to these decisions is reviewable by the court, but only for abuse of process (including bad faith or dishonesty). These decisions are also not generally made in the courtroom, but more often in the prosecutor's office, although the impact of the decisions usually plays out in the courtroom. Prosecutors' exercises of discretion are not relevant to establishing civility standards for reviewing defence counsel in-court conduct because they do not exercise prosecutorial discretion.

56. Considering the difference between the exercise of prosecutorial discretion on the one hand and tactics and conduct before the court on the other hand demonstrates that no inappropriate imbalance or asymmetry exists between review of Crown conduct and review of defence counsel conduct in the courtroom. The threshold for when incivility amounts to professional misconduct should be the same for defence counsel and Crown.

4. The standard for unacceptable incivility may be different for a law society than for a trial judge

57. In-court judicial response to incivility may properly begin at a different threshold, or may consider factors different from those considered by a law society response to uncivil conduct, given that courts and law societies have different interests to protect. [46] The judicial response appropriately takes into account the effect of the conduct on the fairness of the trial. However, an adverse effect on trial fairness should not be a prerequisite for a law society's review of in-court conduct. The risk exists that their considering that factor may amount to second-guessing the trial judge, and arguably undermining judicial independence.

58. "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

[46] *R v Cunningham*, 2010 SCC 10 ("*Cunningham*").

to ensure effective regulation of the profession and protect the process of the court." [Emphasis in original] [47]

59. Controlling the process of the court, preventing abuses of process and ensuring that the machinery of the court functions in an orderly and effective manner are part of the inherent jurisdiction of the courts. This is why the court has "authority to exercise some control over counsel when necessary to protect its process."[48]

60. This Court has recognized the court's and law society's shared responsibility in other cases as well. In *McKercher*, Binnie J, for the Court, described their respective roles this way:[49]

> Both the courts and law societies are involved in resolving issues relating to conflicts of interest – the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession [cite omitted]. In exercising their respective powers, each may properly have regard for the other's views. Yet **each must discharge its unique role.** Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although 'an expression of a professional standard in a code of ethics … should be considered an important statement of public policy.' [Emphasis added]

61. In *MacDonald Estate v Martin*, this Court considered a court's authority over counsel in order to ensure a fair civil trial:[50]

> The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction.

62. In *Jodoin*, this Court recently emphasized the need for the dual roles of courts and law societies. There, the Court held that sanctions by courts and law societies could be imposed concurrently in relation to the same conduct.[51]

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[47] *Cunningham*, *supra* note 46, at para 35; see also *Jodoin*, *supra* note 33, at para 22.
[48] *Cunningham*, *supra* note 46, at para 18.
[49] *McKercher*, *supra* note 20, at para 16.
[50] *MacDonald Estate v Martin*, [1990] 3 SCR 1235, at 1245, cited in *Cunningham*, *supra* note 46, at para 18.
[51] *Jodoin*, *supra* note 33, at paras 20, 23.

63. In *Marchand*, the Court of Appeal for Ontario recognized that the court and the Law Society had different roles. Unprofessional conduct "is a matter for the Law Society of Upper Canada. The issue before us, however, centres not on the conduct of counsel, but its impact on the fairness of the trial."[52] There the Court of Appeal recognized that the court, not the Law Society, must be the one to "second-guess" the trial judge: "Our focus centres on the conduct of the trial judge."

64. *Neil* provides another example of the court being concerned with trial fairness in respect of a matter otherwise appropriate for law society concern. There, this Court considered an allegation of conflict of interest, advanced in an attempt to obtain a stay of proceedings. Binnie J, for the Court, found that there was a conflict of interest but said:[53]

> The appellant falls short on the issue of remedy. He may (and perhaps did) choose to take his complaint to the Law Society of Alberta, but he is not entitled to a stay of proceedings. The law firm's conduct did not affect the fairness of the *Doblanko* trial.

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[52] *Marchand (Litigation Guardian of) v Public General Hospital of Chatham*, [2000] OJ No 4428, 51 OR (3d) 97 (CA); Leave denied, 2001 SCC Bulletin 1685 ("*Marchand*"), at para 141.
[53] *Neil*, *supra* note 19, at para 3.

PART IV: SUBMISSIONS AS TO COSTS

65. The Director of Public Prosecutions does not seek costs and makes no submissions as to costs.

PART V: ORDER SOUGHT

66. The Director of Public Prosecutions requests the opportunity to present oral argument of such duration as the Court considers appropriate at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Ottawa, in the Province of Ontario, this 19th day of July, 2017.

James D Sutton (LSUC # 15416P) Allyson Ratsoy (LSUC# 34439R)

Counsel for the Intervener
Director of Public Prosecutions

PART VI: TABLE OF AUTHORITIES

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28.	*Rondel v Worsley*, [1969] 1 AC 191 (see *Groia v Law Society of Upper Canada*, 2016 ONCA 471 at para 133)	33
29.	*Slaight Communications v Davidson*, [1989] 1 SCR 1038	14

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30.	Federation of Law Societies of Canada, *Model Code of Professional Conduct*, rules 5.1-3, 2.1-1, 2.1-2, 5.1-1, 5.1-5.	37

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31.	*Law Society Act*, R.S.O. 1990, c. L.8	7, 8, 16, 19, 22