

**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)

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**INTERVENERS**

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**FACTUM OF THE INTERVENER**  
(LAW SOCIETY TRIBUNAL)

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

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## **PART I: OVERVIEW**

1. This appeal raises the question of what standard of review courts should apply to decisions of the Law Society Tribunal (“Tribunal”) on its determinations of professional misconduct, penalty and costs. The Tribunal submits that, in accordance with this Court’s decision in *Dunsmuir*<sup>1</sup> and in recognition of the Tribunal’s expertise in deciding issues squarely within its specialization, the appropriate standard of review of its decisions is reasonableness. This is in accordance with the jurisprudence of this Court and the Court of Appeal for Ontario as well as the recognition in the *Law Society Act* (“Act”) of the Law Society Tribunal as an independent tribunal within the Law Society of Upper Canada, the self-regulating governing body of the legal professions in Ontario.<sup>2</sup>

## **PART II: QUESTION IN ISSUE**

2. The Tribunal restricts itself to submissions regarding the appropriate standard of review on appeal from its decisions on professional misconduct, penalty and costs.

## **PART III: STATEMENT OF ARGUMENT**

### *Law Society Tribunal*

3. The Law Society Tribunal is a specialized, expert, independent adjudicative Tribunal within the Law Society of Upper Canada. This model of an independent tribunal within a self-governing body is unique and this should be taken into account in the Court’s analysis of the standard of review. While the current Law Society Tribunal was formally established in March 2014, it rests on many of the same principles as the Hearing and Appeal Panels did. The process of transformation from the previous Hearing Panel to a new administrative tribunal with an independent Chair was well underway when the Appeal Panel rendered its decision on finding and penalty in November 2013. The costs decision was rendered by the Appeal Division of the new Tribunal.

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<sup>1</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9.

<sup>2</sup> *Law Society Act*, R.S.O. 1990 c. L.8, ss. 49.20.1 to 49.37.



4. In June 2012, the Law Society of Upper Canada's governing body, Convocation, approved a report prepared by the Tribunal Committee – the Hearings Process Report.<sup>3</sup> The new Tribunal model introduced in that report was designed to focus on leadership, transparency, quality, adjudicative excellence and availability, objective criteria for appointment and evaluation of adjudicators and cost effectiveness. In September 2013, Convocation appointed the Tribunal's first full-time independent Chair: affirming the independence of the Tribunal from the Law Society of Upper Canada. This was confirmed in legislative amendments the next year. The Ontario Legislature established the Law Society Tribunal, and strengthened the hearing and appeals processes, making them more transparent, fair and effective for the parties and the public.<sup>4</sup>

5. The Tribunal impartially processes and adjudicates regulatory cases concerning Ontario lawyers and paralegals under the *Act* and its Regulation 167/07. The Hearing Division conducts hearings under the *Law Society Act* and the Law Society Tribunal's Rules of Practice and Procedure. Its final orders may be appealed to the Appeal Division. Appeals from the Appeal Division are made, in certain listed circumstances, to the Divisional Court.<sup>5</sup>

6. The *Act* sets out the function of the Law Society as well as the principles it must apply:

### **Function of the Society**

**4.1** It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons

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<sup>3</sup> Tribunal Committee –Hearings Process Report- The Law Society of Upper Canada.

<sup>4</sup> *Modernizing Regulation of the Legal Profession Act*, 2013, S.O. 2013, c. 17 – Bill 111 assented to December 12, 2013.

<sup>5</sup> *Law Society Act*, ss. 49.23, 49.31 and 49.38.

who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

### **Principles to be applied by the Society**

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

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.<sup>6</sup>

#### *Hearing Division*

7. Section 49.23 (1) of the *Law Society Act* gives the Hearing Division the authority to hear applications brought under Part II of the *Act*.<sup>7</sup> The Hearing Division may determine any question of fact or law that arises in a proceeding before it. The Tribunal hears and decides a variety of types of cases involving licensees or licensee applicants.<sup>8</sup> These include allegations of professional misconduct or conduct unbecoming a licensee, questions regarding a licensee's capacity to practise law or provide legal services and whether a lawyer or paralegal applicant should be issued a licence.

#### *Appeal Division*

8. Section 49.31 (1) of the *Law Society Act* gives the Appeal Division the authority to hear and determine appeals. A party to a proceeding before the Hearing Division may appeal a final order of the Hearing Division to the Appeal Division.<sup>9</sup>

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<sup>6</sup> *Law Society Act*, ss. 4.1 and 4.2.

<sup>7</sup> *Law Society Act*, ss. 49.23 (1).

<sup>8</sup> *Law Society Act*, ss. 49.27.

<sup>9</sup> *Law Society Act*, ss. 49.31, 49.32 (1) and 61.2 (2) (c).

9. The Appeal Division may determine any question of fact or law that arises in a proceeding before it. The Appeal Division may:

- a. make any order or decision that ought to or could have been made by the Hearing Division or person who made the order or decision appealed from;
- b. order a new hearing before the Hearing Division, if applicable; or
- c. dismiss the appeal.<sup>10</sup>

10. The same provisions applied to the powers of the Hearing Panel and the Appeal Panel when Mr. Groia's case was heard.

### *Tribunal Expertise*

11. Adjudicators at the Tribunal include benchers of the Law Society of Upper Canada, who also have a governance role, and other appointees.<sup>11</sup> Adjudicators are lawyers, paralegals and members of the public.<sup>12</sup> All adjudicators are part-time, with the exception of the Chair (as of September 2013). The Chair cannot be a bencher of the Law Society.<sup>13</sup> Each Division has a Vice-Chair who is required, under the *Act*, to be an elected bencher.<sup>14</sup> As of December 31, 2016 there were 83 members of the Hearing Division. Twenty-eight of those members were also members of the Appeal Division.

12. Members are appointed and re-appointed to the Tribunal by Convocation on recommendation of the Chair.<sup>15</sup> Benchers are eligible to be appointed to an initial term of up to two years by virtue of their position.<sup>16</sup> Other members are now appointed following a competitive process and must have adjudicative experience. Non-licensee members must be approved by the Attorney General for Ontario.<sup>17</sup> All appointments and re-appointments are in

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<sup>10</sup> *Law Society Act*, s. 49.35 (2).

<sup>11</sup> *Law Society Act*, s. 49.20.1.

<sup>12</sup> *Law Society Act*, s. 49.21 (3).

<sup>13</sup> *Law Society Act*, s. 49.20.2.

<sup>14</sup> *Law Society Act*, ss. 49.22.1 and 49.30.1.

<sup>15</sup> 2015 Annual Report – Law Society Tribunal, page 5.

<sup>16</sup> *Law Society Act*, ss. 49.21 (3)(a), 49.24.1 (2)(a), and 49.29 (3)(a).

<sup>17</sup> *Law Society Act*, ss. 49.21 (3)(c), 49.24.1 (2)(c), and 49.29 (3)(c).

practice made for fixed terms not exceeding two years, with the exception of the Chair who is appointed for a four-year term.<sup>18</sup>

13. Tribunal members must adhere to the *Adjudicator Code of Conduct*.<sup>19</sup> In addition, the following competencies are emphasized:

- Knowledge of administrative law, legislation and rules;
- Commitment to procedurally fair and transparent hearings;
- Production of quality jurisprudence;
- Collegiality and self-reflection;
- Continuous development through education of adjudicative skills and knowledge of issues before the Tribunal.<sup>20</sup>

14. New Tribunal members attend a multi-day training in adjudication and tribunal jurisprudence. All members attend mandatory education sessions twice a year.<sup>21</sup>

15. Tribunal members sit in panels of one, three or five to hear and decide cases. Each panel is composed by the Chair in accordance with the requirements set out in O. Reg. 167/07.<sup>22</sup> For matters such as this one, involving lawyers or lawyer applicants, two of the three members of a hearing panel must be elected lawyer benchers and the third a lay person.<sup>23</sup> An appeal panel must be composed of at least three elected lawyer benchers and one lay person.<sup>24</sup> The hearing and appeal panels in this matter were appointed by the Chairs of the Hearing and Appeal Panels, respectively, that existed before the reforms.

16. By including practising lawyers on hearing and appeal panels, the Tribunal ensures that the day-to-day, in the trenches, reality of legal practice is brought to bear at every hearing. By

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<sup>18</sup> 2015 Annual Report – Law Society Tribunal, page 3; *Law Society Act* s. 49.20.2(3).

<sup>19</sup> *Adjudicator code of Conduct* – Law Society of Upper Canada.

<sup>20</sup> 2015 Annual Report – Law Society Tribunal, page 5.

<sup>21</sup> 2015 Annual Report – Law Society Tribunal, page 5.

<sup>22</sup> *Law Society Act*, s. 49.23 (3), O. Reg. 167/07 ss. 1 (1) and 5 (1).

<sup>23</sup> O.Reg 167/07, s. 1 (2).

<sup>24</sup> O.Reg 167/07, s. 5 (2).

including lay members on every panel at the hearing and appeal levels, the Tribunal ensures that a public voice is represented in the decision making at every hearing. The hearing panel in this matter included two practising lawyers who were both elected benchers and a lay member and the appeal panel included three practising lawyers, all elected benchers, a lay member and the fifth panelist was a former Treasurer as well as a former judge.

17. The Tribunal makes multiple decisions that affect the administration of justice. For example, in making licensing decisions, it decides who is of good character to appear before courts and tribunals. In ruling on whether a licensee failed to serve a client to the standard of a competent lawyer in a civil file, for example having missed deadlines, it decides what court-related errors will be sanctioned and what the penalty will be. In deciding on interlocutory suspensions, it is specifically mandated to decide whether there is a significant risk of harm to the public interest in the administration of justice.<sup>25</sup>

18. The Tribunal is the sole adjudicative body tasked with the responsibility of determining whether licensees should be sanctioned for violating the rules governing their conduct. The Law Society of Upper Canada has developed rules about how licensees govern themselves with professionalism. The Tribunal interprets and applies those rules to the conduct presented, developing principles through jurisprudence in a careful manner.

19. In 2015, there were 142 notices of application, referral for hearing and motions for interlocutory suspension or practice restriction filed with the Tribunal; in 2014, the number was 125. Twenty-three notices of appeal were filed in 2014 and 16 in 2015.<sup>26</sup>

#### *Appeal to the Divisional Court*

20. The *Act* allows for an appeal to the Divisional Court from certain decisions of the Appeal Division. This includes conduct proceedings brought under section 34 of the *Act*.<sup>27</sup>

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<sup>25</sup> *Law Society Act*, s. 49.27.

<sup>26</sup> 2015 Annual Report – Law Society Tribunal, pages 12 to 14.

<sup>27</sup> *Law Society Act*, ss. 49.38 and 49.41.

### *Reasonableness Standard*

21. In *Dunsmuir*, this Court emphasized that “Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.”<sup>28</sup>

22. On questions of fact, discretion or policy or interpreting the tribunal’s home statute deference will usually apply automatically. The same presumption applies where legal and factual issues are intertwined and cannot be readily separated. The correctness standard is applied where the tribunal must decide questions of true jurisdiction, constitutional issues or general questions of law of central importance to the legal system that are outside the tribunal’s specialized expertise.<sup>29</sup>

23. While it is perhaps one of the most prominent files involving civility and courtesy, this matter is by no means unique in raising these issues. The question before the Hearing and Appeal Divisions in this matter – whether Mr. Groia’s conduct amounted to professional misconduct – is at the very heart of the Tribunal’s expertise, its very *raison d’être*.

### *Conclusion*

24. The Legislature and Convocation established the Law Society Tribunal as an independent adjudicative body within the Law Society of Upper Canada. The *Act* expressly acknowledges that Tribunal members have differing backgrounds and bring their experience to their part-time commitment at the Tribunal as part of a self-governing profession. All Tribunal members – lawyers, paralegals, lay persons – must meet the specified requirements in order to be appointed or re-appointed to the Tribunal. The Tribunal’s expertise has been recognized by the Courts as a hallmark of deference.

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<sup>28</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 54, citations omitted.

<sup>29</sup> *Dunsmuir*, *supra* at paras 48-49, 53-54.

25. The Tribunal's mandate is to resolve, in a fair, transparent and expeditious manner, the many applications and appeals made to it annually. Its members have expertise in the substance and procedure of the *Act*, both through (a) their backgrounds as practising lawyers and paralegals and as non-licencees and (b) their adjudicative experience and ongoing training and education provided by the Tribunal. The Tribunal's decisions are highly contextual, fact-based and require finality. While the conduct of licensees is of central importance to the administration of justice, assessing that conduct is at the core of the Tribunal's specialized area of expertise. Accordingly, courts should apply the reasonableness standard to its misconduct, penalty and costs decisions.

#### **PART IV: COSTS**

26. The Law Society Tribunal does not seek its costs and submits that costs should not be awarded against it.

#### **PART V: ORDER REQUESTED**

27. The Tribunal makes no submissions as to the merits of the appeal.

**Dated at Toronto, Ontario, this 12<sup>th</sup> day of July, 2017.**



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Lisa Mallia

**Counsel for the Intervener, Law Society Tribunal**

## PART VI – LIST OF AUTHORITIES

### **Cases**

### **AT PARA**

[\*Dunsmuir v. New Brunswick\*, 2008 SCC 9](#) .....1, 22

### **Secondary Sources**

[2015 Annual Report – Law Society Tribunal](#) .....12, 13, 14, 19

[Tribunal Committee – the Hearings Process Report- The Law Society of Upper Canada](#).....4

[Adjudicator code of Conduct – Law Society of Upper Canada](#).....13

### **Legislation**

[\*Law Society Act\*, R.S.O. 1990, c L. 8. ss. 4.1, 4.2, 49.20 to 49.38, 49.41, 61.2\(2\) \(c\)](#)

[\*Hearings Before the Hearing and Appeal Divisions\*, O. Reg. 167/07 ss. 1\(1\), 1\(2\), 2, 5\(1\), 5\(2\)](#)