Court File No. 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, ATTORNEY GENERAL OF ONTARIO, LAW SOCIETY TRIBUNAL, ADVOCATES' SOCIETY, BARREAU DU QUEBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, FEDERATION OF LAW SOCIETIES OF CANADA, ONTARIO CROWN ATTORNEYS' ASSOCIATION, ONTARIO TRIAL LAWYERS ASSOCIATION, CANADIAN BAR ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Interveners

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**FACTUM OF THE INTERVENER**

**ONTARIO TRIAL LAWYERS ASSOCIATION**

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

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**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

**THOMAS P. CONNOLLY**
Connolly Obagi LLP
200 Elgin Street, Suite 1100
Ottawa, Ontario
K2P 1L5

Tel. (613) 683-2244
Fax (613) 567-9751
Email: tom.connolly@
connollyobagi.com
Ottawa Agent for the Intervener,
Ontario Trial Lawyers Association

**LERNERS LLP**
130 Adelaide Street West
Suite 2400, P.O. Box 95
Toronto, Ontario M5H 3P5

**Earl A. Cherniak, Q.C.**
Tel: (416) 601-2350
Fax: (416) 867-2402
Email: echerniak@lerners.ca
Counsel 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**
**Jaan E. Lilles**
**Andrew M. Porter**
Tel: (416) 865-9500
Fax: (416) 865-9010
Email: tcrry@litigate.com
Counsel for the Respondent,
The Law Society of Upper Canada

**PUBLIC PROSECUTION SERVICE OF CANADA**
160 Elgin Street, 14th Floor
Ottawa, Ontario K1A 0H8

James D. Sutton
Tel: (613) 960-3922
Fax: (613) 960-3717
Email: James.Sutton@ppsc-gc.ca
Counsel for the Intervener, Director
of Public Prosecutions

**MINISTRY OF JUSTICE AND ATTORNEY GENERAL GOVERNMENT OF SASKATCHEWAN**
820-1874 Scarth Street
Regina, Saskatchewan S4P 4B3

Sharon H. Pratchler, Q.C.
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**
160 Elgin Street
Suite 2600, Box 466, Station D
Ottawa, Ontario K1P 1C3

**Jeff Beedell**
Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com
Ottawa Agent for Counsel for the
Appellant Joseph Peter Paul Groia

**DENTONS CANADA LLP**
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 Counsel for the
Respondent, The Law Society of
Upper Canada

**PUBLIC PROSECUTION SERVICE OF CANADA**
160 Elgin Street, 14th Floor
Ottawa, Ontario K1A 0H8

Francois Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: Francois.Lacasse@ppsc-gc.ca
Ottawa Agent for the Intervener,
Director of Public Prosecutions

**GOWLING WLG (CANADA) LLP**
160 Elgin Street, 26th Floor
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel: (613) 786-0171
Fax: (613) 788-3587
Tel. (613)780-2016
Email :
lynne.watt@gowlingswlg.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**
100-340 Gilmour Street
Ottawa, Ontario K2P 0R3

Eugene Meehan, Q.C.
Tel. (613) 695-8855, Ext. 101
Fax (613) 695-8580
Email:
emeehan@supremeadvocacy.ca
Ottawa Agent for the Intervener,
Law Society Tribunal

**ATTORNEY GENERAL OF ONTARIO**
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

Milan Rupic
Tel: (416) 326-4592
Fax: 326-4656
Email: milan.rupic@ontario.ca
Counsel for the Intervener,
Attorney General of Ontario

**BURKE ROBERTSON**
441 McLaren Street, Suite 200
Ottawa, Ontario K2P 2H3

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Email:rhouston@burkerobertson.com
Ottawa Agent for the Intervener,
Attorney General of Ontario

**LAX O'SULLIVAN LISUS GOTTLIEB LLP**
2750-145 King Street West
Toronto, Ontario M5H 1J8

Terrence J. O'Sullivan
Matthew R. Law
Deborah Templer
Tel. (416) 644-5359
Fax (416) 598-3730
Email: tosullivan@counsel-toronto.com
Counsel for the Intervener, Advocates' Society

**MCMILLAN LLP**
2000-45 O'Connor Street
Ottawa, Ontario K1P 1A4

David Debenham
Tel: (613) 691-6109
Fax: (613) 231-3191
Email:
david.debenham@mcmillan.ca
Ottawa Agent for the Intervener,
Advocates' Society

**BARREAU DU QUEBEC**
445, boul. St.-Laurent
Montreal, Quebec H2Y 2Y7

Sylvie Champagne
Andre-Philippe Mallette
Tel: (514) 954-3405, Ext. 3103
Fax: (514) 954-3407
Counsel for the Intervener,
Barreau du Quebec

**SUPREME ADVOCACY LLP**
100-340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel : (613) 695-8855, Ext. 102
Fax: (613) 695-8580
Email :
mfmajor@supremeadvocacy.ca
Ottawa Agent for the Intervener,
Barreau du Quebec

**CANADIAN CIVIL LIBERTIES ASSOCIATION**
90 Eglinton Ave. East, Suite 900
Toronto, Ontario M4P 2Y3

Cara Faith Zwibel
Tel: (416) 363-0321, Ext. 255
Fax: (416) 861-1291
Email : czwibel@ccla.org
Counsel for the Intervener,
Canadian Civil Liberties Association

**FARRIS, VAUGHAN, WILLS & MURPHY LLP**
700 West Georgia Street, 25th Floor
Vancouver, British Columbia V7Y 1B3

Joseph J. Arvay, Q.C.
Catherine George
Tel: (604) 684-9151
Fax: (604) 661-3949
Email: jarvay@farris.com
Counsel for the Interveners, British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society

**FEDERATION OF LAW SOCIETIES OF CANADA**
Three Bentall Centre, P.O. Box 49123
595 Burrard Street, 27th Floor
Vancouver, British Columbia V7X 1J2

Gregory DelBigio, Q.C.
Alison M. Latimer
Tel: (604) 602-4266
Fax: (604) 688-4711
Email: greg@gregdelbigio.com
Counsel for the Intervener,
Federation of Law Societies of Canada

**CAVALLUZZO SHILTON MCINTYRE CORNISH LLP**
300-474 Bathurst Street
Toronto, Ontario M5T 2S6

Paul J.J. Cavalluzzo
Adrienne Telford
Tel: (416) 964-1115
Fax: (416) 964-5895

**GOWLING WLG (CANADA) LLP**
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email : lynne.watt@gowlingwlg.com
Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

**GOWLING WLG (CANADA) LLP**
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com
Ottawa Agent for the Interveners,
British Columbia Civil Liberties Association and Independent Criminal Defence Advocacy Society

**MICHAEL J. SOBKIN**
331 Somerset Street West
Ottawa, Ontario K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca
Ottawa Agent for the Intervener,
Federation of Law Societies of Canada

Email: pcavalluzzo@cavalluzzo.com
Counsel for the Intervener,
Ontario Crown Attorneys' Association

**NORTON ROSE FULBRIGHT CANADA LLP**
1 Place Ville Marie, Bureau 2500
Montreal, Quebec H3B 1R1

Pierre Bienvenu
Andres C. Garin
Tel: (514) 847-4747
Fax: (514) 286-5474
Email: pierre.bienvenu@nortonrosefulbright.com
Counsel for the Intervener,
Canadian Bar Association

**NORTON ROSE FULBRIGHT CANADA LLP**
1500-45 O'Connor Street
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,
Canadian Bar Association

**ADDARIO LAW GROUP**
171 John Street, Suite 101
Toronto, Ontario M5T 1X3

Frank Addario
Samara Secter
Tel: (416) 979-6446
Fax: (866) 714-1196
Email: faddario@addario.ca
Counsel for the Intervener,
Criminal Lawyers' Association
of Ontario

**GOLDBLATT PARTNERS LLP**
500-30 Metcalfe Street
Ottawa, Ontario K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbaumann@goldblattpartners.com
Ottawa Agent for the Intervener,
Criminal Lawyers' Association
of Ontario

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## PART I – OVERVIEW STATEMENT

1. In *R. v. Jordan* and *Hryniak v. Mauldin*, this Court examined the criminal and civil justice systems and determined that a "culture shift" was needed to ensure that legal matters proceed in a more timely and cost efficient manner. The Court stressed that all participants in the justice system have a shared responsibility to bring about a change in culture. Incivility in the conduct of litigation undermines this objective. It distracts from the merits, prolongs the proceeding and crowds out other deserving litigants. The Ontario Trial Lawyers Association ("OTLA") respectfully supports the decisions of the Law Society Appeal Panel and the majority in the Court of Appeal for Ontario in more appropriately furthering this objective.

*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 641

*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87

## PART II – RESPONSE TO THE APPELLANT'S QUESTIONS

2. OTLA proposes to respond to the Appellant's position that: (a) the decisions in the Courts below inhibit the fearless advocacy clients are entitled to receive, and will cause "advocacy chill"; (b) the test for incivility is too vague; (c) in order to meet the test, the conduct in issue must threaten the right to a fair trial. OTLA submits that concerns about advocacy chill cannot detract from the need for responsible conduct by counsel; the test for incivility adopted by the Appeal Panel and the majority in the Court of Appeal, that allegations of misconduct should not be made unless made in good faith and with a reasonable basis, provides a sufficiently clear legal standard; a requirement that the conduct in issue threaten the right to a fair trial need not be part of the test. The standard of good faith and reasonable basis provides a built in safeguard for counsel acting responsibly.

## PART III – STATEMENT OF ARGUMENT

### Background

3. The context for this appeal involves conduct that occurred in court, during the course of a prosecution under the *Securities Act*. The majority in the Court of Appeal rightly stated, at para. 123 of the reasons, that the test for incivility applies equally to conduct that occurs out of court. No matter what the context, it has been recognized that incivility in the conduct of litigation interferes with the orderly progress of a claim and impacts upon the administration of justice.

4. When the judicial review proceeding in *R. v. Felderhof* came before the Court of Appeal, Rosenberg J.A. referred with approval to a paper by U.S. academic Kara Anne Nagorney:

> Conduct 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.
>
> *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), 2003 CanLII 37346, para. 83.

5. *Marchand (Litigation Guardian) v. Public General Hospital Society of Chatham* involved an action for medical malpractice protracted by the uncivil conduct of defence counsel. The Court stated that civility is "a shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves."

> *Marchand (Litigation Guardian) v. Public General Hospital Society of Chatham* (2001), 51 O.R. (3d) 97 (C.A.), 2000 CanLII 16946, para. 148.

6. This Court examined excessive cost and delay in the civil justice system in *Hryniak v. Mauldin*. Karakatsanis J. stressed the importance of the issues at stake: "Ensuring access to justice is the greatest challenge to the rule of law in Canada today." A culture shift was needed to promote "timely and affordable" access to the system. Undue process interfering with adjudication on the merits was singled out as a source of concern. The responsibility to effect a change in culture rests with all participants. Judges can more readily exercise their case management powers, and "counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice." While the focus in *Hryniak v. Mauldin* was on the use of proportionate procedures, it is apparent that the concerns of the Court apply equally to the effects of incivility.

> *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, paras. 1, 2, 24, 28, 32.

7. The Court returned to the same themes in *R. v. Jordan*. An efficient and timely criminal justice system is "of utmost importance." Unnecessary procedural steps and inefficient advocacy were singled out as "weighing down the entire system." "Each procedural step or motion that is improperly taken…deprives other worthy litigants of timely access to the courts." A "change in courtroom culture" is needed, and "Ultimately, all participants in the justice system must work in concert to achieve speedier trials." Judges can more readily exercise their case management powers, Crown counsel can streamline the proceeding or the number of charges and, for defence counsel, this means actively advancing their client's right to a trial within a reasonable time, "collaborating

with Crown counsel when appropriate and, like Crown counsel, using court time efficiently."

*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, paras. 3, 43, 44, 116, 138.

8. These themes are reflected in the *Rules of Professional Conduct*. The duty of civility found in Rule 6.03(1) provides that "A lawyer shall be courteous, civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice." The duty of civility can be seen as part of the broader obligation of lawyers as officers of the court to promote the efficient administration of justice. In that regard, Rule 6.03(2) states: "A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client." These Rules apply equally to civil and criminal practitioners, and are designed to avoid unnecessary cost and procedures that do not go to the merits of the dispute, or impact upon the rights of the client.

9. The obligations are not new. In *Rondel v. Worsley*, Lord Reid referred to counsel's "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." This includes a duty not to "cast aspersions" on the other party or witnesses for which there is no sufficient information in counsel's possession.

*Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.), pp. 227-228.

10. OTLA's interest in this appeal stems from the fact that its 1,600 members, including over 1,000 lawyer members, are engaged daily in the civil justice system on behalf of plaintiffs, many of whom are catastrophically injured and require timely adjudication. To the extent incivility interferes with the orderly progress of a claim, or results in protracted and unnecessary procedure, the interests of litigants suffer. With those concerns in mind, in May 2015, OTLA promulgated a Code of Conduct entitled *Standards of Conduct for Excellence* which includes in relevant part:

> (i) Members demonstrate respect, fairness and civility in all of their professional interactions and relationships;
>
> (ii) Once retained, members advance claims in a manner and within a time frame that is consistent with the client's interest. Members endeavour to achieve the most cost effective, expeditious and just resolution of claims and encourage sensible settlement and compromise or trial as the client's interest dictates;
>
> (iii) Members co-operate reasonably with courts and tribunals to streamline the adjudication process, narrow the issues in dispute, and avoid unnecessary cost and delay,

while advancing the proper interest of their clients;

(iv) Members reasonably co-operate with other participants in the civil justice system to facilitate an organized, efficient and effective process for the resolution of claims.

*The OTLA Code, Standards of Conduct for Excellence*, May 2015.

**Advocacy Chill**

11. In his Factum at para. 5, the Appellant says that clients have the right to demand zealous advocacy from their counsel, and this should not suffer from the chilling effect of after the fact involvement by the Law Society. In *Grant v. Torstar Corp.*, a similar argument about libel chill was made by the media in the context of claims for defamation. The Court gave effect to the argument, and established the new defence of responsible communication on a matter of public interest. The Court held, however, that concerns about libel chill could not detract from the need for responsible conduct. McLachlin C.J. stated, at para. 53: "Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards." Similarly here, concerns about advocacy chill should not detract from the need for responsible conduct by counsel, in accordance with standards of the profession.

*Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, para. 53.

12. Further, the validity of concerns about advocacy chill can only be evaluated in the context of the test for incivility. The Appeal Panel held that it is professional misconduct to impugn the integrity of opposing counsel unless the allegations are made in good faith and have a reasonable basis. In applying the test, a Court or Tribunal is to adopt a broad contextual approach that takes into account "the dynamics, complexity and particular burdens and stakes of the trial." The contextual approach "will ensure that the vicissitudes that confront courtroom advocates are fairly accounted for so as not to create a chilling effect on zealous advocacy."

*Groia v. The Law Society of Upper Canada*, 2013 ONLSAP 41, paras. 232-235.

13. In *Grant v. Torstar Corp.*, the Court gave effect to media concerns about libel chill because the existing legal test provided for a standard of strict liability. A publisher would have to be certain a statement could be proven in court before publication. By contrast, the test for incivility and the broad contextual approach account for the "burdens and stakes" faced by criminal defence counsel. The test thus provides a built in safeguard for counsel acting in good faith and with a reasonable basis, and is sufficient to address the concerns about advocacy chill.

*Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, paras. 28, 53, 57, 126.

**The Rules on Civility are Clear Enough**

14. Closely related to advocacy chill is the concern that the test for incivility is too vague, and fails to give fair warning to counsel for prohibited conduct until determined after the fact. Our legal system, however, is shot through with open ended legal standards: the best interests of the child; the reasonable man; the interests of justice. Under the *Charter of Rights and Freedoms*, section 24(2), evidence shall be excluded if, having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute. On a daily basis, litigants in civil and criminal matters are called upon to make important decisions in the absence of clear legal rules.

15. In fact, the *Rules of Professional Conduct* and authorities do provide guidance on the nature of the prohibited conduct. In *Dore v. Barreau du Quebec*, the Court described incivility as "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy." In *R. v. Felderhof*, the conduct was described as "abrasive, hostile or obstructive." The Appeal Panel and majority in the Court of Appeal made clear that the incivility rule is not meant to capture isolated incidents. And at para. 74 of its decision in this case, the Divisional Court referred to conduct that is "rude, unnecessarily abrasive, sarcastic, demeaning or of any like quality." These descriptions provide adequate guidance on the types of conduct the rule is designed to prohibit.

*Dore v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 61.

*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), 2003 CanLII 37346, para. 83.

*Groia v. The Law Society of Upper Canada*, 2015 ONSC 686 (Div. Ct.), para. 74.

16. In *R. v. Lyttle*, the Court considered whether counsel are entitled to put suggestions to a witness in cross-examination in the absence of supporting evidence. Given the importance of cross-examination and the right to make full answer and defence, the Court held that such conduct is permissible provided there is "a good faith basis" for doing so. Major and Fish JJ. stated at para. 48:

> The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.

*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, paras. 1, 41, 47, 48.

17. Given the importance of zealous advocacy and the right to make full answer and defence, the same principles apply here. Faced with a similar context involving counsel's ethical obligations, the Court held that a good faith standard provided sufficient guidance and struck a proper balance between *Charter* rights and a lawyer's ethical duties. The test of good faith and reasonable basis adopted by the Appeal Panel and majority in the Court of Appeal leads to the same result.

**There is No Need for a Second Step**

18. A significant issue in this appeal involves whether the test for incivility requires an additional component to the good faith and reasonable basis standard. When the Appeal Panel decision came before the Divisional Court, the Court added an additional step to the test: that the conduct undermine, or have the tendency to undermine, the proper administration of justice.

*Groia v. The Law Society of Upper Canada*, 2015 ONSC 686 (Div. Ct.), paras. 75, 76.

19. The majority in the Court of Appeal rejected this aspect of the Divisional Court decision. D.M. Brown J.A. modified it to provide that, in order to amount to a disciplinary offence, the conduct in issue would have to undermine, or threaten to undermine, the fairness of the trial.

*Groia v. The Law Society of Upper Canada*, 2016 ONCA 471, (2016), 131 O.R. (3d) 1 (C.A.), paras. 169-177, 352-359.

20. OTLA respectfully agrees with the majority in the Court of Appeal on this point. The effect of the modification of D.M. Brown J.A. would leave unregulated conduct undertaken by counsel in bad faith and without a reasonable basis. That would send the wrong message to the profession, and fails to adequately take into account the harmful effects of uncivil conduct on the reputation of the administration of justice. As Rosenberg J.A. stated in *R. v. Felderhof*:

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

*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), 2003 CanLII 37346, para. 83.

21. In *Marchand, supra,* the Court of Appeal said that the failure to discharge the shared responsibility to ensure civility in the courtroom in that case "tarnished the reputation of the administration of justice." In *R. v. Lyttle*, the Court referred to the "important professional duties and ethical responsibilities" of counsel, and cited with approval the passage of Lord Reid in *Rondel*

*v. Worsley* referred to above, on counsel's "overriding duty to the court, to the standards of his profession, and to the public."

*Marchand (Litigation Guardian) v. Public General Hospital Society of Chatham* (2001), 51 O.R. (3d) 97 (C.A.), 2000 CanLII 16946, para. 148.

*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, para. 66.

22. The additional step is not required to give effect to zealous advocacy. The test of good faith and reasonable belief, together with the broad contextual approach that takes into account "the burdens and stakes of the trial" and "the vicissitudes that confront courtroom advocates" is sufficient for that purpose. The test adopted by the Appeal Panel and the majority in the Court of Appeal strikes a sensitive and appropriate balance between the competing interests at stake.

23. The majority in the Court of Appeal was right to say:

> Uncivil conduct that falls short of fatally compromising the fairness of a trial may nonetheless impede the efficient and orderly progress of the trial, tarnishing public respect for and confidence in our justice system in the process.

*Groia v. The Law Society of Upper Canada*, 2016 ONCA 471, (2016), 131 O.R. (3d) 1 (C.A.), para. 173.

**Conclusion**

24. Clients are entitled to the fearless, determined and loyal representation of their lawyers. No-one involved in this appeal would dispute that. There is also no doubt that criminal defence lawyers deal with hugely important matters that can bring them into conflict with the police and prosecuting authorities. At every step of this proceeding, from Campbell J. and Rosenberg J.A. on the judicial review in *R. v. Felderhof*, to the Appeal Panel, the Divisional Court and the Court of Appeal here, it has been emphasized that civility is not inconsistent with zealous advocacy. Holding lawyers to a standard that reflects responsible conduct enhances the administration of justice.

## PART IV – ORDER SOUGHT CONCERNING COSTS

25. In the order granting leave to intervene, OTLA and the other interveners have been ordered to pay any additional disbursements arising out of their intervention.

## PART V – ORDER SOUGHT

26. OTLA does not take a position on the merits of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, in the Province of Ontario, this 24th day of July, 2017.

ALLAN ROUBEN
Counsel for the Intervener,
Ontario Trial Lawyers Association

## PART VI -TABLE OF AUTHORITIES

| | CASES | Factum Paragraphs |
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| 6. | *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 | 1, 6 |
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| 9. | *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 | 1, 7 |
| 10. | *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 | 16, 21 |
| 11. | *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.) (See *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, para. 66) | 9, 21 |

| | SOURCES | Factum Paragraphs |
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## PART VII – STATUTES AND REGULATIONS

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| 1. | *Canadian Charter of Rights and Freedoms*, section 24(2) |
| 2. | Law Society of Upper Canada, *Rules of Professional Conduct*, 2000, Rules 6.03(1), (2) |