S.C.C. 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

- AND -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT

-AND-

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FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

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

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TABLE OF CONTENTS

PART I - OVERVIEW

1. The obligation placed upon lawyers to zealously advocate for their clients is an essential element of a fair and just judicial process. Limits on how lawyers express themselves in representing a client in the courtroom must be well-defined and narrow. This Court has been called upon to define the reasonable limits of freedom of expression in a wide variety of contexts, before and after the enactment of the *Canadian Charter of Rights and Freedoms*.[1] In each instance, the task is to safeguard a compelling interest while providing robust protection for freedom of expression and its underlying values. In considering when courtroom incivility rises to the level of professional misconduct, this Court must assess how curtailing a lawyer's expressive freedom may affect his or her ability to fulfill other professional obligations – most significantly, the assertion and defence of a client's constitutional rights. Protection of the public is what lies at the core of these questions.

2. The Canadian Civil Liberties Association ("CCLA") focuses its submissions on interpreting the civility requirement in a manner that affirms the freedom of lawyers to make submissions to the court on behalf of their clients, and establishes clear limits on that freedom, only to the extent strictly required. The CCLA's proposed standard provides lawyers with meaningful guidance and fair warning of when courtroom conduct may lead to discipline.

3. While the CCLA's intervention is directed at the broader questions raised in this appeal, the context of the Appellant's case is relevant to the way in which the issues are approached. The Appellant's finding of misconduct and penalty were based solely and strictly on arguments made while representing a client, before a judge, in open court. The statements were highly critical of the prosecutor's conduct of the case and made in defence of the client's constitutional rights. They were repeatedly brought to the attention of the presiding judge who chose not to rule against the Appellant, not to reprimand him, and not to ask him to stop. The CCLA submits that in circumstances such as these, *post hoc* review and disciplinary action against a lawyer based on incivility poses a genuine threat to freedom of expression; it risks chilling the zealous advocacy with which lawyers are duty-bound to act on behalf of their clients, and it risks unduly narrowing

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[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

the bounds of *Charter*-protected expression by paying insufficient heed and deference to the context of a lawyer's expression.

4. The CCLA relies on the facts as set out by the parties to the appeal.

PART II - POSITION ON THE QUESTION IN ISSUE

5. The CCLA's submissions are directed at the second issue identified by the Appellant in his factum: in what circumstances can a law society discipline a lawyer for professional misconduct arising out of submissions to a judge in open court, while acting for a client. CCLA proposes that disciplinary proceedings for courtroom incivility may only be brought in the clearest of cases, based on alleged incivility that seriously undermines the administration of justice, or has caused or is reasonably likely to cause a miscarriage of justice. Further, it is imperative that any *post hoc* review of counsel's in-court conduct by a disciplinary body give due regard to how the conduct was (or was not) addressed by the presiding judge.

PART III - ARGUMENT

A. Freedom of Expression is Vital to Protect Constitutional Rights

6. Freedom of expression is among the most fundamental rights possessed by all individuals; it is crucial to our liberty and central to our democratic system. It is a means of fostering the search for truth, creativity, and self-fulfillment and was recognized as a bedrock component of Canada's democratic system well before it was enshrined as a constitutional guarantee in the *Charter*.

7. Freedom of expression is not only fundamental to the functioning of our democracy, but is also the hallmark of *institutions* that aspire to democratic ideals and transparency – including our justice system. Indeed, the freedom is not only an end in itself, but a tool that can improve how our institutions function. As this Court noted in *Edmonton Journal v. Alberta (Attorney General)*:

> …a democracy cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.[2]

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[2] [1989] 2 S.C.R. 1326, p. 1336.

8. Participants in the justice system – lawyers and judges alike – require this basic freedom to effectively carry out their responsibilities and meet their professional obligations. Most significantly, the freedom is essential to the protection of other constitutional and legal rights including the right to a fair trial and to make full answer and defence. Further, in light of their legal expertise, training, and first-hand experience, lawyers are often looked to as sources of insight and commentary on the workings of public institutions and, in particular, our justice system.

9. The reasonableness of restrictions on freedom of expression depends on context and must consider both the instrumental function of free expression in a particular case, and its importance writ large. While restrictions on expression may be justified in some circumstances to protect the integrity of the court system, the reputation of judicial officers, and the rights of an accused, our courts have recognized that these interests are in fact often best served by providing strong protections for free expression. In the context of a publication ban in a criminal proceeding, the Supreme Court has held:

> …it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process and all of the participants in the court process.[3]

10. The question of how and where to appropriately draw the line with respect to lawyers' expressive freedoms has been addressed by our courts before, although in contexts that differ from the instant case in significant ways. For example, in *R. v. Kopyto,*[4] the Ontario Court of Appeal considered whether the common law offence of scandalizing the Court was a constitutionally permissible limit on freedom of expression. Cory J.A. held that criticism of the courts is to be expected and that this type of expression should be given a wide margin, stating that "…the courts are not fragile flowers that will wither in the hot heat of controversy."[5]

11. This Court recently affirmed that there was significant benefit to the public "in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular".[6] As Abella J. noted:

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[3] *Dagenais v Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, p. 882.
[4] (1987) 62 O.R. (2d) 449 (ONCA).
[5] *Ibid.,* para. 197
[6] *Doré v. Barreau du Québec,* 2012 SCC 12, para. 63 [*Doré*].

> Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the Charter. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. [7]

12. This Court's comments in *Doré* are equally applicable when the subject of a lawyer's criticism is another participant in the justice system, particularly a prosecutor acting on behalf of the state. Indeed, such discourse is intimately linked to protecting the constitutional rights of accused persons. The fundamental importance of open, and even forceful, criticism of our public institutions and representatives must be balanced with the need to ensure civility in the profession. However, as the Divisional Court held in this case:

> The "zealous advocacy chill" is not a concern to be ignored or minimized. Indeed, *where the interests clash, I would suggest it is better that zealous advocacy be favoured over the desire for civility*. Our justice system can tolerate uncomfortable and unpleasant exchanges in the courtroom much better than we can ever tolerate a wrongful result.[8]

B. Defining the Standard for Incivility Resulting in Professional Misconduct

13. There has been disagreement between the parties and some interveners over the significance of the fact that the alleged incivility in this case took the form of submissions before a judge in open court. The CCLA does not argue that civility is a professional obligation that can be left at the courthouse door. However, to suggest that there is simply one "test" for determining when incivility amounts to professional misconduct does not provide meaningful guidance to counsel, our courts, or the regulatory bodies. It ignores the highly contextual nature of applying the broad and subjective civility requirement. Courtroom incivility is the area where this Honourable Court's guidance is most sorely needed.

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[7] *Ibid.,* paras. 65-66.
[8] *Groia v Law Society of Upper Canada,* 2015 ONSC 686, para. 71 (emphasis added) [*Groia* – Div Ct].

14. The CCLA's approach takes into account the fact that judges have broad powers to exercise control in the courtroom using a variety of tools.[9] At the same time, it recognizes that judges may have good reason not to intervene to address uncivil behavior in every instance.

15. CCLA submits that professional disciplinary proceedings should only be brought based on courtroom incivility in the clearest of cases, where the lawyer's behavior has seriously undermined the administration of justice, or has caused or is reasonably likely to cause a miscarriage of justice. The CCLA's proposed test intentionally sets a high threshold. There is a real risk that a less exacting standard will chill lawyers' expressive freedoms in a manner that directly impacts their ability to protect clients' constitutional and legal rights.

16. In assessing whether this threshold has been reached, the factors articulated by Brown J.A. in his dissenting opinion – while not determinative – must be meaningfully considered. These consider what the barrister did, how the judge addressed the conduct, how the barrister responded to directions from the judge, and what effect the conduct complained of had on the fairness of the proceeding, including the ability of the opposing side to present its case.[10] CCLA submits that where the trial judge takes no steps to control counsel's allegedly uncivil conduct, a rebuttable presumption as described in the factum of the Canadian Bar Association provides a helpful mechanism to reconcile the law society's role with the independence of the courts.[11]

17. The CCLA's approach, as articulated above, flows from two main principles. First, that standards that restrict free expression and result in punitive sanctions should be articulated as clearly and narrowly as possible. The rules governing lawyers throughout Canada provide law societies with broad scope to regulate the lawyers both in their legal practice and in their private

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[9] Judges engage in regulating the practice of law, including the competence of lawyers, through their administration of civil negligence actions. Judicial regulation also occurs in entry restrictions, advertising restrictions, conflicts of interest and lawyer withdrawals from the record. See also paras. 23-25 of the factum of the intervener, Canadian Bar Association for a helpful discussion on the powers of a trial judge to control courtroom conduct.

[10] *Groia v. The Law Society of Upper Canada,* 2016 ONCA 471, para. 319 [*Groia* – ONCA].

[11] See paras. 12(b) and 30-32 of the factum of the intervener, Canadian Bar Association.

lives. Where these rules restrict expressive freedoms, clarity is required to provide meaningful guidance to lawyers, courts and regulators.

18. Second, the CCLA submits that the test for incivility leading to a finding of professional misconduct must be linked to the purposes that law societies serve in regulating the profession. These purposes have the public interest at their core.

i) Clarity and guidance

19. The CCLA accepts that standards of conduct – for lawyers and in other contexts – cannot be defined with absolute precision; some measure of uncertainty is to be expected. However, given that freedom of expression is essential to a lawyer's ability to protect a client's constitutional and legal rights, the civility obligation must be made as concrete as possible if it is to be applied for disciplinary purposes.

20. Since the case law frequently describes incivility as a matter of degree rather than a bright line, counsel may find it challenging to accurately assess when conduct might move from zealous to uncivil territory.[12] There is a genuine risk that the civility requirement could be interpreted in very broad terms, exposing lawyers to discipline for a wide variety of behaviours and conduct, or for simply being wrong about the validity of an argument made forcefully, with conviction, and in good faith. At times, it is in the client's best interests that a lawyer be provocative and persistent. Moreover, criticisms of other counsel may only be found to be ill-considered, uninformed or misinformed after the fact. Lawyers play an important role in keeping each other in check. Concerns about disciplinary consequences for incivility may undermine this role.[13]

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[12] Don Bayne, "Problems with the Prevailing Approach to the Tension Between Zealous Advocacy and Incivility"4 C.R. (7th) 301 , p. 2 [Bayne]; Appellant's Brief of Authorities, Tab 2.

[13] See Alice Wooley, "Does Civility Matter?" (2008) 46 Osgoode Hall L.J. 175. Prof. Wooley notes at pp. 179-180: "Lawyers do not and should not "share and be nice" where to do so impinges either on their loyalty to their client or their fidelity to the legal system. This does not mean that lawyers must be uncivil, but it does mean that disciplining lawyers for incivility…may have negative ethical consequences. Most significantly, an undue emphasis on civility has the potential to undermine the ability of law societies to fulfill their obligation to regulate lawyers'

21. The need for clarity is heightened in the context of courtroom behavior, since counsel reasonably and necessarily take their cues from the presiding judge. It is important that lawyers and presiding judges know that a disciplinary body will put the judge's reaction and directions, and counsel's response, at the centre of any *post hoc* review. Trial judges have both statutory and inherent powers to control proceedings in their courtrooms and a number of tools available to address uncivil behaviour by counsel.[14] Moreover, judges hearing a case will be in the best position to determine whether and to what extent a lawyer's conduct is disrupting proceedings in a manner that has a genuine impact on trial fairness and the administration of justice.

ii) The purposes of professional regulation

22. The Respondent and some interveners have argued that an impact on the administration of justice is not a prerequisite to the initiation of disciplinary proceedings, or that incivility, in and of itself, brings the administration of justice into disrepute. The CCLA disagrees. The *Law Society Act* states that, in carrying out its duties, the LSUC "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.[15]

23. These principles demonstrate that the core of the LSUC's mandate (similar to the mandates of all Canadian law societies) is to regulate lawyers *in the public interest and for the benefit of the*

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ethics. As members of a self-regulating profession, lawyers must hold each other to account. They must be actively engaged with each other's ethics and professionalism, and must be critical where necessary. Emphasizing civility has the significant potential to dampen the effect of this function, and to foster professional protectionism. If a strongly-worded criticism will subject a lawyer to discipline for incivility she will, naturally, be less likely to make that criticism event if it is well-founded."

[14] See Paul M. Perell, "The Civil Law of Civility" (Paper from the 10th Colloquium of the Chief Justice of Ontario's Advisory Committee on Professionalism, March 2008); online at: http://www.lsuc.on.ca/media/tenth_colloquium_perell.pdf.

[15] *Law Society Act,* R.S.O. 1990, c. L.8, s. 4.2.

public. The LSUC must distinguish between concerns of civility that may go to mannerism alone, and those concerns of civility which may impede the proper and fair administration and disposition of justice. In stating that standards of professional conduct should be proportionate to regulatory objectives, the legislation underlines the need for a link between discipline for misconduct and a public interest concern. Indeed, the Commentary to the *Rules of Professional Conduct* explicitly links lawyers' obligation to the protection of clients' rights.[16]

24. In light of the LSUC's public interest mandate, the impact of civility requirements on the criminal defence bar merit special consideration. This group is likely to be disproportionately affected by the regulation of civility, particularly in relation to submissions made in court. The high standard that must be met before a stay will be granted for prosecutorial misconduct creates an inevitable tension with the duty of civility,[17] highlighted clearly in this case. Such circumstances demonstrate the important role played by a presiding judge and the need for restraint by professional regulatory bodies when addressing in-court conduct.

iii) Undermining the administration of justice

25. The Divisional Court recognized the need to provide lawyers with meaningful guidelines for appropriate conduct in court. It held that in addition to conduct that is "rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality", there must be a further element to result in a finding of professional misconduct:

> …It is, therefore, ultimately necessary for a finding of professional misconduct for the uncivil conduct to have undermined, or to have had the realistic prospect of undermining, the proper administration of justice.[18]

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[16] The Commentary to Rule 4.01(1) of the *Rules of Professional Conduct* sets out a lawyer's duty to a client to "raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law." The Commentary further states that "Maintaining dignity, decorum, and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected."

[17] Bayne, *supra* note 12 at 2.

[18] *Groia* – Div. Ct., paras. 75-6.

26. In principle, the Divisional Court's approach helps to reconcile the various competing concerns at play in this appeal and provides a clearer standard than the one articulated by the Appeal Panel and affirmed by the Ontario Court of Appeal. Unfortunately, and with respect, the clarity is undercut by the Divisional Court's own description of conduct that is said to undermine (or have a reasonable prospect of undermining) the administration of justice. The Divisional Court held:

> Many different kinds of conduct may give rise to this effect. Such conduct will include, but is not limited to, repeated personal attacks on one's opponents or on the judge or adjudicator, without a good faith basis or *without an objectively reasonable basis*; *improper* efforts to forestall the ultimate completion of the matter at issue; actions designed to *wrongly* impede counsel from the presentation of their case; and efforts to *needlessly* drag the judge or adjudicator "into the fray" and thus imperil their required impartiality, either in fact or in appearance. Of special concern is any such conduct that could ultimately result in a decision that would amount to a miscarriage of justice.[19]

27. This is problematic for two reasons. First, the conduct described is loosely-defined and highly subjective. Second, it implies that a disciplinary body can determine, *after the fact,* that actions in court, made in good faith and in reliance on the guidance of the presiding judge, were simply mistaken or objectively unreasonable. While these errors may be addressed via regulatory intervention with respect to competency, they ought not to form the basis of discipline for incivility.

28. The majority decision of the Court of Appeal puts even less emphasis on the impact of alleged incivility on the administration of justice, holding that a threat or harm to trial fairness is unnecessary to trigger disciplinary action.[20] The majority appears to accept that any act of incivility undermines the administration of justice.[21]

29. The concern about the chilling impact on zealous advocacy cannot be adequately addressed unless a higher, and clearer, bar has been set. If any alleged incivility is considered, by definition, to undermine the administration of justice, the definition is circular and unhelpful. As such, CCLA's proposed approach is to elevate the requirement to incivility that seriously undermines the administration of justice, or causes (or is reasonably likely to cause) a miscarriage of justice.

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[19] *Ibid.,* para. 76 (emphasis added).
[20] *Groia* – ONCA, paras. 173-177.
[21] *Ibid.,* paras. 169-170

This ensures that the need to demonstrate an impact on the administration of justice is weighty and substantive.

C. Conclusion

30. CCLA's proposed standard – that professional disciplinary proceedings should only be brought on the basis of courtroom incivility that seriously undermines the administration of justice, or has caused or is reasonably likely to cause a miscarriage of justice – would serve compelling goals. It respects the rights of lawyers to freely express themselves when representing a client's interests and asserting or defending his/her constitutional rights. It properly focuses on the public interest mandate of the LSUC, requiring a link between lawyer conduct and a clear and weighty impact on the administration of justice. It recognizes the importance of context and the role of a presiding judge in controlling proceedings. Finally, it is a proportionate response to the public interest objectives the Law Society seeks to achieve and helps to avoid the chilling effect that a broader definition of incivility might have on counsel, and most importantly, on the constitutional rights of clients.

PART IV - SUBMISSIONS ON COSTS

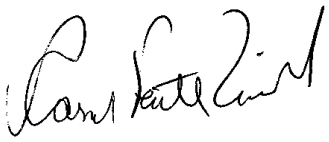
31. The CCLA will not seek costs and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

32. The CCLA has been granted five minutes for oral argument in the hearing of this appeal.

33. The CCLA takes no position on the merits of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st day of July, 2017



Cara Faith Zwibel

PART VI - TABLE OF AUTHORITIES AND LEGISLATION

PARA. NO.

CASES:

LEGISLATION:

SECONDARY SOURCES: