

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 -

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PART I - OVERVIEW & FACTS

1. Law societies and the judiciary have parallel but different roles to play in overseeing the courtroom conduct of lawyers. One of the key issues raised by this appeal, and by courtroom incivility generally, is ensuring that the role played by law societies in upholding professional ethical standards is respectful of the institutional role of the courts as the primary guardians of trial fairness and the proper administration of justice.
2. The courts below have struggled to accommodate the role and responsibility of our independent judiciary within a test for assessing when courtroom incivility constitutes professional misconduct. With respect, it is submitted that they have failed to lay out an analytical framework that adequately balances the values at stake.
3. This difficulty is illustrated by the majority and dissenting reasons in the Ontario Court of Appeal. The approach of the majority effectively excludes from the test for misconduct any consideration of the role of our independent judiciary, as guardian of the proper administration of justice and trial fairness, in supervising lawyers' courtroom conduct. While the dissenting opinion recognizes the vital importance of this factor, the actual test for misconduct formulated by Brown J.A. paradoxically undercuts the authority of the courts, by inviting law societies to inquire into whether the advocate's conduct undermined, or threatened to undermine, trial fairness¹ – a matter which presiding judges have the primary responsibility to preserve.
4. The Canadian Bar Association (**CBA**) intervenes in the present appeal in order to propose an alternative test for courtroom incivility amounting to professional misconduct. The CBA's test seeks to strike an appropriate balance between the competing values engaged by the issue of courtroom incivility.
5. As an intervener, the CBA takes no position in respect of the facts at issue in the dispute giving rise to this appeal.

¹ *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 [*Groia CA*], para. 359.

PART II - POSITION ON THE QUESTIONS IN ISSUE

6. The CBA intervenes solely to propose a test for courtroom incivility amounting to sanctionable professional misconduct that properly balances the values at stake. The CBA takes no position on the disposition of the appeal.

PART III - ARGUMENT

(A) The Three Values At Stake

7. At the core of this appeal lie three principles that are of fundamental importance to our court system: the value of courtroom civility, the independence of the judiciary, and the right of litigants to fearless and zealous representation.
8. *First*, this appeal offers an opportunity for the Court to reaffirm the central value of civility and, in particular, courtroom civility to the legal profession and to the court system. Civility is a hallmark of our best advocacy. Throughout its history, the CBA has unreservedly upheld and defended civility in the legal profession. Maintaining civility in Canada's courtrooms is fundamental to ensuring public confidence in the administration of justice and to "enhancing the fairness and effectiveness of the justice system".²
9. *Second*, courtroom incivility, on account of *where* it occurs – in a courtroom presided over by a judge whose responsibility it is to preserve procedural fairness and the proper administration of justice – engages the constitutionally protected principle of judicial independence. Failure to take into account where the impugned misconduct occurs and the authority of the presiding judge to control and sanction courtroom conduct risks undermining the independence of the judiciary. Accordingly, the test for incivility amounting to professional misconduct must give significant weight to the presiding judge's views and reactions to the impugned conduct, lest law societies impermissibly engage in second-guessing the judge's handling of the proceedings.
10. *Lastly*, as the various courts and decision makers below have all recognized, the question of whether and when courtroom incivility constitutes professional misconduct also

² Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97, p. 100.

engages the value of zealous advocacy. While not absolute, the right of litigants to zealous representation is foundational to our adversarial system, and requires a “barrister ... fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he properly may and which he thinks will help his client’s case, without regard to any unpleasant consequences to himself or any other person”.³ The duty of zealous advocacy may be seen as a component of lawyers’ duty of commitment to their client’s cause, which this Court has recently recognized as a principle of fundamental justice protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.⁴

11. Irrespective of the standard of review applicable to the Appeal Panel’s Decision, an issue on which the CBA takes no position, any test for courtroom incivility amounting to professional misconduct must afford due weight to all three values at play. To be clear, a test that fails to appropriately balance the values of civility, judicial independence and zealous advocacy ought not pass muster under a reasonableness standard of review, nor *a fortiori* under review for correctness.

(B) The Appropriate Test

12. To strike an appropriate balance between civility, judicial independence, and zealous advocacy, the CBA proposes the following two step test for courtroom incivility amounting to professional misconduct:
 - a) Has counsel engaged in uncivil courtroom conduct, in that:
 - i) counsel’s behavior is objectively offensive, disruptive, demeaning, abusive or discriminatory; and
 - ii) counsel was not acting in good faith or had no reasonable basis for the conduct at issue?

³ *Irvine v. Canada*, [1987] 1 S.C.R. 181, p. 211 (quoting from *Halsbury’s Laws of England*, vol. 3, 4th ed., p. 619, para. 1137).

⁴ *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, paras. 88-102.

- b) Was the impugned conduct manifestly inconsistent with counsel's duties as an officer of the court? In that regard, where the presiding judge did not intervene or comment adversely on counsel's conduct, has the law society rebutted the resulting presumption that the presiding judge implicitly determined that the conduct, although perhaps uncivil, was not manifestly inconsistent with counsel's duties as an officer of the court and therefore does not constitute professional misconduct?
13. The CBA's test differs from that of the Law Society Tribunal's Appeal Panel, as confirmed by the majority of the Court of Appeal, in three ways:
- a) It is framed broadly, to capture different forms of courtroom incivility;
- b) It is stringent to avoid creating a chilling effect on zealous advocacy;
- c) It is consistent with judicial independence as it reflects and respects the primary role of judges in controlling the courtroom conduct of participants in the judicial process and preserving procedural fairness.
- (C) The Elements of the Test for Incivility Amounting to Professional Misconduct**
- (1) Providing a Clear and Workable Definition of Courtroom Incivility**
14. Any test for courtroom incivility amounting to professional misconduct must, to begin with, recognize and preserve the importance of civility to our court system and to the legal profession. Attorneys have a professional duty and are expected by the public, on whose behalf they serve, to endure the constraints and pressures of the court process with civility and dignity.⁵ More than a mere nicety, civility is a necessary condition to the basic goal of resolving disputes rationally, peacefully, and efficiently.⁶
15. Promoting civility amongst legal professionals and civil debate in society generally has been one of the central aims of the CBA throughout its history. With respect to courtroom

⁵ *Doré v. Barreau du Québec*, 2012 SCC 12, para. 68.

⁶ Kara Anne Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999) 12 *Geo. J. Legal Ethics* 815, at 816-17.

civility in particular, commentary 16 in Chapter IX of the CBA *Code of Professional Conduct* – cited by this Court in *Doré v. Barreau du Québec*⁷ – states that lawyers “should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding.”⁸ The CBA has also adopted “Principles of Civility for Advocates” (the **Principles**) as an Appendix to the CBA *Code of Professional Conduct*. While recognizing that litigation is not a “tea party” and that lawyers are “bound to vigorously advance their client’s case”, the preamble to the Principles correctly declares that “civility is the hallmark of our best counsel”.⁹

16. To provide helpful guidance to the courts, disciplinary bodies and the legal profession, the test for courtroom incivility amounting to professional misconduct must be clear and workable. This involves identifying conduct that qualifies as uncivil and that, as such, may require further scrutiny by a law society.
17. Under the test elaborated by the Appeal Panel and upheld by the majority of the Court of Appeal, allegations that impugn the integrity of opposing counsel constitute misconduct unless they are made in good faith and have a reasonable basis. Although this test does capture forms of conduct that are uncivil, its formulation is problematic in two respects. First, without more it does not adequately account for the other values – judicial independence and zealous advocacy – that must also inform a proper test for courtroom incivility amounting to professional misconduct. Second, and acknowledging that the test crafted below was not meant to be exhaustive, the test as articulated is directed at one form of incivility alone: attacks on the integrity of opposing counsel. To provide useful guidance for the profession and regulators, the test should not be expressed in a case-specific fashion but ought to be cast in broader terms. For instance, as formulated, the test

⁷ *Ibid.*, para. 62.

⁸ *Code of Professional Conduct*, CBA, 2009, p. 68. Though not binding, the CBA *Code of Professional Conduct* has served as a model used by law societies in establishing rules of professional ethics for decades. With a view to harmonizing ethical standards across Canada, however, most law societies have now adopted the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada, or plan to do so. The CBA has therefore ceased to update the *Code of Professional Conduct* since 2014.

⁹ *Principles of Civility for Advocates*, Appendix to *Code of Professional Conduct*, *supra*, p. 132. The Principles serve primarily as an educational tool and “are not intended as a code of professional conduct subject to enforcement by discipline or other sanction”. *Id.*

will not capture racist, sexist or homophobic remarks or behaviour in the courtroom that may or may not be directed to opposing counsel.¹⁰

18. A better approach is the one suggested by Brown J.A. in his dissenting reasons, that requires, as a first step, a full contextual analysis of the attorney's behaviour.¹¹
19. Once the conduct at issue has been fully appreciated, the reviewing authority must determine: (1) whether it is objectively offensive, disruptive, demeaning, abusive or discriminatory; and (2) whether counsel was acting in good faith and, if so, without any reasonable basis.

(2) Distinguishing Professional Misconduct from Zealous Advocacy

20. To ensure that the threat of disciplinary sanctions will not unnecessarily chill or erode zealous representation, the test for courtroom incivility amounting to professional misconduct should be exacting and capture only egregious forms of incivility. Attorneys should not be compelled to soft-pedal the representation of their clients out of fear of prosecution for incivility. An integral part of every lawyer's duty of commitment to the client's cause and of every litigant's right to a loyal representation, zealous advocacy is "essential in an adversarial system of justice", as recently reaffirmed in *Jodoin*.¹² While zealous advocacy does not authorize unprofessional conduct, the test for misconduct must be rigorous and provide ample room for advocates to defend their clients' interests in a vigorous and even, at times, unpleasant manner.¹³
21. For these reasons, the test for courtroom incivility amounting to professional misconduct should be restricted to patent incivility involving egregious conduct. In this respect, it is submitted that courtroom incivility that may be sanctioned as professional misconduct must be manifestly inconsistent with counsel's duties as an officer of the court in that it is aimed at or has the effect of distracting the Court from its mission of finding the truth and applying the law to the facts.

¹⁰ See, e.g., *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, para. 17.

¹¹ *Groia CA*, para. 320.

¹² *Québec (Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, para. 32.

¹³ *Irvine v. Canada, supra*, p. 211. See also *R. v. Neil*, 2002 SCC 70, para. 12.

22. The application of a stringent standard, that assesses counsel’s conduct against his or her duties as an officer of the court, is necessary to distinguish professional misconduct from zealous advocacy and to minimize the chilling effect of the threat of disciplinary proceedings.

(3) Respecting the Primary Role of the Presiding Judge in Supervising Counsel’s Courtroom Conduct

23. In *R. v. Anderson*, this Court commented on the power of Canadian courts to uphold order in the courtroom.¹⁴ For superior courts, this power is derived from their inherent jurisdiction “to ensure that the machinery of the court functions in an orderly and effective manner”.¹⁵ Similarly, to function as courts of law, statutory courts have implicit powers that derive from their authority to control their own processes. As stated in *Anderson*, the court’s authority “includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire”¹⁶. Judges thus have a variety of tools available to control courtroom conduct, including orders to comply, injunctions, warnings and reprimands,¹⁷ cost awards,¹⁸ referral of counsel to the law society for discipline,¹⁹ removal of counsel from a case,²⁰ and contempt proceedings.²¹
24. Moreover, while a judge enjoys discretion in deciding whether to intervene where counsel’s conduct does not meet professional standards of civility, a judicial duty to

¹⁴ *R. v. Anderson*, [2014] 2 S.C.R. 167, para. 58.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ M. Code, *supra*, pp. 117-19. See also *R. v. Henderson*, 1999 CanLII 2358, 134 C.C.C. (3d) 131, pp. 145-47 (ON CA).

¹⁸ *Jodoin, supra*, para. 18.

¹⁹ *R. v. Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667, para. 331; *R. v. Francis*, 2006 CanLII 10203, 79 OR (3d) (CA), para. 21.

²⁰ *R. v. Cunningham*, [2010] 1 S.C.R. 331, para. 18; *Kobre v. Sun Life Assurance Company of Canada*, 2005 CanLII 36165 (ON SC).

²¹ M. Code, *supra*, pp. 123-26. See also *R. v. Vermette*, [1987] 1 S.C.R. 577, para. 6.

intervene arises where the impugned conduct threatens trial fairness.²² Recently, in *Jodoin*, the Court confirmed an established line of cases recognizing the “duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice.”²³

25. In view of the courts’ authority and duty to supervise counsel’s courtroom conduct, any test for professional misconduct must not only be anchored in the law societies’ institutional function but also respect the independent judiciary’s primary role in preserving procedural fairness and the proper administration of justice. Allowing a disciplinary body to second-guess the manner in which a presiding judge has discharged his or her core responsibilities would interfere with the “accepted core” of judicial independence, described by Dickson C.J. in *R. v. Beauregard* as the requirement that “no outsider . . . interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.”²⁴
26. The difficulty in formulating a test for incivility amounting to professional misconduct that respects judicial independence may be observed from the majority and dissenting reasons in the Ontario Court of Appeal. In summarily finding that a law society’s review of an advocate’s courtroom behavior “does not in any way conflict” with a trial judge’s authority, the majority effectively excludes from its analysis any consideration of the courts’ role as guardians of the due administration of justice in supervising courtroom conduct.
27. While the dissenting opinion recognizes the vital importance of this factor, the actual test for misconduct formulated by Brown J.A. paradoxically undercuts the courts’ authority by inviting disciplinary bodies to inquire into whether the advocate’s conduct

²² *Jodoin, supra*, paras. 18 and 38. See also Daniel Naymark and Jennifer Ip, “Judicial Sanction of Uncivil and Unprofessional Conduct” (2012) 31 *The Advocates J.* 3, p. 4; W.B. Williston & R.J. Rolls, *The Conduct of an Action* (Toronto: Butterworths, 1982), p. 202.

²³ *Jodoin, supra*, para. 18.

²⁴ *R. v. Beauregard*, [1986] 2 S.C.R. 56, para. 21.

undermined, or threatened to undermine, trial fairness²⁵ – a matter which presiding judges have the primary responsibility to preserve. Any such explicit or implicit determination – except by an appellate court properly charged with reviewing and correcting first instance errors – necessarily undermines the authority of the courts and interferes with judicial independence.

28. This approach is not simply problematic as a matter of principle. It takes little imagination to conceive of a case where an acquittal is entered after a lengthy and hard fought criminal trial and, years later, the law society determines, in disciplinary proceedings, that defence counsel's incivility impaired trial fairness. Faced with such an *ex post facto* finding that the process was effectively tainted, the confidence in the administration of justice of participants in the judicial process – including witnesses, alleged victims, and interested observers – will necessarily be shaken.
29. In short, to the extent that a subsequent disciplinary finding of incivility amounting to professional misconduct implies that the outcome of a case – be it a conviction, an acquittal, an award of damages or the dismissal of a civil claim – is the product of an unfair judicial process, there is a significant risk that public confidence in the administration of justice will be undermined.
30. To guard against the risk that disciplinary bodies thus impermissibly second-guess the presiding judge's handling of the case, the test for misconduct must include a rebuttable presumption to the effect that where a judge chooses not to intervene, or comment adversely on counsel's conduct – from the bench, in reasons for judgment, or in other formal communications such as communications addressed to the law society itself – he or she has implicitly determined that the conduct is not manifestly inconsistent with counsel's duties as an officer of the court. In such cases, it is appropriate to presume that the conduct has not crossed the line between zealous advocacy and professional misconduct, and law societies ought to defer to the court's determination.

²⁵ *Groia CA*, para. 359.

31. The presumption inherent in the proposed test is, as noted, rebuttable. Thus, where a judge did not intervene in respect of courtroom conduct, a law society may nonetheless scrutinize the conduct by pointing to evidence that rebuts the presumption that the conduct is not manifestly inconsistent with counsel's duties as an officer of the court. For example, relevant rebuttal evidence would include:
- a) evidence demonstrating that the presiding judge did not have an opportunity to make a determination with respect to counsel's conduct (for instance, where the conduct was imperceptible and unreported to the judge, or where the judge's assignment to a case ended before a determination could be made as a result of settlement, recusal, or other discontinuance);
 - b) evidence showing that the presiding judge deliberately chose not to make any determination as to the propriety of counsel's conduct (for instance, where the judge expressed the view that it was not his or her role to address such matters or indicated a preference to leave issues of civility to the law society); or
 - c) appellate intervention based on errors in the presiding judge's management of counsel's courtroom conduct.
32. Reliance on a rigorous test tethered to a presumption of implied judicial finding ensures a coherent approach to the test for incivility amounting to professional misconduct in which the presiding judge's views of the impugned conduct is a factor of significant weight. This rebuttable presumption achieves the appropriate institutional balance between the law societies' role as guardians of professional and ethical norms, and the role, authority and powers of the independent judiciary as guardian of the administration of justice in Canada.

PART IV - COSTS

33. The CBA does not seek costs and requests that none be awarded against it.

PART V - ORDER SOUGHT

34. The CBA takes no position on the disposition of this appeal.

ALL OF WHICH is respectfully submitted.

DATED at Montréal, Province of Québec, this 27th day of July, 2017.



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PART VI - TABLE OF AUTHORITIES

	<u>Paragraph No(s)</u>
STATUTES	
<i>Canadian Charter of Rights and Freedoms</i> , s. 7 10
CASES	
<i>Canada (Attorney General) v. Federation of Law Societies of Canada</i> , 2015 SCC 7	..... 10
<i>Doré v. Barreau du Québec</i> , 2012 SCC 12	..... 14, 15
<i>Groia v. The Law Society of Upper Canada</i> , 2016 ONCA 471	..... 3, 18, 27
<i>Irvine v. Canada</i> , [1987] 1 S.C.R. 181	..... 10,20
<i>Kobre v. Sun Life Assurance Company of Canada</i> , 2005 CanLII 36165 (ON SC)	..... 23
<i>Mugesera v. Canada (Minister of Citizenship and Immigration)</i> , [2005] 2 S.C.R. 91	..... 17
<i>Québec (Criminal and Penal Prosecutions) v. Jodoin</i> , 2017 SCC 26	..... 20, 23, 24
<i>R. v. Anderson</i> , [2014] 2 S.C.R. 167	..... 23
<i>R. v. Beauregard</i> , [1986] 2 S.C.R. 56	..... 25
<i>R. v. Cunningham</i> , [2010] 1 S.C.R. 331	..... 23
<i>R. v. Dunbar, Pollard, Leiding and Kravit</i> , 2003 BCCA 667	..... 23
<i>R. v. Francis</i> , 2006 CanLII 10203, 79 OR (3d) 551 (CA)	..... 23
<i>R. v. Henderson</i> , 1999 CanLII 2358, 134 C.C.C. (3d) 131 (ON CA)	..... 23
<i>R. v. Neil</i> , 2002 SCC 70	..... 20
<i>R. v. Vermette</i> [1987] 1 S.C.R. 577	..... 23

Paragraph No(s)**SECONDARY SOURCES**

<i>Code of Professional Conduct</i> , Canadian Bar Association, 2009 (CBA Book of Authorities, Tab 1)	.....15
<i>Principles of Civility for Advocates</i> , Appendix to <i>Code of Professional Conduct</i> , Canadian Bar Association, 2009 (CBA Book of Authorities, Tab 2)	.....15
Michael Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007) 11 Can. Crim. L. Rev. 97 (CBA Book of Authorities, Tab 3)	.....8, 23
Kara Anne Nagorney, “A Noble Profession? A Discussion of Civility Among Lawyers” (1999) 12 Geo. J. Legal Ethics 815 (CBA Book of Authorities, Tab 4)	.....14
Daniel Naymark and Jennifer Ip, “Judicial Sanction of Uncivil and Unprofessional Conduct” (2012) 31 The Advocates J. 3 (CBA Book of Authorities, Tab 5)	.....24
W.B. Williston & R.J. Rolls, <i>The Conduct of an Action</i> (Toronto: Butterworths, 1982) (CBA Book of Authorities, Tab 6)	.....24