

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 -

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

Interveners

FACTUM OF THE INTERVENER,
THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

ADDARIO LAW GROUP LLP

171 John Street, Suite 101
Toronto, ON M5T 1X3
Tel: (416) 979-6446
Fax: 1-866-714-1196

Frank Addario (faddario@addario.ca)
Samara Sectar (ssecter@addario.ca)

GOLDBLATT PARTNERS LLP

30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4
Tel: (613) 482-2463
Fax: (613) 235-3041

Colleen Bauman

**Ottawa Agent for the Intervener, The
Criminal Lawyers' Association (Ontario)**

PARADIGM LAW GROUP LLP

1401-80 Richmond St. W.
Toronto, ON M5H 2A4
Tel: (416) 868-1694
Fax: 855-351-9215

Robin Parker

**Counsel for the Intervener
Criminal Lawyers' Association (Ontario)**

ORIGINAL

TO:

The Registrar

Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES

TO:

Lerners LLP

130 Adelaide Street West
Suite 2400
Toronto, Ontario
M5H 3P5

Earl Cherniak

(echerniak@lerners.ca)
Tel. 416-601-2350
Fax 416-867-2402

**Counsel for the Appellant, Joseph Peter
Paul Groia**

Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Jeffrey W. Beedell

(jeff.beedell@gowlingwlg.com)
Tel. 613-786-0171
Fax 613-788-3587

**Ottawa Agent for the Appellant, Joseph Peter
Paul Groia**

**Lenczner Slaght Royce Smith Griffin
LLP**

Suite 2600
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

J. Thomas Curry

(tcurry@litigate.com)
Tel. 416-865-3096
Fax 416-865-9010

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

Dentons Canada LLP

99 Bank Street, Suite 1420
Ottawa, Ontario
K1P 1H4

David R. Elliott

(david.elliott@fmc-law.com)
Tel. 613-783-9638
Fax 613-783-9690

**Ottawa Agent for the Respondent, The Law
Society of Upper Canada**

Attorney General for Saskatchewan

802-1874 Scarth Street
Regina, Saskatchewan
S4P 4B3

Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Sharon H. Pratchler

(sharon.pratchler@gov.sk.ca)
Tel. 306-787-3319
Fax 306-787-9111

**Counsel for the Intervener, the Attorney
General of Saskatchewan**

D. Lynne Watt

(lynne.watt@gowlingwlg.com)
Tel. 613-786-8695
Fax 613-788-3509

**Ottawa Agent for the Intervener, The
Attorney General of Saskatchewan**

Public Prosecution Service of Canada

160 Elgin Street
14th Floor
Ottawa, Ontario
K1A 0H8

Director of Public Prosecutions of Canada

160 Elgin Street
12th Floor
Ottawa, Ontario
K1A 0H8

James D. Sutton

(james.sutton@ppsc-sppc.gc.ca)
Tel. 613-960-3922
Fax 613-960-3717

**Counsel for the Intervener, Director of
Public Prosecutions**

François Lacasse

(francois.lacasse@ppsc-sppc.gc.ca)
Tel. 613-957-4770
Fax 613-941-7865

**Ottawa Agent for the Intervener, Director of
Public Prosecutions**

Law Society Tribunal
402-375 University Avenue
Toronto, Ontario
M2G 2J5

Lisa Mallia
(lmallia@lsuc.on.ca)
Tel. 416-947-3488
Fax 416-947-5219

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

Attorney General of Ontario
720 Bay Street
10th Floor
Toronto, Ontario
M7A 2S9

Milan Rupic
(milan.rupic@ontario.ca)
Tel. 613-326-4592
Fax 416-326-4656
**Counsel for the Intervener, Attorney
General of Ontario**

Lax O'Sullivan Lisus Gottlieb LLP
2750 - 145 King St. West
Toronto, Ontario
M5H 1J8

Terrence O'Sullivan
(tosullivan@counsel-toronto.com)
Telephone: (416) 644-5359
FAX: (416) 598-3730
**Counsel for the Intervener, The
Advocates' Society**

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Eugene Meehan, Q.C.
(emeehan@supremeadvocacy.ca)
Tel. 613-695-8855 x 101
Fax 613-695-8580

**Ottawa Agent for the Intervener, Law Society
Tribunal**

Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, Ontario
K2P 2H3

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

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

David Debenham
(david.debenham@mcmillan.ca)
Telephone: (613) 691-6109
FAX: (613) 231-3191
**Ottawa Agent for the Intervener, The
Advocates' Society**

Barreau du Québec
445, boul. St-Laurent
Montréal, Quebec
H2Y 2Y7

Sylvie Champagne
Telephone: (514) 954-3405 Ext: 3103
FAX: (514) 954-3407
Counsel for the Intervener, Barreau du Québec

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

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

Farris, Vaughan, Wills & Murphy LLP
25th Floor
700 West Georgia Street
Vancouver, British Columbia
V7Y 1B3

Joseph Arvay
(jarvay@farris.com)
Telephone: (604) 684-9151
FAX: (604) 661-9349
Counsel for the Interveners, British Columbia Civil Liberties Association/Independent Criminal Defence Advocacy Society

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Ottawa Agents for the Intervener, Barreau du Québec

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

D. Lynne Watt
(lynne.watt@gowlingwlg.com)
Telephone: (613) 786-8695
FAX: (613) 788-3509
Ottawa Agents for the Intervener, Canadian Civil Liberties Association

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Jeffrey W. Beedell
(jeff.beedell@gowlingwlg.com)
Telephone: (613) 786-0171
FAX: (613) 788-3587
Ottawa Agents for the Interveners, British Columbia Civil Liberties Association/Independent Criminal Defence Advocacy Society

**Cavalluzzo Shilton McIntyre Cornish
LLP**

300 - 474 Bathurst Street
Toronto, Ontario
M5T 2S6

Paul Cavaluzzo

(pcavalluzzo@cavalluzzo.com)
Telephone: (416) 964-1115
FAX: (416) 964-5895

**Counsel for the Intervener, Ontario
Crown Attorney's Association**

Nelligan O'Brien Payne LLP

50 O'Connor St, Suite 300
Ottawa, ON
K1P 6L2

Christopher Rootham

(Christopher.Rootham@nelligan.ca)
Telephone: 613-231-8311
Fax: 631-788-3667

**Ottawa Agent for the Intervener, Ontario
Crown Attorneys' Association**

Gregory DelBigio, Q.C.

Three Bentall Centre, P.O. Box 49123
27th Floor, 595 Burrard Street
Vancouver, British Columbia
V7X 1J2

(greg@gregdelbigio.com)

Telephone: (604) 602-4266
FAX: (604) 688-4711

**Counsel for the Intervener, Federation
of Law Societies of Canada**

Michael Sobkin

331 Somerset Street West
Ottawa, Ontario
K2P 0J8

(msobkin@sympatico.ca)

Telephone: (613) 282-1712
FAX: (613) 288-2896

**Ottawa Agent for the Intervener, Federation
of Law Societies of Canada**

Allen Rouben

70 Bond Street
Suite 200
Toronto, Ontario
M5B 1X3

(arouben@bellnet.ca)

Telephone: (416) 360-5444
FAX: (416) 365-7702

**Counsel for the Intervener, Ontario
Trial Lawyers Association**

Connolly Obagi LLP

1100 - 200 Elgin Street
Ottawa, Ontario
K2P 1L5

Thomas P. Connolly

(tom.connolly@connollyobagi.com)
Telephone: (613) 683-2244
FAX: (613) 567-9751

**Ottawa Agent for the Intervener, Ontario
Trial Lawyers Association**

Norton Rose Fulbright Canada LLP

1, Place Ville Marie
Bureau 2500
Montréal, Quebec
H3B 1R1

Pierre Bienvenu

(pierre.bienvenu@nortonrosefulbright.com)
Telephone: (514) 847-4747
FAX: (514) 286-5474

**Counsel for the Intervener, Canadian
Bar Association**

Norton Rose Fulbright Canada LLP

45 O'Connor Street
Suite 1500
Ottawa, Ontario
K1P 1A4

Matthew J. Halpin

(matthew.halpin@nortonrosefulbright.com)
Telephone: (613) 780-8654
FAX: (613) 230-5459

**Ottawa Agent for the Intervener, Canadian
Bar Association**

TABLE OF CONTENTS

PART I – OVERVIEW.....1

PART II – CLA POSITION ON QUESTIONS ON APPEAL.....2

PART III- STATEMENT OF ARGUMENT.....2

1. REVIEWABILITY OF THE CROWN AND DEFENCE COUNSEL2

2. A FRAMEWORK FOR SANCTIONING DEFENCE COUNSEL.....4

a) Defence Counsel Need Clear Rules4

b) Rare and Exceptional Circumstances5

c) Conduct Must Show Bad Faith, Dishonesty, or Maliciousness6

d) Defence Counsel’s In-Court Conduct Must Have the Realistic Prospect of Undermining Trial Fairness or the Administration of Justice6

3. TRIAL JUDGES’ INTERVENTION OR NON-INTERVENTION SHOULD HAVE LIMITED WEIGHT IN DISCIPLINARY PROCEEDINGS.....7

PART IV - SUBMISSIONS ON COSTS.....9

PART V – ORDER REQUESTED.....9

PART VI - TABLE OF AUTHORITIES.....10

PART I – OVERVIEW

1. The idea that defence counsel must zealously advance the client’s case is more than an abstraction. It is an imperative responsibility. Zealous advocacy stands between the accused and the power of the state. Zealous advocacy puts the Crown to its burden of proof. The justice system can tolerate unpleasant exchanges far easier than it can tolerate a wrongful result.¹ For criminal defendants, the reality is that a wrongful result could be a wrongful conviction.

2. Defence lawyers need clear guidance from the Court to understand how to execute their duty of fearlessly protecting the accused. The ability of defence counsel to make novel arguments without fear of professional discipline enables the law to evolve. It is a tool for fairness in criminal proceedings. Many previously innovative arguments are now orthodox criminal or constitutional law because of creative, zealous advocacy.

3. The duty of civility, one issue on this appeal, itself does not threaten zealous advocacy. It is the expansive and amorphous definition of that duty that is threatening. The *Rules of Professional Conduct* applicable to the Appellant required him to “raise fearlessly every issue, advance every argument, and ask every question, however distasteful, that the lawyer thinks will help the client’s case.”² Defence counsel must be free to take unpopular and irritating positions without fear of reprisal from the courts or their regulators. Any apprehension that defence counsel’s *bona fide* but incorrect trial decision will result in professional discipline undermines a countervailing professional obligation and the *Charter* right to effective assistance of counsel.

4. The CLA invites the Court to consider the unique role of defence counsel when deciding the appropriate test for disciplining in-court conduct. The arguments defence counsel make can be unsympathetic or incomprehensible to the layperson and non-criminal lawyers. To advance the client’s position, we are frequently required to criticize the way state actors do their jobs. Defence counsel are professionally obliged to challenge judges and Crown counsel whose decisions or conduct may interfere with the fair trial right.

5. The CLA submits that professional discipline for defence counsel’s in-court conduct is only appropriate in rare and exceptional circumstances. Defence counsel’s conduct will become

¹ *Joseph Groia v. Law Society of Upper Canada*, 2015 ONSC 686, at para. 71

² Law Society of Upper Canada, *Rules of Professional Conduct*, Commentary to Rule 5.1-1; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, at para. 128

sanctionable when counsel acts with bad faith, dishonesty, or malice and this conduct negatively affects trial fairness or the administration of justice. In delineating this test, the CLA submits the Court should take into account its approach to reviewing Crown discretion. The Court must give defence counsel's freedom to engage in zealous advocacy an equivalent protective sphere as Crown counsel's freedom to make discretionary decisions. Respect for the important but differing role of each requires as much.

6. The CLA takes no position on the facts.

PART II – CLA POSITION ON QUESTIONS ON APPEAL

7. The CLA submits:

- a) Because of the unique context of criminal proceedings, defence counsel's freedom to engage in zealous advocacy is a professional and constitutional imperative. This Court should approach regulation of defence advocacy with the same respect as this Court has approached review of Crown discretion.
- b) Legal regulators should only discipline defence counsel in exceptional cases where defence counsel's conduct shows bad faith that negatively impacts on trial fairness or the administration of justice.
- c) The trial judge's commentary or absence of comment on defence counsel's conduct is of limited weight in later disciplinary proceedings.

PART III- STATEMENT OF ARGUMENT

1. REVIEWABILITY OF THE CROWN AND DEFENCE COUNSEL

8. Zealous advocacy is as important to the healthy functioning of a criminal justice system as Crown discretion. While defence counsel has no duty of fairness to her opponent's cause, and is not a minister of justice³ her duty is similarly important: to prevent her client's conviction and oppose the Crown with every legitimate tool in her arsenal. Raising issues of Crown fairness and

³ *R v. Stinchcombe*, [1991] 3 SCR 326, at para. 23; Law Society of Upper Canada, *Rules of Professional Conduct*, r. 5.1-3

abuse of process belong squarely in that arsenal. Respect for the duty of zealous defence advocacy contributes to the proper administration of justice to the same degree as respect for Crown discretion. The Court should protect defence counsel's oppositional role, based as it is in the goal of protecting the accused from the power of the state and especially wrongful convictions.

9. Deference to prosecutorial discretion enables Crown independence from judicial or political interference.⁴ This independence allows Crown counsel to focus on justice being done in each particular case without influence from state power.⁵ It ensures that the Crown's undivided loyalty is always to the proper administration of justice⁶ and serves as a check on state power.

10. Freedom to engage in zealous defence advocacy does the same. First, it ensures defence counsel's undivided loyalty to her client, a key ingredient of Canadian criminal justice.⁷ Limiting regulator interference with defence conduct allows defence lawyers to focus completely on the client's cause. A narrow scope of review ensures that counsel's loyalty is not split between her client and the lawyer's self interest to avoid prosecution for over-zealous conduct. This freedom to engage in zealous advocacy also serves as a check on state power, allowing the lawyer to advance positions critical of state and Crown conduct.

11. Another reason advanced for the "hands off" approach to judicial review of Crown discretion is based on respect for counsel's expertise. Judges "who are not as competent [as prosecutors] to consider the various factors involved" accept that they should not intervene in prosecutorial discretion.⁸ Likewise, no regulator will ever be as close to the issues as defence counsel. Removed from the lawyer-client relationship, the pressure of the trial, the weight of a potential conviction, regulators cannot truly appreciate the real time judgment calls that defence counsel must make to protect their clients.⁹

⁴ *Krieger v. Law Society of Alberta*, 2002 SCC 65, at para. 3, 29 [**Krieger**]; *R v. Anderson*, 2014 SCC 41, at para. 37 [**Anderson**]

⁵ Justice Binnie in dissent in *R v. Reagan*, 2002 SCC 12, at para. 157, upheld in *Krieger* at para. 30

⁶ *R v. McNeil*, 2009 SCC 3, at para. 49

⁷ See generally, *R v. G.D.B.*, 2000 SCC 22 at para. 25, citing to *R v. Joannis* (1995), 102 CCC (3d) 35 (Ont. CA)

⁸ *Anderson*, at para. 47

⁹ *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at para. 318

12. Defence counsel and the Crown have asymmetrical roles – but those roles are of equal significance. Justice Binnie articulated this equivalency in *Regan*, stating that effective assistance of counsel and the independence of Crown Attorneys are equally fundamental to our criminal justice system.¹⁰ The CLA is not asking the Court to set up a parallel regime, akin to the virtual immunity of Crown discretion.¹¹ The CLA is asking the Court to approach regulation of zealous advocacy with the same respect for the defence role as it gives Crown counsel.

2. A FRAMEWORK FOR SANCTIONING DEFENCE COUNSEL

a) *Defence Counsel Need Clear Rules*

13. In *Jodoin*, the Court accepted the crucial role oppositional defence counsel play in the criminal justice system.¹² Zealous defence lawyers preserve the reliability of the adversarial process.¹³ In determining when courts can sanction defence counsel’s conduct through personal costs orders, Gascon J. explained that an award of costs against a lawyer personally requires exceptional circumstances, where the lawyer’s conduct has seriously undermined the courts’ authority or interfered with the administration of justice.¹⁴

14. While costs orders will normally involve small amounts,¹⁵ professional disciplinary decisions can have permanent career consequences.¹⁶ The *Jodoin* test is an uneasy fit for determining sanctionable incivility, as it risks dividing defence counsel’s loyalty between protecting her client and protecting her career.

15. The differing judicial opinions about *Jodoin*’s conduct illustrate the risk. A majority of this Court thought that *Jodoin*’s conduct was sufficiently reprehensible to order the costs award.¹⁷ The Superior Court judge found that the writs of prohibition were frivolous and “unfounded”.¹⁸

¹⁰ Justice Binnie in dissent in *R v. Reagan*, 2002 SCC 12 at para. 157, upheld in *Krieger* at para. 30

¹¹ *R v. Nur*, 2015 SCC 15, at para. 94

¹² *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at para. 32

[*Jodoin*]

¹³ *Jodoin*, at para. 32

¹⁴ *Jodoin*, at para. 29

¹⁵ *Jodoin*, at para. 24

¹⁶ *Kane v. University of British Columbia*, [1980] 1 SCR 1105, at para. 31

¹⁷ *Jodoin*, at para. 39

¹⁸ *Jodoin*, at para. 50

But, the Court of Appeal and the dissent in this Court were not persuaded.¹⁹ Thirteen judges could not agree, despite a frozen record and without the pressure of performing in real time. This split shows the risk and leaves defence counsel with sub-optimal guidance as to what level of zeal or creativity is appropriate.

16. The work of defence counsel means that they may frequently be in error, will often disagree with the law as stated, or may offend other actors in the criminal justice system. Defence counsel is often obliged to persuade courts the law is wrong or to criticize state conduct. Skilled defence lawyers invoke procedural and substantive protections for their clients to disrupt the smooth path to conviction. This is a disagreeable role, but one that strikes at the core of defence counsel's obligation.²⁰ It is important that this Court not penalize or be seen to penalize counsel's legitimate resort to such conduct.

17. Further, since poverty and race often find ways into the courtroom, defence counsel frequently represent marginalized individuals.²¹ Defence counsel is often the only ally for such defendants. A rule limiting counsel's independence or fearlessness because of a need to promote an abstract principle of civility must be careful not to erode the protection of vulnerable litigants or to alienate defendants who are already mistrustful of the justice system.²²

18. The CLA proposes the following framework for misconduct based on defence counsel's in-court advocacy: (1) regulators must start from the position that a finding of misconduct will only be warranted in exceptional circumstances, (2) defence misconduct must be deliberately done in bad faith, dishonest, or malicious and (3) the conduct at issue must negatively impact trial fairness or undermine the administration of justice.

b) Rare and Exceptional Circumstances

19. This language echoes the sentiment from *Jodoin*, in which the Court acknowledged that personal costs should only be awarded against defence lawyers in "rare" and "exceptional" cases.

¹⁹ *Jodoin*, at para. 14, 58-75

²⁰ *Jodoin*, at para. 32

²¹ *R v. Gladue*, [1999] 1 SCR 688, at para. 65. In *Gladue*, Justices Cory and Iacobucci noted that Aboriginal individuals feel "alienated" by the criminal justice system. See also *R v. Ipeelee*, 2012 SCC 13, at para. 62 [*Ipeelee*]

²² *R v. Golden*, 2001 SCC 83, at para. 83; *Ipeelee*, at para. 62

This aspect of the proposed test will orient the regulator to the negative consequences of routine findings of misconduct for incivility on a healthy criminal justice system.

c) Conduct Must Show Bad Faith, Dishonesty, or Maliciousness

20. The Appeal Panel accepted that Mr. Groia, “honestly believed what he was saying,” but nonetheless breached his professional duties by making arguments without a reasonable basis.²³ His *bona fide* belief in his position was insufficient.

21. No other actor in the criminal justice system is held to an equivalent professional standard. Crown counsel are given a wide scope to make mistakes.²⁴ *Krieger* suggests that a finding of professional misconduct on the part of the Crown requires the prosecutor to intentionally depart from his or her duty of fairness.²⁵ As such, a *bona fide* but mistaken belief would protect Crown counsel from professional misconduct findings.

22. Judges, likewise, are routinely permitted to misapprehend evidence without risking professional sanction, such errors being treated as a simple ground of appeal by the losing party. Even a reasonable apprehension of bias rarely attracts a judicial conduct hearing.

23. The high level of subjective intent proposed by the CLA ensures that regulators are not sanctioning defence counsel for being wrong or making “unfounded” allegations.²⁶ Giving defence counsel the right to be wrong encourages creativity and fearlessness.

d) Defence Counsel’s In-Court Conduct Must Have the Realistic Prospect of Undermining Trial Fairness or the Administration of Justice

24. When a defence lawyer’s bad faith conduct has the potential to impact trial fairness or undermine the administration of justice it should become sanctionable. The high bar of this test allows defence counsel to make some missteps in the heat of an adversarial process without placing his or her career in jeopardy. It acknowledges the reality that trials are stressful experiences, where emotions run high, and the consequences can be grave.²⁷

²³ *Groia v. Law Society of Upper Canada*, 2013 ONLSAP 41 at paras. 9-10, 234-6 and 332

²⁴ See, for example, *Miazga v. Kvello Estate*, 2009 SCC 51 on the high standard for the tort of malicious prosecution

²⁵ *Krieger*, at para. 59

²⁶ *Jodoin*, at para. 29

²⁷ *Joseph Groia v. Law Society of Upper Canada*, 2015 ONSC 686, at para. 52

25. This factor is also necessary to ensure the test for professional misconduct based on incivility is at least as stringent as that articulated in *Jodoin*. As the consequences of a negative finding against counsel increase, so too must the bar for making that finding in the first place.²⁸ If an award of costs against a lawyer personally can only be justified where the lawyer's acts have "seriously undermined the authority of the courts or seriously interfered with the administration of justice"²⁹ the same must be true of a finding of professional misconduct based on incivility.

3. TRIAL JUDGES' INTERVENTION OR NON-INTERVENTION SHOULD HAVE LIMITED WEIGHT IN DISCIPLINARY PROCEEDINGS

26. Judicial intervention in trials to regulate conduct of counsel is too irregular to be decisive in a later discipline proceeding. While judicial comment is not "nothing" in a discipline proceeding, it must be rebuttable.

27. The Court of Appeal correctly noted that judicial non-intervention might be related to efficiencies or appearances of impartiality.³⁰

28. Equally, intervention may not always be accurate or fair. *Brown* is an early racial profiling decision in Ontario.³¹ At trial, defence counsel ran a racial profiling defence to what the Crown presented as a legitimate highway traffic stop. The trial judge criticized defence counsel three times for making "serious" and "quite offensive allegations" against a police officer.³² The trial judge described the defence's theory as "really quite nasty" accusations, based on nothing.³³ On appeal, Morden J.A. concluded that the trial judge's repeated admonitions throughout the proceedings gave rise to a reasonable apprehension of bias.³⁴ Lawyers who brave judicial disapproval to expose an abuse of state power show that the system is working. Had *Brown* not appealed, the trial judge's comments would still have been wrong. Put differently, the trial judge's comments were not decisive of defence counsel's professionalism.

²⁸ *Jodoin*, at para. 24

²⁹ *Jodoin*, at para. 29

³⁰ *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at para. 108

³¹ *R v. Brown* (2003), 105 CRR (2d) 132 [*Brown*]

³² *Brown*, at para. 95

³³ *Brown*, at para. 81

³⁴ *Brown*, at para. 2

29. Another example is the case of *Legebokoff*, a decision from the British Columbia Court of Appeal regarding a change of venue application.³⁵ In his reasons dismissing the application, the trial judge criticized counsel for preparing misleading affidavits.³⁶ On appeal, the Court found that the trial judge's criticism was wrong and based on a flawed understanding of counsel's role.³⁷ Had the defence lawyers been disciplined by their law society prior to or in the absence of an appeal, the trial judges' baseless criticisms would have been presumptively valuable. These two cases show the difficulty with giving too much weight to a trial judge's comments in later discipline proceedings. The CLA proposes instead that the observations of a trial judge, as with her non-comment, be treated as one piece of relevant information about counsel's conduct.

30. Although trial judges play a central role in maintaining order in their own courtrooms, their commentary should not be determinative in disciplinary decisions. Disciplinary decisions are made in hindsight and removed from the day-to-day tension of the trial atmosphere. In order to ensure regulators give appropriate weight to the comments of trial judges, the Court should direct regulators to examine the following:

- a) Did counsel have an opportunity to respond to the criticism of the trial judge? Was counsel notified about the trial judge's concerns?
- b) Was there an appeal on the basis of the trial judge's comments? If yes, it is advisable for the regulator to wait for the outcome of the appeal before assigning weight to those comments. If not, law societies should keep in mind that some defendants do not appeal even when strong grounds exist.
- c) Were other counsel admonished? If yes, it may be an indication that this particular trial judge was open to intervening, and not that the defence counsel's behaviour was rare and exceptional.
- d) At what stage of the trial were the comments made by the trial judge?

³⁵ See *R v. Legebokoff*, 2016 BCCA 386, leave to appeal refused, 2016 SCCA No. 508

[*Legebokoff*]

³⁶ *Legebokoff*, at para. 28

³⁷ *Legebokoff*, at para. 34-35, 42

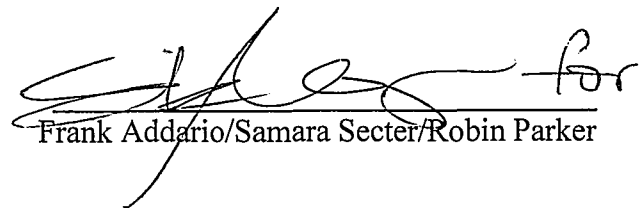
PART IV - SUBMISSIONS ON COSTS

31. The CLA does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – ORDER REQUESTED

32. The CLA takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2017


Frank Addario/Samara Sectar/Robin Parker

PART VI - TABLE OF AUTHORITIES

<u><i>Groia v. Law Society of Upper Canada</i></u> , 2013 ONSLAP 41	21
<u><i>Groia v. Law Society of Upper Canada</i></u> , 2016 ONCA 471	3, 11, 27
<u><i>Joseph Groia v. The Law Society of Upper Canada</i></u> , 2015 ONSC 686	1, 24
<u><i>Kane v. University of British Columbia</i></u> , [1980] 1 SCR 1105	14
<u><i>Krieger v. Law Society of Alberta</i></u> , 2002 SCC 65	9, 12, 21
<u><i>Miazga v. Kvello Estate</i></u> , 2009 SCC 51	21
<u><i>Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin</i></u> , 2017 SCC 26	13, 14, 15, 16, 19, 23, 25
<u><i>R v. Anderson</i></u> , 2014 SCC 41	9, 11
<u><i>R v. Brown</i></u> (2003), 105 CRR (2d) 132	28
<u><i>R v. G.D.B.</i></u> , 2000 SCC 22	10
<u><i>R v. Golden</i></u> , 2001 SCC 83	17
<u><i>R v. Gladue</i></u> , [1999] 1 SCR 688	17
<u><i>R v. Ipeelee</i></u> , 2012 SCC 13	17
<u><i>R v. Joannis</i></u> (1995) 102 CCC (3d) 35 (Ont. CA)	10
<u><i>R v. Legebokoff</i></u> , 2016 BCCA 386	29
<u><i>R v. McNeil</i></u> , 2009 SCC 3	9
<u><i>R v. Nur</i></u> , 2015 SCC 15	12
<u><i>R v. Regan</i></u> , 2002 SCC 12	9, 12
<u><i>R v. Stinchcombe</i></u> , [1991] 3 SCR 326	8
<u><i>Rules of Professional Conduct</i></u> , Law Society of Upper Canada (Current)	3, 8