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

# FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

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


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**OTTAWA AGENT FOR INTERVENERS**

**TABLE OF CONTENTS**

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# FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

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

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## PART I – OVERVIEW

1. This case is about whether Morden J.A. was correct when he said that "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work".[1] Civility has never been more essential than it is today, particularly in light of *Regina v. Jordan*, [2016] 1 S.C.R. 631. The broad purpose of *Jordan* has been to improve the efficiency of trial process, with a view to upending the "culture of complacency" that has beset the judiciary and the legal profession in recent decades. The "change of direction" announced in *Jordan* applies to all participants in trial process. There is a significant collaborative component to any trial, and efficiency in trial process is impossible without the civility of counsel. The potential of *Jordan* will not be fulfilled unless civility is unequivocally accepted as a vital part of a lawyer's professional duty.

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[1] Morden J.A., speaking at the Call to the Bar in Ontario in 2001, quoted by Rosenberg J.A. in *Regina v. Felderhof* (2003), 180 O.A.C. 288 at para. 83

2. However, the danger posed by incivility to the administration of justice is more than mere inefficiency. Incivility undermines public confidence in the administration of justice. Incivility corrodes the legitimacy of adjudication. Incivility thwarts the essential objectives of the practice of law. Lawyers and their clients bear significant personal hardship when litigation becomes mean and rancorous.

3. The Appellant contends that undue emphasis on civility will have a chilling effect on zealous advocacy and, thereby, undermine the rights of the accused. This proposition is a canard that has been previously refuted in the jurisprudence. Nonetheless, the Intervener appreciates that, in various quarters of the bench and bar, scepticism exists regarding the importance of civility. The present case provides this Honourable Court with an opportunity to address the importance of civility in litigation. The Intervener submits that this Court should affirm that civility is an essential component of a lawyer's professional duty.

4. The facts are summarized in the majority judgment of the court below, and in the Respondent Law Society's factum at paras. 17 to 80, and 128 to 131.

## PART II – POSITION OF INTERVENER

5. Cronk J.A. in her majority judgment correctly addressed the various issues that have bearing on civility.[2] Civility is an essential part of a lawyer's professional duty. There is no contradiction between civility and zealous advocacy. The duty of civility does not undercut freedom of expression. The Law Society's jurisdiction to discipline counsel for incivility does not undermine the independence of the judiciary. The demise of civility would encourage a dog-eat-dog style of litigation, to the detriment of public confidence in the administration of justice.

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[2] Judgment of the Court of Appeal (MacPherson, Cronk, and Brown JJ.A.) in the present case, released June 14, 2016, *Appellant's Record*, vol. III, tab 15

## PART III – STATEMENT OF ARGUMENT

### A) The importance of civility

6. In *Felderhof*, Rosenberg J.A. outlined the reasons why civility is an essential component of a lawyer's professional duty[3]:

> 83. . . .Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. . . As Kara Anne Nagorney said in her article . . ."Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. . . . 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." 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.
>
> 84. Nothing said here is inconsistent with or would in any way impede counsel from the fierce and fearless pursuit of a client's interests in a criminal or quasi-criminal case. Zealous advocacy on behalf of a client, to advance the client's case and protect that client's rights, is a cornerstone of our adversary system. It is "a mark of professionalism for a lawyer to firmly protect and pursue the legitimate interests of his or her client". As G. Arthur Martin said, The existence of a strong, vigorous and *responsible* Defence Bar is essential in a free Society" (emphasis added). Counsel have a responsibility to the administration of justice, and as officers of the court, they have a duty to act with integrity, a duty that requires civil conduct. [footnotes and citations omitted]

*Felderhof* stands for the proposition that effective advocacy is *undermined*, not enhanced, by incivility. There is no contradiction between civility and zealous advocacy.

7. "Zealous advocacy" is frequently misunderstood. In "Advocacy, Civility, and the Mythical Gap Between", Robin Flumerfelt describes the confusion that sometimes arises

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[3] *Regina v. Felderhof* (2003), 180 O.A.C. 288 at paras. 88, and 93 to 97

when jurists talk about zealous advocacy:[4]

> ["Zealous advocacy"] has been misunderstood for so long that it is now useless as a compass for lawyers' conduct. Its most frequent interpretation is that everything should be done in extremes. If arguing is good, shouting is better. If opposition is justified, accusation is too. But "zeal" is not a synonym for outrage, sarcasm, or contempt. It means, simply, "great energy or enthusiasm in pursuit of a cause or an objective". . .
>
> Zeal is evidenced by effort, not indignation. For example, "zealous" commitment to the most effective jury address will often result in a direct but calm presentation of fact and common sense. Rarely are juries swayed by thunderous lectures. Few people respond favourably to abrasive conduct. The lawyers I have always feared the most are calm and charming in court, making them highly credible to judges and juries. . .
>
> . . .[H]as the principle of "zealous advocacy" become a Trojan horse through which incivility enters courtrooms, damaging the truth-seeking process (by distracting everyone from the real issues), thwarting access to justice (by devouring judicial resources), and undermining the public's confidence in our justice system (by confirming its worst fears about the type of people who become lawyers)? [citations omitted]

8. In support of his submission that there is an "inevitable" collision between civility and zealous advocacy, and that incivility is often *necessary* in litigation, the Appellant gives only one abstract hypothetical in his factum, at para. 61:

> . . .For example, it is difficult, if not impossible, to allege prosecutorial misconduct except by using language that might be considered "uncivil" if used in another context.

It is *not* true that allegations of prosecutorial misconduct, properly litigated, require incivility. Allegations of misconduct are litigated regularly without the defence or the Crown resorting to incivility.[5] The Appellant's submission that incivility is often

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[4] Robin Flumerfelt, "Advocacy, Civility, and the Mythical Gap Between", Canadian Bar Association (Ontario), *Criminal Justice Section Newsletter*, September 2015

[5] For example, see the ruling of Pardu J. (as she then was) in *Regina v. Schertzer et al.,* 2011 ONSC 1818, aff'd (2015) 333 O.A.C. 308, leave to appeal ref'd [2015] S.C.C.A. No. 242

"inevitable" has no support in the jurisprudence or in experience, and is not otherwise supported by the record in this case.

**B) The purpose of incivility**

9. A repeated pattern of incivility is rarely part of a *bona fide* attempt at "zealous advocacy". Incivility is usually a *tactic* calibrated to disrupt a proceeding, as well as harass and demoralize opposing counsel. On occasion, incivility may assist in winning, and that doubtless accounts for its enduring appeal.[6] An experienced counsel is most likely to resort to incivility in a proceeding before a passive judge (as in *Marchand* ).[7] In the Appellant's factum filed in the court below, he candidly asserted, at para. 78, that:[8]

> Every trial has its own dynamic and rhythm, where the trial judge is the "conductor". Great advocates use these intangible elements to the advantage of their clients. What one judge will accept, another may not...

In his dissenting judgment, Brown J.A. accepted the Appellant's submission:

> 333. . . .when a barrister walks into a courtroom, the barrister reasonably expects that he or she can look to the presiding judge for direction as what conduct is on-side, and what is off-side. That expectation is a reasonable one. . .

The Intervener submits that it is *not* the mark of a great advocate to use incivility as a means of disrupting and delaying a proceeding for tactical advantage in a case where the trial judge is unduly passive or otherwise inexperienced. Stripped of rhetoric, the Appellant's basic position is that it is not unprofessional for a lawyer to exploit such circumstances in that way. The use of incivility for that purpose is disreputable and undermines the sound administration of justice.

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[6] *Regina v. Elliott* (2003), 179 O.A.C. 219, *per curiam* at paras. 175-181

[7] *Marchand v. Public General Hospital Society of Chatham* (2000), 138 O.A.C. 201. Also see *Felderhof* (Ont. C.A.), at paras. 88, 93-99, where Rosenberg J.A. comments on the trial judge's failure to curtail the Appellant's incivility, although he adds, at para. 99, "I do not wish to leave the impression that the trial judge did nothing to curb defence counsel's excesses".

[8] Appellant's factum filed in court below, *Respondent's Record*, tab 2

**C) Trial judges do not have a duty to discipline counsel for incivility**

10. The authorities are clear that a judge possesses a discretion to curtail incivility, but has *no duty* to do so. A trial judge who sits passively, or is ineffective in addressing incivility, may be criticized on appeal, but will fall into error only if the incivility results in an unfair trial. Incivility may tarnish the reputation of the administration of justice without resulting in an unfair trial.[9] In *Felderhof*, Campbell J. summarized several factors that have bearing on a judge's discretion regarding incivility:[10]

> 279. . . .it is a matter of judgment [for the trial judge] in every case whether it is best to intervene, and risk further inflaming a counsel whose zeal exceeds his civility or his judgment, or simply to let the storm pass and then move ahead. It is not the function of the trial judge to intervene constantly and curb every rhetorical excess. Many judges take the view that it is more productive in the long run to give such counsel as much rope as they want, out of concern that constant judicial reaction will simply provoke more rhetoric and further delay.

Following *Regina v. Cody*, 2017 SCC 31, there may now be an increased role for trial judges to address incivility that threatens to disrupt a trial. Nonetheless, the Law Society and other provincial regulators throughout Canada each possess an independent jurisdiction to discipline counsel for incivility.[11]

11. Trial judges in Ontario may also refer instances of misconduct to the Law Society for review and possible discipline, but they are not required to do so. The comments of Nordheimer J., in his unanimous Divisional Court judgment in the present case, are pertinent:[12]

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[9] For example, see *Marchand*, in which the defendants' counsel made baseless attacks on the integrity of plaintiff's counsel at trial. On appeal, the Court of Appeal concluded that the incivility was deplorable, and that it "tarnished the reputation of the administration of justice". Nonetheless, the incivility did not result in an unfair trial: see paras. 139-141, 148 and 151.

[10] *Regina v. Felderhof*, [2003] O.J. No. 393 (S.C.)

[11] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at paras. 60-66

[12] Judgment of the Divisional Court (Sachs, Nordheimer and Harvison Young JJ.) in the present case, released February 2, 2015, *Appellant's Record*, vol. II, tab 11

> 43. Another important consideration, regarding the trial judge's failure to complain, is the reality, at the time, that judges generally did not feel that a complaint to the respondent about a lawyer's conduct was a useful exercise. This judicial state of mind was commented on in the LeSage/Code report, where the authors said, at p. 141:
>
> > We encountered widespread dismay amongst members of the judiciary, if not outright cynicism, on the subject of LSUC discipline for court room misconduct. There is a widespread perception that the LSUC will do little or nothing in response to these matters. That perception has considerable basis in fact. As a result, the judiciary has simply given up on referring lawyers to the LSUC when they misconduct themselves in the course of criminal proceedings.

**D) The findings of fact and the principles of civility in *Felderhof* are not obiter**

12. The Appellant relies on the judgments in *Felderhof* to prove that his conduct did not render the trial unfair. Yet he endeavours to sidestep the weight of the related findings made against him by Campbell J., and, subsequently, by the Court of Appeal. The Appellant contends that those findings, as well as the courts' statements regarding the principles of civility, were merely obiter.[13] It is respectfully submitted that neither the findings nor the principles were obiter.

**i) The findings of fact by Campbell J. and the Court of Appeal**

13. With respect to whether the findings of fact made by Campbell J. and the Court of Appeal were merely obiter, it bears noting that the narrow question in the application before Campbell J. was whether the trial had been rendered unfair by the trial judge's failure to control the Appellant's conduct as counsel for the accused. In deciding that question, Campbell J. was required to assess whether there had been professional misconduct on the Appellant's part, and, if so, of what nature and to what degree. The adequacy of the trial judge's governance of the case could only be determined in relation to the Appellant's misconduct, if any. The findings made by Campbell J. in relation to

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[13] See Appellant's factum in this appeal, at paras. 19, 85, and 90

the Appellant's conduct (that it was "appalling", "unrestrained", "unacceptable", *et cetera*), were therefore *necessary components* of his judgment. In a case where a verdict or decision is predicated on findings of fact, those underlying findings can form the basis of issue estoppel, depending on the circumstances. In any event, such findings cannot be characterized as obiter.[14] The findings of the Court of Appeal in *Felderhof* were similarly essential to the judgment and not merely obiter. The Appellant should not cherry-pick the findings he likes and disregard the rest.

14. The Intervener appreciates that Cronk J.A. in her majority judgment at para. 227 did not find it necessary to resolve the issue of the "the permissible use of the [Court of Appeal's] Reasons" in *Felderhof* for the purposes of the present case. Although the issue is now nearly moot, it appears to the Intervener that, if the issue had been correctly addressed earlier in the proceedings, the subsequent fourteen years of litigation may have been better streamlined.

15. The Divisional Court in the present case held that the findings made by Campbell J. and the Court of Appeal did not engage the doctrine of abuse of process (as an adjunct to issue estoppel) in the present case. However, in its treatment of that issue, the Divisional Court failed to apply the analysis that is dictated by *Toronto v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at paras. 35-38. The Court's analysis of the issue was instead restricted to the narrow criteria that govern issue estoppel.[15] *C.U.P.E* concerned the propriety of a collateral attack on a criminal conviction in the context of an administrative proceeding, but the judgment is not restricted to such cases. The findings of a judge on an application for a prerogative remedy in a quasi-criminal proceeding, and a subsequent review of the judgment on appeal, may also deserve protection from collateral attack in a subsequent proceeding, depending on the circumstances.

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[14] *Regina v. Punko*, [2012] 2 S.C.R. 396 at paras. 7 to 12

[15] Judgment of the Divisional Court at paras. 124-28, *Appellant's Record*, vol. II, tab 11

16. The Intervener takes no position as to whether the doctrine of abuse of process should be engaged in the within case, but it is submitted that the Divisional Court erred in its application of the governing law. As stated in *C.U.P.E.*, the focus of the doctrine of abuse of process in this context is on the integrity of the adjudicative process, but the Divisional Court did not take that consideration into account. In particular, the Court did not evaluate the record to determine whether the issues in the present case were effectively litigated before Campbell J. from the perspective of the Appellant.[16]

17. With respect to the first reason that the Divisional Court held that abuse of process was not engaged (namely, that the Appellant was not a party in *Felderhof*), the Court erred in treating "mutuality" as a requirement. Mutuality is *not* a requirement of the doctrine of abuse of process.[17] With respect to the second reason that the Court held that abuse of process did not apply (namely, that the judgments of Campbell J. and of the Court of Appeal in *Felderhof* "were not engaged in the professional misconduct question"),[18] the Court erred in its analysis of the issues at stake in the two proceedings. In particular, the Court failed to appreciate that the fundamental issue in *Felderhof* required predicate findings as to whether there had been misconduct. The Court failed to isolate the findings of fact that were *necessary components* of the judgments of Campbell J. and of the Court of Appeal. The Divisional Court also failed to determine whether those findings were responsive to the issues in the Law Society proceedings.

18. It appears to the Intervener that any future case that resembles the present case could be litigated with greater efficiency if the doctrine of abuse of process (as an adjunct to issue estoppel) were correctly applied.

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[16] The record in that regard is referred to in the Respondent Law Society's factum, at paras. 38, and 128-31.

[17] See *C.U.P.E.* at paras. 24 to 32

[18] Judgment of the Divisional Court at para. 128, *Appellant's Record*, vol. II, tab 11

### ii) The Court of Appeal's summary of the principles of civility

19. Cronk J.A. in her majority judgment properly rejected the Appellant's "troubling" submission that the Court of Appeal's summary of the principles of civility were "merely obiter":

> 116. . . . it is wrong to diminish the force of the *Felderhof* court's comments about civility. . . on the basis that they are 'merely obiter'. In *Felderhof*. . .the court sought to provide guidance on professionalism, for counsel and trial judges alike, in particular, about the need for civility "both inside and outside the courtroom" and the obligation of advocates to conduct themselves professionally "as part of their duty to the court, to the administration of justice generally and to their clients". The court's warning about the need for civility forms an integral part of the foundation for its decision. It is a mistake to discount it.

## PART IV – SUBMISSION AS TO COSTS

20. It is submitted that there should be no order of costs for or against the Intervener.

## PART V – ORDER REQUESTED

21. The Intervener Attorney General for Ontario takes no position on the disposition of the appeal.

DATED in Toronto, Ontario, this 28th day of July, 2017

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY**

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Milan Rupic
Counsel for the Intervener Attorney General of Ontario

## PART VI – TABLE OF AUTHORITIES

**PARAS.**

**JUDGMENTS**



**OTHER MATERIAL**